



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES  
UNDER ARTICLE 40 OF THE COVENANT**

**Fifth periodic report**

**GERMANY\***

[13 November 2002]

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\* This report is issued unedited, in compliance with the wish expressed by the Human Rights Committee at its sixty-sixth session in July 1999.

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**List of abbreviations**

Add.	addendum
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
cf.	confer. (compare)
CPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ETS	European Treaty Series
et seq.	et sequens (and the following)
et seqq.	et sequentia (and those that follow)
EU	European Union
GDR	German Democratic Republic
loc. cit.	loco citato (in the place cited)
p.	page
para.	paragraph
pp.	pages
UNHCR	United Nations High Commissioner for Refugees

**FIFTH PERIODIC REPORT BY THE FEDERAL REPUBLIC OF  
GERMANY UNDER ARTICLE 40 OF THE INTERNATIONAL  
COVENANT ON CIVIL AND POLITICAL RIGHTS**

**Period under report September 1993 to July 2002**

**A. Preliminary remarks**

1. The German Government submits its fifth Periodic Report under Article. 40 of the International Covenant on Civil and Political Rights (hereinafter referred to as “Covenant”) to the Human Rights Committee. This document reports on a period in which the continuity of international cooperation in the field of human rights was marked by a large number of anniversaries: 1998 marked the 50th anniversary of the Universal Declaration of Human Rights. In November 2000, Europe looked back on half a century during which the European Convention for the Protection of Human Rights and Fundamental Freedoms has provided a strong impetus for the development of human rights throughout Europe and beyond.

2. In addition to this, the Federal Constitution, by which we mean the Basic Law (Grundgesetz) for the Federal Republic of Germany, has now applied since 1949, in other words for more than five decades. The Basic Law includes essential human rights in its list of basic rights. 2001 saw the 50th anniversary of the start of the work of the Federal Constitutional Court. The court has made a great contribution through its past consistent decisions on basic and human rights towards ensuring that human rights in the Federal Republic of Germany have become practised, living rights. It is not infrequent for it to base its decisions explicitly on the provisions contained in the Covenant.

3. The fifth Periodic Report - also a minor anniversary in itself - shows that the Federal Republic of Germany is now a reliable integral part and a factor of worldwide and regional cooperation within the international community, and particularly in the field of human rights. Basic and human rights form the cornerstone of the German system of government. The obligation to protect the dignity of the individual, as well as inviolable and inalienable human rights, forms the core of the German Constitution. Article 1 para 1 of the Basic Law reads as follows:

“The dignity of man is inviolable. To respect and protect it is the duty of all state authority.”

This principle follows from Article 1 of the 1948 Universal Declaration of Human Rights. In Article 1 para 2 of the Basic Law, “the German people ... acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world”.

4. The Federal Republic of Germany can now look back on more than ten years of human rights development across unified Germany. It was not least due to the call for human rights and the invocation of the provisions contained in the Covenant that the citizens of the German Democratic Republic were strengthened in their striving for freedom, human rights and unity for Germany. A uniform standard of human rights protection now applies to all of Germany. The fourth Periodic Report of the Federal Republic of Germany reported on these developments in detail. The past decade was also used to investigate so-called “GDR government crime”.

The criminal law prosecution of breaches of human rights by the German Democratic Republic in particular relied to a quite considerable degree on the preliminary work carried out in the framework of the Covenant (cf. on this below the information re Article 6 paragraphs 63 et seqq.).

5. The Federal Republic of Germany has developed new points of emphasis in very recent times. In its Coalition Agreement of autumn 1998, the Federal Government made human rights policy a focus of its work. Human rights policy is regarded here as a cross-sectional task. All fields of state activity - both inwardly and outwardly - should take account of the goal of protecting and promoting human rights, as prescribed by the Constitution of the Federal Republic of Germany.

6. Effective human rights policy starts at home. The Federal Republic of Germany has therefore improved the domestic tools available to protect and promote human rights. At the start of the 14th legislative period (1998), the German Federal Parliament established an independent Commission on Human Rights, whereas previously only a sub-committee of the Foreign Affairs Committee had dealt with these matters. The Commission on Human Rights is concerned with the human rights situation within the Federal Republic and with human rights issues abroad.

7. The Federal Government submits a human rights report to the German Federal Parliament every two years, and in other respects also works together as closely as possible with the German Federal Parliament in human rights issues. The 6th Federal Government Report on its human rights policy in foreign relations and in other policy areas was submitted in June 2002; it discloses in greater detail than the previous reports the human rights situation in the Federal Republic.

8. In addition to the Commissioner for Human Rights Issues at the Federal Ministry of Justice, whose office was established in 1970, the Federal Government created in November 1998 the Office of a Commissioner for Human Rights and Humanitarian Aid at the Foreign Office. Like all other institutions of the Federal Government, both Commissioners also regard it as their task to intensify and improve cooperation with non-governmental organisations.

9. A major milestone in the human rights work of the Federal Republic of Germany is the new National Human Rights Institute, an independent facility which is structured in line with the Paris principles (UN Doc A/52/469/Add.1). Its formation was prepared by a resolution passed by the German Federal Parliament and by the guarantee of basic funding by the Federal Republic of Germany. The Institute was established on 8 March 2001. Its bodies have now been constituted and have begun their work.

10. The Human Rights Institute is to perform information and documentation work as a central point of call for the field of human rights. It is to commit itself to educational work related to human rights and to application-orientated research. The Institute will also advise the political sphere and non-governmental organisations. Finally, the Institute will promote dialogue and cooperation between governmental and non-governmental institutions and organisations. The Institute is an independent civil society establishment. Government representatives do not have a voting right in the bodies of the Institute.

11. Another important main focus of human rights work in the Federal Republic of Germany is the decisive approach to right-wing radical, xenophobic and anti-Semitic violence. The "Alliance for Democracy and Tolerance" was established in Berlin on 23 May 2000, and consists of more than 900 groups and individuals. It thus represents the most important forces within German society. Its work is mainly structured by a 20-member advisory council including representatives from the Government and Parliament, the Berlin Senate's and the Federal Commissioners for the Interests of Foreigners, representatives from industry, the trade unions, academic circles, the Jewish community and social organisations. The Alliance coordinates and supports projects forming part of the fight against xenophobia. The Federal Government has launched further initiatives in order to effectively suppress right-wing extremism. The Report will consider them in detail (cf. the comments re Article 26 of the Covenant, 326). In this way, the Federal Republic is facing up to the task of preventing all forms of discrimination and xenophobia at home.

12. In addition to the commitment in our own country, the Federal Republic of Germany is working both at regional and international level to develop further the system of human rights. At European level, this includes many initiatives in the context of the European Union and of the Council of Europe. Of particular significance is the European Charter of Fundamental Rights, which was proclaimed at the EU Summit in Nice in December 2000. The Federal Republic of Germany lent its intensive support to the development of this document. The former President of the Federal Republic of Germany and former President of the Federal Constitutional Court, Professor Dr. Roman Herzog, chaired the Convention which drafted the text. In the context of the Council of Europe, the Federal Government particularly emphasises the constructive cooperation with the European Court of Human Rights and adherence to and further development of the European Convention on Human Rights (such as in the abolition of the death penalty in all circumstances, cf. below para. 89 et seq.).

13. The Federal Republic of Germany has also given new impetus in the further development of international human rights regimes. It has now withdrawn the reservation which it had declared re Art. 7 para 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the summer of 2001, the Federal Republic declared to the United Nations that it would subject itself to the communications procedure in accordance with Art. 14 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination dated 7 March 1966. Also in 2001, it submitted declarations in accordance with Article 21 and 22 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to recognise communications submitted by individuals and by states. Furthermore, it submitted itself for the first time with no time limit to the proceedings in accordance with Art. 41 of the Covenant (communications submitted by states). Here, too, with the ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 15 January 2002, the communication procedure and an inquiry procedure are recognised.

14. In the light of these trends, the Federal Republic of Germany confirms its desire to cooperate at national, regional and international level with all governmental supra national and non-governmental organisations in order to support the effective protection and promotion of human rights. The fifth Periodic Report is to be a building block in this joint global project.

## **B. Re the Concluding Observations of the United Nations Human Rights Committee**

15. After the deliberations on the Fourth Periodic Report (CCPR/C/84/Add.5) on 4 and 5 November (CCPR/C/SR.1551 - 1553) the United Nations Human Rights Committee summarised its impressions in Concluding Observations on 7 November 1996 (CCPR/C/79/Add.73 dated 8 November 1996). These observations have been taken up with considerable interest by the Federal Republic of Germany and, where they expressed criticism, carefully examined and considered. All critical observations will be discussed in the proper context in the Report below; reference is made to the following paragraphs: paras. 151 re observation 11; paras. 326 to 366 - 340 et seqq. on human rights education - re observation 12; paras. 373 et seqq. re observation 13; paras. 371 et seq. re observation 14; paras. 157 et seqq. re observation 15; paras. 308 to 314 and 232 to 236 re observation 16; paras. 307 to 308 and 314 et seqq. re observation 17; paras. 263, 266 to 268 observation 18; paras. 264 and 284 et seqq. re observation 19.

## **C. On developments related to individual rights**

### **Article 1**

#### **Peoples' right of self-determination**

16. The Federal Republic of Germany attaches considerable significance to the peoples' right of self-determination. This was emphasised in the earlier reports (cf. the third Report - CCPR/C/52/Add.3, paragraphs 47 - 52 - and the fourth Report - CCPR/C/84/Add.5 paragraphs 12 and 13). The German Government refers to these.

### **Article 2**

#### **National implementation of rights recognised in the Covenant**

17. The Federal Republic of Germany ensures that the rights ensuing from the Covenant are guaranteed within the field of its sovereign power with no discrimination of any kind. The Covenant is directly applicable law in the Federal Republic. In the same way as any other statute, it has been published in the Federal Law Gazette (Bundesgesetzblatt 1973 Part II p. 1553). The precise wording of the rights recognised in the Covenant is therefore accessible to all. Furthermore, the Covenant is contained in collections of laws which are published by private publishers. In addition, the Federal Government has published brochures to inform the population of the text contained in the Covenant. The Federal Centre for Political Education in Bonn produced a publication entitled "Human Rights" which contains the wording of all major documents and declarations on the international protection of human rights. This contains the Covenant and its two Optional Protocols. This collection is sold to citizens for a token fee. Furthermore, the most important documents on the protection of human rights are available on the Internet at <http://www.auswaertiges-amt.de>.

18. All governmental bodies are bound by the rights recognised in the Covenant. Independent judges ensure that human rights are respected in the Federal Republic. In accordance with Article 19 para 4 of the Basic Law, recourse to the court is open to anyone

whose right is violated by public authority. The German legal system has implemented this principle in all its branches. All persons living in the Federal Republic of Germany are hence enabled to challenge before the courts, which are independent, any violation of the rights recognised in the Covenant. In addition, everyone may submit written requests or complaints to the authorities and to the Parliaments of the Federation and the Länder (cf. Article 17 of the Basic Law). As a special appeal - after exhausting the legal remedies - the Federal Constitutional Court may also be called on by anybody to examine whether a body wielding public authority has violated basic and human rights.

19. The Federal Republic of Germany has also ensured that all persons who are subjected to its authority may call on international bodies to ensure that their human rights are respected. Germany has signed the Optional Protocol to the Covenant. In the period under report, seven communications have been submitted to the Human Rights Committee on the basis of the Optional Protocol. Five of these communications have been considered inadmissible (communication K.V. and C.V., file ref. 568/1993; communication Maloney, file ref. 755/1997, communication Rogl, file ref. 808/1998; communication Kehler, file ref. 834/1998, communication Nerenberg, file ref. 931/2001). Two further communications are still pending (communication Baumgarten, file ref. 960/2000; communication Lavelle, file ref. 1003/2001).

20. An Application to the European Court of Human Rights is another important tool of human rights protection, which may be filed if a person complains of the violation of a right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The rights under the ECHR largely correspond to those that are protected by the Covenant.

21. The Federal Republic of Germany has additionally subjected itself to the communication procedures in accordance with the Convention on the Elimination of All Forms of Racial Discrimination, in accordance with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and in accordance with the Convention on the Elimination of All Forms of Discrimination against Women, or is preparing to recognise these proceedings (cf. on this also paragraph 4139 below). The CEDAW Optional Protocol was ratified on 15 January 2002.

22. If German or international courts find that the Federal Republic of Germany has violated human rights, the Federal Republic of Germany complies with the judicial decision. There has as yet been no recommendation or statement against the Federal Republic of Germany from a committee competent for the proceedings stated in accordance with the UN human rights covenants. The Federal Republic, however, is determined to comply with all its international law obligations.

23. The core document (HRI/CORE/1/Add. 65, paragraphs 58 - 61; in the new version submitted to the United Nations at the same time as this Report cf. paras. 62 - 65) provides information regarding the structure and organisation of the legal system of the Federal Republic of Germany.

24. Additional information was provided in the first and second Periodic Reports (CCPR/C/1/Add.18, p. 7 and CCPR/C/28/Add. 6, paras. 17-20) concerning Article 2 of the Covenant. Also the core document of the Federal Republic of Germany (HRI/CORE/1/Add. 75,

paragraphs 73 et seqq.; in the new version submitted to the United Nations at the same time as this Report cf. paras. 80 et seqq.) contains at III.A. a description of the fulfilment of human rights in Germany. The Federal Republic of Germany refers to this information.

### **Article 3**

#### **Equal rights of women and men**

25. The Federal Government is decidedly in favour of recognising women's rights as human rights. The protection of women against discrimination and human rights violations is a major element of both the equality policy and the human rights policy of the Federal Government.

#### **1. Developments in constitutional law**

26. There were two amendments to the Basic Law concerning equal rights of men and women in the period under report.

27. Article 3 para 2 of the Basic Law, which guarantees equal rights of men and women, was supplemented by Act of 27 October 1994 (Federal Law Gazette Part I p. 3146) to include the following sentence: "The state supports the effective realisation of equality of women and men and works towards abolishing existing present disadvantages". The aim of this amendment is to implement the principle of equal rights effectively in reality. Article 3 para 2 second sentence of the Basic Law sets a state goal forcing the state bodies to take measures to achieve actual equal rights in all fields of the state and of society. This is not a matter solely of abolishing legal standards entailing advantages or disadvantages linked to gender, but in particular of effectively approximating the lives of men and women in real terms. It is hence less a matter of attempting to solve legal problems than, rather, of approaching a societal problem. Here, formulating the aim as a state goal makes it clear that no individual claim to a specific state action is granted. The new constitutional provision is to launch at Federal, Land and local level a proper promotion policy in order to achieve effective equal rights between the genders.

28. Article 12a para 4 second sentence of the Basic Law was reworded by means of the Act of 19 December 2000 (Federal Law Gazette, Part I, p. 1755). This has made available to women access to all careers in the German armed forces. Previously, women could only be deployed in the medical corps and in the military music service. Women may now volunteer to serve in the German armed forces as professional or regular soldiers, or on the basis of a voluntary undertaking to perform individual services, such as exercises in peacetime and special deployment abroad.

#### **2. Equality policy**

29. With the "Women and work" programme adopted by the Federal Government in June 1999, a group of measures has been implemented to improve the situation on the labour market, which is difficult for many women. The programme follows the principle of setting up equality policy as a cross-sectional task which covers the essential inclusion of gender-specific interests in all areas of policy (gender mainstreaming), as well as deliberately promoting women.

30. The programme focuses on improving women's opportunities in training and at work, in particular in the future-orientated occupations of the information society and in research and teaching, removing discrimination in income and wages, and disadvantages for women starting up businesses, as well as promoting the reconciliation of family and gainful work. In this context, the Federal Government has improved the statutory framework by reforming educational assistance benefit and parental leave from 2001 onwards.

31. The ongoing guiding principle of gender mainstreaming has been included in the Joint Rules of Procedure of the Federal Ministries as an obligation incumbent on all agencies to adhere to the principle of mainstreaming in all political, legislative and administrative measures put in place by the Federal Government.

### **3. More recent developments in labour law**

#### **(a) Public service of the Federation**

32. The new Federal Equality Act for the Federal Administration and the Courts of the Federation (Bundesgleichstellungsgesetz für die Bundesverwaltung und die Gerichte des Bundes), which entered into force on 5 December 2001 (Federal Law Gazette Part I p. 3234), affords greater emphasis to equality between the staff of the public service of the Federation. It replaces the Federal Act on the Promotion of Women (Frauenfördergesetz des Bundes), in force since 1994, which did not have the hoped-for impact because it was not sufficiently binding. The new Federal Equality Act is intended to decisively promote the actual equality of women and men in the public service of the Federation. This corresponds to the constitutional mandate contained in the Basic Law (Article 3 para 2 second sentence of the Basic Law), the requirements of the EC Treaty (Article 2, Article 3 para 2 and Article 141 para 4 of the EC Treaty) and international law obligations (Article 11 of the CEDAW). With this Act, the state as an employer undertakes the function of a role model where equality is concerned.

33. The necessary improvements and closer definitions contained in this new Federal Equality Act provide for the following, amongst other things:

- Women with equivalent qualifications are given preference if they are underrepresented in the respective field, taking account of the individual case in training, appointments, recruitment and promotion (so-called individual case quota).
- The previous provisions on the reconciliation of family and gainful employment for both women and men are improved.
- The equality plans are being expanded to form effective tools for modern personnel planning and development.
- The rights and duties of equality commissioners in the authorities of the Federation are being strengthened and given concrete shape; their mandate is being expanded.



- The international equality policy tool of gender mainstreaming, meaning the inclusion on principle of gender-specific interests in all fields of policy, is being anchored in the Federal service as an ongoing guiding principle.
- All legal provisions of the Federation, as well as official written correspondence, are in future to be written in gender-neutral language, and the applicable law is to be reviewed from a linguistic point of view if it is typified by masculine designations of persons.

**(b) Private industry**

34. With the Agreement to Promote Equal Opportunities in Private Industry, the Federal Government and the central organisations of German industry completed a major step towards the equality of women and men in industry on 2 July 2001. The central organisations of German industry have committed themselves to an active equality policy for the first time.

35. The agreement makes possible the following in-company measures, amongst other things:

- to make equal opportunities and family-friendliness an element of corporate philosophy,
- to increase the share of women in leadership positions,
- to provide offerings to win more young women for future-orientated training and courses of study,
- to improve the reconciliation of family and gainful employment for mothers and fathers,
- to draft binding objectives for the implementation of equal opportunities and family-friendliness in companies and to document them accordingly; staff in companies are to be involved in this.

36. This modern concept for achieving equality between women and men in private industry relies on the enterprises' own initiative. Implementation is supported by a high-ranking group with members from the political sphere and from enterprises. An initial success check will take place in 2003, after which a balance sheet will be drawn up at two-year intervals. This group will start by drawing up a stocktake.

37. The Act to Reform the Works Constitution Act (Gesetz zur Reform des Betriebsverfassungsgesetzes), which entered into force on 28 July 2002, contains a large number of provisions seizing on the gender mainstreaming principle, and thus contributing considerably towards the realisation of the equality of women and men and towards the reconciliation of family and gainful employment. Major elements include increasing the representation of women on works councils, eliminating existing disadvantages for part-time workers in particular, resolving the problem of female advisory council members on the works council frequently having to work and participate in training outside their personal working hours, and expanding

the tasks and rights of the works council to promote equal opportunities of women and men. This includes, amongst other things, the right to propose women's promotion plans and to make these the subject-matter of personnel planning, as well as expanding the mandate of the works council to include the promotion of reconciliation of family and work. Employers, for their part, must accommodate in personnel planning the promotion and assurance of the actual equality of women and men, and must discuss their ideas on this with the works council, as well as reporting at works assemblies and work meetings on the state of the equality of women and men in the company.

38. The Act on Part-Time Working and Fixed-Term Employment Contracts (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge) entered into force on 1 January 2001. The part-time provisions contained in the Act - in particular those on the right to part-time work - are to provide an effective contribution towards job security and the reduction of unemployment by expanding part-time work. The new part-time regulations are significant not only for labour policy, however, but also have considerable implications for family and equality policy. The family-friendly objective of the provisions is to enable women and men equally to better reconcile family and work, and to better realise their individual plans. The regulations hence promote equal opportunities between women and men and better reconciliation of work and family.

#### **4. International activities**

39. In the period under report, Germany submitted the second, third and fourth Reports in accordance with Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). These reports build on the first report of 1988 (CEDAW/C/5/Add. 59 dated 23 September 1988) and its supplement from 1990, and describe further developments in equality that have taken place in Germany since 1990.

40. On the occasion of the twentieth anniversary of the adoption of the CEDAW, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth on 25 and 26 November 1999 financially co-promoted a conference of the Human Rights Centre of the University of Potsdam and its documentation. The texts of the CEDAW and of the Optional Protocol in their provisional official translations have been made available to the interested German public on the occasion of this anniversary in the form of a brochure.

41. At the beginning of 1999, the Federal Government actively worked towards the successful conclusion of the negotiations on the CEDAW Optional Protocol in the context of its EU Council Presidency, and during its period as Chair of the Commission on the Status of Women, and, when the Optional Protocol was opened for signing on 10 December 1999, signed immediately. The protocol was ratified on 15 January 2002.

42. Furthermore, the Federal Government withdrew the reservation regarding Article 7 of the CEDAW Convention with effect from 10 December 2001 and agreed to the amendment of Article 20 para 1 of the CEDAW Convention, with which the time restriction of the annual meeting of the CEDAW Committee to two weeks was to be rescinded.

43. The Federal Government has supported the CEDAW Committee in drafting the rules of procedure required in accordance with the Optional Protocol. At its invitation, a seminar of experts took place in Berlin from 27 to 30 November 2000 with the participation of the Committee members, at which these rules of procedure were drafted.

### **Articles 4 and 5**

44. The German situation in the area of application of these Articles was illustrated in the first and second Reports (CCPR/C/1/Add. 18, pp. 7/8; CCRP/C/28/Add. 6, paragraphs 35-37). Nothing new has since happened on this in the period under report.

### **Article 6**

#### **Right to life**

##### **1. Fundamental comments**

45. In accordance with the constitutional order of the Federal Republic of Germany, human life is a supreme value. The Basic Law hence agrees with the evaluation attached by the Civil Covenant to the protection of life (cf. CCPR General Comment 14 dated 11 September 1984, No. 1).

46. Accordingly, it follows from Article 2 para 1 first sentence in conjunction with Article 1 para 1 second sentence of the Basic Law that - having regard to the value of life - the comprehensive duty of the state to protect all human life and to guard it against unlawful encroachments by others is to be taken seriously (on this see the past consistent decisions of the Federal Constitutional Court: judgment dated 25 February 1975, file ref. 1 BvF 1, 2, 3, 4, 5, 6/74, published in the official collection BVerfGE 39, pp. 1 et seqq., 42; ruling dated 1 August 1978, 2 BvR 1013, 1019, 1034/77, BVerfGE Vol. 49, pp. 24 et seqq., 53; judgment dated 28 May 1993, file ref. 2 BvF 2/90 and 4, 5/92 -, BVerfGE Vol. 88, pp. 203 et seqq., 251).

47. This constitutional mandate for protection has implications for the entire legal order. Its direct expression is found in the criminal law provisions which set out in law the prohibition of homicide and protect life against unlawful attacks by third parties (sections 211 and 212 of the Criminal Code [Strafgesetzbuch]). The principle also characterises the legal and social order of the Federal Republic of Germany in many ways.

48. The Basic Law determines in Article 102 that the death penalty has been abolished in Germany. This prohibition has applied since the establishment of the Federal Republic of Germany in 1949.

##### **2. Protection of life in the legal system: two examples**

49. Encroachment on human life is prohibited on principle in accordance with the legal order of the Federal Republic of Germany. The legal order is structured such that life is to be protected, and Article 6 para 1 second sentence of the Covenant is therefore accommodated. This is to be illustrated using two examples, namely the use of firearms and protection against deportation if life is threatened.

**(a) Use of firearms by the police**

50. An important topic in the field of Article 6 of the Covenant is the use of firearms by those exercising state sovereignty. The Human Rights Committee has stressed (cf. General Comment 6 dated 27 July 1982, para 3) that states' duties to protect imposed by Article 6 of the Covenant are not fulfilled solely by using criminal law to protect the asset constituted by life. Rather, they must ensure that their own armed forces do not act arbitrarily, thereby causing death. Hence, one needs to define precisely and very closely under what circumstances encroachments on life may be justified. In the Federal Republic of Germany, the law defines precisely under what circumstances it is permissible - as a last resort - to use firearms against humans.

51. The law enforcement officers of the Federation may use direct force in lawful exercise of their office. Direct force means impacting on persons or things by means of physical violence, using aids or by means of arms to influence the will of the person under an obligation. Law enforcement officers must comply with the principle of proportionality in using direct force: They must choose among several possible, suitable measures those least disadvantageous to the individual and the public. Additionally, the damage to be expected as a result of a measure of direct force may not be clearly disproportionate to the intended success.

52. The use of firearms against persons or things may only be considered as a coercive measure in extremis. Other less intrusive measures of direct force must have been applied unsuccessfully, or their use must be clearly seen from the outset as having no prospects of success.

53. The use of firearms against persons is permissible in the following situations:

- to avert a direct danger to life or limb,
- to prevent a serious or less serious criminal offence being or about to be committed using or carrying firearms or explosives,
- to stop a person fleeing who is directly suspected either of a serious criminal offence, or of a less serious criminal offence if there are indications that use will be made of a firearm or of explosives,
- to prevent the escape of or to recapture a person who was in official custody
  - on the basis of a judicial arrest warrant, or
  - to serve a prison sentence, or to enforce preventive detention, or
  - because of the urgent suspicion of a serious criminal offence, or
  - because of the urgent suspicion of a less serious criminal offence if the fear exists that it will involve the use of a firearm or explosives, and
  - to prevent violent means being used to free a prisoner.

54. Firearms may on principle only be used against persons to make them unable to attack or escape. A shot which will lead to death with a probability bordering on certainty fired in order to avert a direct danger to life or the direct danger of a serious violation of physical integrity is governed by most police statutes of the Federal Länder. It is only permissible if it is the only means of averting a direct danger to life or a direct danger of a serious violation of physical integrity. If the police officer is able to recognise that passers-by are very likely to be placed in danger, a firearm may be used only to avert direct danger to life or limb.

55. The use of direct force by law enforcement officers of the Federation is regulated in the Act on Direct Coercion in the Exercise of Public Force by Enforcement Officers of the Federation (Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes [UZwG]). The police statutes of the Länder contain largely comparable provisions for the law enforcement officers of the Länder. Furthermore, law enforcement officers, like anyone else, have the right to defend themselves in an emergency, and have the right derived from section 32 of the Criminal Code to lend assistance in time of need.

56. The following number of persons were killed or injured in the use of firearms against persons in the Federal Republic of Germany between 1993 and 2000:

	1993	1994	1995	1996	1997	1998	1999	2000
Deaths	16	8	19	9	10	8	15	6
Injuries	66	59	52	43	37	42	33	30

**(b) Protection against deportation if life is threatened**

57. Measures terminating the residence of an alien may not breach the requirements of Article 6 of the Covenant. The provisions under the law on aliens are worded accordingly.

58. The Act on the Entry and Residence of Aliens on Federal Territory (Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Aliens Act [Ausländergesetz]) dated 9 July 1990, most recently amended by Act of 9 January 2002) takes account of the requirements under Article 6 of the Covenant. This applies first and foremost to political persecution: An alien may not be deported to a state in which his life or freedom would be at risk because of his race, religion, nationality, affiliation to a certain social group or because of his political conviction (section 51 para 1 of the Aliens Act).

59. Section 51 para 1 of the Aliens Act however does not apply if the alien for grievous reasons is to be considered a danger to the security of the Federal Republic of Germany or constitutes a danger to the public because he has been sentenced with legal force to a minimum of three years' imprisonment in respect of a serious criminal offence or a particularly grave less serious criminal offence (section 51 para 3 first sentence of the Aliens Act). The same applies if the supposition is justified for grievous reasons that the alien has committed a crime against humanity or that he has committed a serious non-political crime outside Germany prior to his acceptance as a refugee, or has been guilty of acts counter to the objectives and principles of the United Nations (section 51 para 3 second sentence of the Aliens Act). However, in these cases, too, an alien may not be deported if he is wanted in the destination state in respect of a criminal

offence and the danger exists that the death penalty might be imposed (section 53 para 2 of the Aliens Act), or if the person concerned is specifically threatened with torture or inhuman or degrading punishment or treatment (section 53 paras 1 and 4 of the Aliens Act).

60. In each case - in other words not only in the event of political persecution - it is possible to refrain from deporting an alien to another state if a considerable specific danger to life, limb or freedom exists in that other state for the person concerned (section 53 para 6 of the Aliens Act). If it is a danger to which the population or the group within the population to which the alien belongs is subjected in general, the highest Land authorities may order a general ban on deportation for this group (sections 53 para 6 second sentence and 54 of the Aliens Act).

61. These provisions are at the discretion of the authorities. The German Constitution however requires, as does Article 6 of the Covenant, to accommodate in this discretionary decision the high ranking of the right to protection of life. This can lead in individual cases to this discretion becoming restricted, with the consequence that only one decision, namely the decision against deportation, is lawful. (cf. paragraph 100 below on the prohibition of deportation where there is a danger of torture.)

62. Where the deportation measure itself would constitute a lethal danger to the alien, as may be the case if there is an inability to travel, this must be taken into consideration by the competent immigration authority. Deportation is hence suspended as long as it cannot be carried out for legal or factual reasons (cf. section 55 para 2 of the Aliens Act).

### **3. Criminal law prosecution of homicide carried out at the intra-German border in breach of human rights**

63. The period under report was characterised by the re-examination of so-called "GDR government crime" in terms of criminal law. In the area of application of Article 6 of the Covenant, this largely concerned the practice pursued in the German Democratic Republic of using barbed wire, mines and firearms to prevent exit via the intra-German border by anyone who wished to go to the West from the German Democratic Republic without state approval. Exit applications were rejected as a matter of course - pensioners and the disabled being the exception - and led to reprisals against the applicants. Many people therefore decided to cross the border without authorisation. According to official information provided by the criminal prosecution organs of the Federal Republic of Germany, a total of 264 people died in the attempt in the period until the autumn of 1989. According to information from the "13 August working party", this number is even higher, at more than 900. This so-called border regime was ordered by the state leadership of the German Democratic Republic and implemented and maintained by the border guards of the German Democratic Republic.

64. The Human Rights Committee discussed the practice of the German Democratic Republic when the German Democratic Republic's Periodic Report was presented in July 1984 (cf. Yearbook of the Human Rights Committee 1983-1984, Volume I, pp. 521-543). Even then, the deaths at the intra-German border - in addition to the aspect of liberty of movement under Article 12 (cf. on this below No. 175) - had been criticised in view of Article 6 of the Covenant (cf. on this the comments of Committee member Felix Ermacora, loc cit., p. 28, No. 16; cf. also the same, loc cit., p. 533 Nos. 12-13, as well as the statement of Committee member Sir Vincent Evans, loc cit., p. 529 No. 22).

65. In accordance with recent international law developments, bodies of the United Nations require in the case of extrajudicial violations of human life by those exercising sovereign power (“extrajudicial, summary or arbitrary executions”) that the guilty parties should be punished, irrespective of whether domestic legislation may possibly have afforded extraordinary powers to the security forces responsible (cf. resolutions 2000/31 and 2001/45 of the Human Rights Committee of the United Nations dated 20 April 2000 and 23 April 2001). This category also includes “Deaths due to excessive use of force by law enforcement officials”, cf. the report by the special rapporteur Asma Jahangir, 25 January 2000, E/CN.4/2000/3, paragraphs 27-28).

66. It was only possible to adhere to these principles on German territory after the separation of Germany had been overcome. A number of sets of criminal proceedings were pursued in the period under report in respect of the killing of people at the border between the German Democratic Republic and the Federal Republic of Germany. In addition to border guards who shot people escaping, and those directly giving orders at the scene of the crime, senior office-holders of the German Democratic Republic who assisted the political leadership of the German Democratic Republic in its decision-making as to the form of the border regime, have also been convicted. They had to take responsibility for the killing of people who had attempted to leave the German Democratic Republic over the border to the Federal Republic of Germany in respect of incitement to manslaughter or manslaughter using an innocent agent.

67. The criminal law of the German Democratic Republic that was applicable at the time is applied to these proceedings on principle; in accordance with section 2 para 3 of the Criminal Code, Federal German criminal law applies if it is less intrusive (“most-favourable clause”). The Federal Court of Justice, the highest German court in criminal matters, determined in several decisions that the state practice of the German Democratic Republic, which accepted the intentional killing of escapees using firearms, automatic-fire systems or mines to prevent escape from the German Democratic Republic, is not suited to justify the offenders because of evident, unacceptable violation of elementary principles of justice and human rights protected by international law.

68. The Federal Court of Justice stressed in its fundamental decision dated 3 November 1992 (file ref. 5 StR 370/92, published in the official collection BGHSt, Vol. 39, pp. 1 et seqq., 15 et seqq.) that the border regime violated Article 6 of the Covenant in particular. It referred here to the General Comments of the Human Rights Committee of the United Nations on the right to life from 1982 (General Comment No. 6 dated 27 July 1982 - cf. on this above at para. 50). The Federal Court of Justice found that the killing of escapees at the intra-German border constituted arbitrary acts within the meaning of Article 6 para 1 second sentence of the Covenant. It further developed and consolidated these past consistent decisions through many other decisions (published in the official collection BGHSt, 39, pp. 168 et seqq., 183; 40, pp. 218 et seqq., 232; 40, pp. 241 et seqq., 244).

69. The Federal Constitutional Court confirmed these past consistent decisions in its fundamental decision dated 24 October 1996 (2 BvR 1851, 1853, 1875, 1852/94, printed in the official collection BVerfGE, 95, pp. 96 et seqq.).

70. Finally, the European Court of Human Rights also dealt with the decisions of the German courts, and confirmed that the border regime constituted a major violation of the human right to life which is also protected by Article 2 of the ECHR (decision in the case of Krenz et al. ./ Germany dated 22 March 2001, Applications Nos. 34044/96, 35532/97 and 44801/98; decision in the case of K.-H. W. ./ Germany dated 22 March 2001, Application No. 37201/97; both decisions are available in English on the Internet at <http://hudoc.echr.coe.int>; unofficial German translations have been published in Europäische Grundrechte Zeitschrift 2001, p. 210 and p. 219).

#### **4. Protection of life and developments in international criminal law**

71. The Federal Republic of Germany supports in many ways the recent efforts to anchor the protection of life in international law criminal jurisdiction. In the period under report, Germany developed and expanded its cooperation with the international bodies and took its own initiatives.

##### **(a) Establishment of the International Criminal Court**

72. The Federal Republic of Germany committed itself from the outset to the work to establish an International Criminal Court. In the summer of 1998 it made a major contribution to the United Nations Diplomatic Conference in Rome which adopted the Statute of the International Criminal Court.

73. Germany ratified the Roman Statute on 11 December 2000 after the Basic Law had also been amended in order to make possible the transfer of German nationals to the Court (Article 16 para 2 second sentence of the Basic Law, added by Act of 29 November 2000, Federal Law Gazette Part I p. 1633). The Act Implementing the Roman Statute (Gesetz zur Umsetzung des Römischen Statuts), which governs the details of cooperation between the Court and the German authorities and courts, entered into force in the summer of 2002.

74. Germany promotes taking up work of the International Criminal Court and plays a major role in the group of like-minded states aiming to establish as quickly as possible a Court that is as effective as possible. In addition, Germany also supports efforts by the community of states and by the non-governmental organisations active in this field to disseminate knowledge of the International Criminal Court, and thus to promote the widest possible ratification and implementation of the Roman Statute. Furthermore, Germany is actively involved in the efforts to create a strong organisational basis for the actual establishment of the International Criminal Court after the entry into force of the Statute on 1 July 2002. For this, at the first assembly of the States Parties, which is envisioned for September 2002, the practical arrangements drafted by the Preparatory Commission to be included in the Statute (Agreement on the Privileges and Immunities of the Court, Financial Regulations, et al.) are to be accepted and the election of the judges and the prosecutor are to be prepared.

##### **(b) Cooperation with the UN's tribunals**

75. In order to prosecute serious breaches of the 1949 Geneva Agreement, of violations of the laws or customs of war and of genocide and crimes against humanity, the Federal Republic of Germany is unconditionally co-operating with the International Criminal Court for the former



Yugoslavia and with the International Criminal Court for Rwanda. To make this possible, it has adjusted its domestic legal order (Act on Cooperation with the International Criminal Court for the former Yugoslavia [Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien] of 10 April 1995, Federal Law Gazette Part I p. 485; Act on Cooperation with the International Criminal Court for Rwanda [Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für Rwanda] dated 4 May 1998, Federal Law Gazette Part I p. 843).

76. This includes, on the one hand, that at the request of the Courts, persons can be taken into custody and transferred to the Court for prosecution in respect of a criminal offence that is within the jurisdiction of the Court, or to execute a sanction imposed in respect of such a criminal offence. In this way, the Bosnian Serb Dusko Tadić was taken into custody in Munich on 13 February 1994 and transferred to the Tribunal on 24 April 1995.

77. On the other hand, other types of mutual assistance are extensively afforded at the request of the Courts in respect of a criminal offence subject to the jurisdiction of the Courts, in accordance with the Act on International Assistance in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen). The Federal Government, finally, can also grant judicial assistance by executing a sentence handed down with force of law by the Courts. Thus, Dusko Tadić, who was sentenced by the International Criminal Court for the former Yugoslavia, has been serving his sentence in a German prison since 31 October 2000.

78. Furthermore, nationals of Bosnia and Herzegovina and Kosovo who had escaped to Germany, and who were now under an obligation to exit the country, were granted a temporary right of residence in Germany if the International Criminal Court for the former Yugoslavia needed them as witnesses. If the Court confirmed that these witnesses were in danger should they return, the right of residence for these persons and their close relatives was (and is) extended.

79. The Federal Government provides financial support to the Courts with a standard contribution of more than USD 15 million. Added to this are benefits in kind, such as financial support and residence for witnesses in Germany.

### **(c) Draft of an International Criminal Code**

80. In order to meet international law requirements even more closely, the Federal Ministry of Justice has also drafted an International Criminal Code which implements in German criminal law the serious criminal offences described in the Roman Statute and several other crimes defined by international law. Most of these offences were already punishable in accordance with domestic law. The new Code however creates a uniform basis which is intended to give appropriate expression to the particular weight attaching to specific wrongfulness of these most grievous criminal offences. Thus, for instance, it contains a separate offence of torture in the context of crimes against humanity. After this International Criminal Code has been adopted, the most serious international law criminal offences could be sanctioned by German courts irrespective of any special domestic connection (cf. on this below para. 83). The International Criminal Code, which was unanimously supported by the German Federal Parliament and the Federal Council, entered into force on 30 June 2002, one day before the Roman Statute of the International Criminal Court.

## **5. Prosecution of crimes defined by international criminal law by German criminal prosecution authorities**

81. In accordance with section 220a of the German Criminal Code (StGB), genocide is to be sanctioned by life imprisonment (in less serious cases with not less than five years' imprisonment, section 220a subsection 2 of the Criminal Code). The Federal Public Prosecutor General at the Federal Court of Justice is the sole competent authority for the prosecution of the crime of genocide.

82. Whilst this competence was virtually insignificant until the beginning of the nineties, the Office of the Federal Prosecutor has been conducting investigations in numerous proceedings on suspicion of genocide since 1993 because of the events in the former Yugoslavia. The investigation proceedings largely concern Serb accused persons who are suspected of the crime of genocide against Moslems, and in individual cases against Croats. Investigations are however also being carried out on suspicion of genocide committed by Moslems against Serbs and by Croats against Moslems or Serbs. The crime scenes are mostly in Bosnia-Herzegovina. As yet, no sets of investigation proceedings have become pending at the Office of the Federal Prosecutor in respect of the events in Kosovo.

83. It should be taken into account here that German criminal law does not apply to each act of genocide committed abroad by aliens against aliens prior to entry into force of the International Criminal Code. For the application of the so-called universality principle, which is was previously defined by section 6 subsection 1 of the Criminal Code for the crime of genocide committed abroad, past consistent decisions of the highest courts required depends on a legitimising connecting factor in individual cases which creates a direct domestic connection for criminal prosecution. Thus, the universality principle, for instance, is was generally applicable if the accused is could be located in the Federal Republic of Germany. In accordance with section 1 of the Code of Crimes Against International Law, the universality principle now applies without restriction to genocide and the other crimes against international law named in this Code.

84. In accordance with Article. 9 para 2 of the Court's Statute in conjunction with section 2 of the Act on Cooperation with the International Criminal Court for the former Yugoslavia (Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien), the International Criminal Court for the former Yugoslavia in the Hague has the right to transfer investigation and criminal proceedings to itself. Thus far, the Court has only once made use of this right as against the Federal Republic of Germany.

85. 125 sets of investigation proceedings have so far been initiated in Germany since 1993 in respect of a total of 164 accused persons concerning the events in the former Yugoslavia (as on 22 April 2002). The Federal Criminal Police Office is primarily charged with the investigations. A total of 100 sets of investigation proceedings have now been concluded. The majority of these proceedings was discontinued for lack of evidence. Five accused persons are currently wanted under an arrest warrant issued by the investigating judge of the Federal Court of Justice.

86. Charges were filed against five accused persons. All offences were linked to the conflicts on the territory of the former Yugoslavia. The first set of criminal proceedings of this kind, namely concerning Dusko Tadić, was taken over after the charges had been filed by the International Criminal Court for the former Yugoslavia in the Hague. Tadić was sentenced there to 20 years' imprisonment on 14 July 1997.

87. Düsseldorf Higher Regional Court sentenced an accused person to life imprisonment for genocide and murder (judgment dated 26 September 1997, file ref. IV - 26/96 - 2 StE 8/96) and another to nine years' imprisonment for aiding and abetting genocide and other criminal offences (judgment dated 29 November 1999, file ref. IV 9/97 - 2 StE 6/97). The Highest Bavarian Regional Court in Munich handed down five years' imprisonment to an accused person in respect of aiding and abetting murder (judgment dated 23 May 1997, file ref. 3 St 20/96) and imposed life imprisonment on another accused person for aiding and abetting genocide and murder (judgment dated 15 December 1999, file ref. 6 St 1/99 - 2 BJs 25/95 - 5 - 2 StE 5/99). These judgments have the force of law. As reported above - (at para. 77) -, the judgment of the International Criminal Court for the former Yugoslavia against Dusko Tadić is being executed in the Federal Republic of Germany.

88. The Federal Court of Justice has now also dealt with these proceedings. In several fundamental decisions (cf. for instance judgment dated 30 April 1999, file ref. 3 StR 215/98, published in the official collection BGHSt 45, pp. 64 et seq.) it has clarified major legal questions on the prosecution of offences in this field, and hence has made the prosecution of these offences by German courts easier. The Federal Constitutional Court upon an appeal by a convicted person found in a ruling dated 12 December 2000 (file ref. 2 BvR 1290/99, published in Neue Juristische Wochenschrift 2001, pp. 1848 to 1853) that a violation of the convicted person's basic rights cannot be considered to have taken place by virtue of these decisions.

## **6. Initiatives to abolish the death penalty globally**

89. It is a matter of particular concern to the Federal Republic of Germany to strive towards the worldwide abolition of the death penalty. This commitment included the German initiative for the "Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty" already mentioned in the previous Reports., The Protocol now has 47 states worldwide as States Parties, 29 of which were added in the period under report.

90. As a member of the Council of Europe, Germany is explicitly in favour of new member States being required, upon accession, to undertake early ratification of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty dated 28 April 1983. Germany also supports Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which goes beyond Protocol No. 6 in that it abolishes the death penalty under all circumstances, including in times of war and emergency, and signed it immediately after it was opened for signature on 3 May 2002.

91. Even if there is no international consensus as yet on the general abolition of the death penalty, the Federal Republic takes the view that there is now an international consensus consisting of a rule under general international law prohibiting the execution of minors and the mentally ill, so that the further application of the death penalty against this group of people is a violation of international law. This view has been represented on several occasions by the Federal Republic of Germany together with its EU partners in Washington and *amicus curiae* writings before U.S. courts.

92. In the proceedings of *La Grand* (Federal Republic of Germany against the USA) before the International Court in the Hague, the Court found that Article 36 para 1 of the Vienna Convention on Consular Relations contains the individual right of detainees to be informed of their right to contact the competent consulate of their home state, and that it is a breach of Article 36 para 2 of the Vienna Convention if a state does not permit the legal examination of judgments handed down in breach of this right. Even if this judgment is not concerned with the death penalty, it nevertheless will make it easier in future for all states to care for and support their nationals threatened abroad by the death penalty if they are not informed without delay after apprehension of their consular rights by the authorities of the state in which they are being detained.

## **Article 7**

### **Prohibition of torture and other forms of inhuman or degrading treatment; medical experimentation**

#### **1. Prohibition of torture and other forms of inhuman or degrading treatment**

93. Torture is outlawed in the Federal Republic of Germany; it is regarded as a violation of elementary fundamental concepts of the German constitutional order, namely as a violation of Articles 1 and 2 of the Basic Law. Any form of degrading and inhuman treatment or punishment is prohibited. The Basic Law has once more stressed this for persons in imprisonment, Article 104 para 1 second sentence of the Basic Law.

94. The prohibition of torture is ensured in the Federal Republic of Germany in many ways. Violations are sanctioned under criminal law. Anyone abusing another person physically, depriving him of his liberty, coercing or threatening is punishable (sections 223 et seqq., 239, 240 and 241 of the Criminal Code). An office-holder who physically abuses a person in the exercise of his office is subject to more serious punishment (section 340 of the Criminal Code). The Criminal Code also contains the crime of exhorting testimony by duress which places such conduct by office-holders under punishment as a crime (section 343 of the Criminal Code).

95. This area of crime has undergone considerable amendments in the Sixth Act to Reform Criminal Law (*Sechstes Gesetz zur Reform des Strafrechts*), which entered into force on 1 April 1998. The statutory ranges of punishment contained in the Criminal Code have been harmonised with the aim of giving the highly-personal interests such as life, physical integrity and freedom a higher status in comparison with legal interests such as ownership, property and security of legal relations. This has led - in regard to crimes resulting in bodily harm - amongst other things to a tightening-up of the statutory range of punishment for grievous bodily harm in accordance with section 224 of the Criminal Code and serious bodily harm in accordance with

section 226 of the Criminal Code. Furthermore, attempted bodily harm is generally punishable now as well. Also section 340 of the Criminal Code (bodily harm in office) has been amended: The attempt at such a crime is now generally punishable, and the punishments for major crimes in accordance with section 340 of the Criminal Code have been tightened up. In the new International Criminal Code (cf. paragraph 79), a separate offence of torture is provided for among crimes against humanity.

96. Additionally, in particular persons who have been apprehended and those who have been detained have a large number of safeguards under procedural law. These will be reported below at Articles 9 and 10. They also serve to provide protection against unauthorised treatment of detained persons.

97. The Federal Republic of Germany has ratified regional and international agreements which provide protection against torture: the European Convention on Human Rights, Article 3 of which prohibits torture, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Thus, these international supranational human rights protection mechanisms supplement the protection of the individual against human rights violations at international level.

98. After its first visit which took place in 1991, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Organ of the CPT, visited Germany again during the period under report in 1996, 1998 and 2000. In 1998, an ad hoc visit was made to Frankfurt Airport, where the Committee gathered information concerning the situation of refugees at the Airport. The Reports on the regular visits in 1996 and 1998 have been published (and can be accessed on the Internet at [www.cpt.coe.int](http://www.cpt.coe.int)). In August 2001, the Committee submitted its report on the December 2000 visit to the Federal Government. The latter has drafted a statement which is likely to be published by the Committee, together with the report.

99. Germany has now submitted three reports to the CAT Committee in accordance with Article 19 of the CAT. In October 2001, the Federal Government submitted declarations in accordance with Articles 21 and 22 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. All three CAT monitoring mechanisms therefore now apply to Germany. Germany is also involved in the UN context in the work on an Optional Protocol to the CAT which is to establish a visiting mechanism similar to that already created by the CPT.

100. The Federal Republic of Germany also meets its obligations under Article 7 regarding deportation in cases in which there is a risk of torture: Adherence to Article 7 is guaranteed in this instance by section 53 subsection 1 of the Aliens Act and section 53 subsection 4 of the Aliens Act in conjunction with Article 3 of the ECHR. Accordingly, an alien may not be deported to a state in which the specific danger exists of their being subjected to torture. This is also the practice pursued by the Federal Office for the Recognition of Foreign Refugees, which examines for each rejected asylum application whether there are obstacles to deportation in accordance with section 53 of the Aliens Act. Furthermore, protection against deportation also emerges in the event of a risk of torture with considerable actual danger to life, limb or freedom, from section 53 subsection 6 of the Aliens Act and - from 1 January 2003 - in improved form

from section 60 subsection 7 first sentence of the Residence Act (Aufenthaltsgesetz). (Cf. on this also the decision of the European Court of Human Rights in the case of T.I. against United Kingdom dated 7 March 2000, in which the Federal Republic of Germany was also involved, Application No. 43844/98; available in English on the Internet at <http://hudoc.echr.coe.int>).

101. The European Court of Human Rights has dealt with the allegation in several sets of proceedings that in individual cases, the German authorities did not respect Article 3 of the ECHR (prohibition of torture) in the case of deportation. These Applications were rejected as inadmissible (cf. for instance the decision in the case of Besse Damla et al. dated 26 October 2000, Application No. 61479/00; decision in the case of Ahmed Duran Caglar against Germany dated 7 December 2000, Application No. 62444/00; both decisions are available in English on the Internet at <http://hudoc.echr.coe.int>).

102. Applications to the European Court of Human Rights also alleging a violation of Article 3 ECHR for other reasons were not successful. In the case of Selahattin Erdem against Germany (Application No. 38321/97) the Applicant had complained of being placed in a single cell. This part of the Application was declared inadmissible by ruling of 9 December 1999.

103. Additional reference is made to the information provided with regard to Article 10 (paras. 150 et seqq.).

## **2. Medical experimentation**

104. The trial of medical treatment procedures on people is subject to strict statutory provisions in Germany protecting the rights to privacy and human health. In accordance with sections 40 and 41 of the Pharmaceuticals Act (Arzneimittelgesetz), trials to ascertain the effectiveness and unobjectionability of medicines (clinical tests) may in particular be implemented only if the persons to be treated with the medicine in question have been informed by a physician of the nature, significance and extent of the clinical test, and have consented to their participation.

105. Much stricter requirements apply to minors. Here, the permission of the statutory representative of the person concerned is necessary, who must have been informed by a physician of the abovementioned contexts. If the minor is able to understand the essence, significance and extent of the clinical test and to form his will accordingly, his written permission is also required. Furthermore, the medicine must be intended to diagnose or prevent illnesses among minors, and clinical testing on adults may not permit one to anticipate sufficient test results, and the use of the medicine must be indicated in order to diagnose illnesses in the minor or to protect him/her against illnesses.

106. With a sick adult who is unable to give permission, clinical tests of medicines may only be carried out with the permission of the statutory representative, who has been informed by a physician, and only if the application of the medicine is indicated in order to save the sick person's life, to restore his health or to alleviate his suffering. Section 41 of the Pharmaceuticals Act contains additional procedural restrictions. Research that only benefits third parties is not permitted on adults who are unable to give consent.

107. Clinical tests may also only be carried out if the risks for the participating persons in the application of the medicine to be tested are justifiable in comparison with the anticipated significance of the medicine for medical science. Strict requirements are imposed as to the qualification of the physicians in attendance and the quality of the study planning and of documentation. Final preconditions for the implementation of a clinical study are on principle the approving evaluation by the competent ethical committee and the submission of the necessary documents, including a test plan, to the competent higher Federal authority.

108. Medical research on sentenced offenders is rejected - including on a voluntary basis. It is doubtful whether a decision can in fact be taken voluntarily regarding participation in a medical trial in the special situation entailed by deprivation of liberty. The danger exists of inmates presuming that their willingness to participate could be given a positive evaluation by the staff by suggesting that the inmates were ready to cooperate, and that it could lead in this way to advantages such as relaxation of the prison regime. Such medical experimentation is not carried out in prisons in order to avoid the very appearance of such a connection, link and the pressure that it would create. This also applies to all other persons placed in an institution on order by an authority or a court.

### **3. Protection of persons in long-term care homes**

109. The area protected by Article 7 may become significant for home residents since it prohibits all forms of degrading treatment, and in general terms provides protection against involuntary participation in medical or scientific experimentation. Over and above the relevant provisions of the Criminal Code (cf. above at paras. 94 et seq.) the Homes Act (Heimgesetz) contains additional provisions to protect home residents. The Homes Act has been comprehensively reworded at the initiative of the Federal Government. The amendment entered into force on 1 January 2002.

110. The new Homes Act contains in section 2 subsection 1 a clarification of the purpose of the statute. Accordingly, the Act aims to protect the dignity, interests and needs of home residents against possible detriment. This includes protection against degrading treatment.

111. The protection of home residents is given further concrete shape in section 11. Accordingly, a home may only be operated if both the organisation and the management, in addition to the protection of human dignity, safeguard and promote the independence, self-determination and self-responsibility of residents and ensure a suitable level of care in accordance with the generally recognised state of medical and care knowledge, including medical and health care.

112. The homes may be checked at any time, with or without warning, by the state home inspection authorities. The list of measures applied to violations against provisions of the Homes Act covers, in addition to the - priority - advice of home residents, as well as home organisations, fines of up to Euro 25,000, and as a final possible measure the closure of the home.

113. An insight into the situation in state care facilities is provided by the knowledge of the Medical Services of Health Insurance (MDK) based on many more than 7,000 quality checks since the beginning of long-term care insurance in 1995/96. In the framework of the quality

checks which have been carried out so far by the MDK, in particular the following qualitative shortcomings in the residential care facilities were identified: For instance, a lack of implementation of the care concept and insufficient care documentation were complained about in practice in care. In many facilities, instead of state-promoted activating, disempowering care was found that was not coordinated with the resources and potential of those in need of care. Furthermore, the skills of the responsible care specialists and the topicality of their care knowledge left much to be desired in many cases. Special problem areas also included decubitus prophylactics and therapy, care in the event of incontinence, the administration of medicines and a lack of knowledge concerning the provision of food and liquids.

114. All concerned agree that shortcomings must be consistently redressed. The shortcomings that have come to light and cannot be tolerated should not, on the other hand, blind us to the efforts undertaken by many long-term care homes and long-term care services to provide high-quality care to the persons in need of care who have been entrusted to them.

115. The causes of the shortcomings in long-term care are multi-faceted. For example, management errors in the facilities may play a role, as may the level of qualification of the long-term care staff. Furthermore, the staff and the trends in the structure of home residents are factors which have a major influence on the quality of care. At the same time, it can be ascertained that the organisations in charge of the facilities are not always able to make their voices heard effectively in the payment negotiations with the funding bodies as to rights to payment in line with the benefits provided. Added to this is the fact that the testing and monitoring of the facilities is not ensured or cannot be ensured by the monitoring institutions everywhere to the required extent. This multiplicity of causes shows that a comparison with state coercive measures or measures involving the use of physical force is not expedient.

116. Independently of this, there is no dispute that the shortcomings in care must be remedied as a matter of urgency. In order to improve the quality of care, the Long-Term Care Quality Assurance Act (Pflege-Qualitätssicherungsgesetz) entered into force on 1 January 2002. The following tools, especially, will have a positive impact on care:

(a) improvement of the services offered by ensuring, developing and monitoring the quality of long-term care (unannounced checks, internal quality management, quality checks by independent experts);

(b) strengthening responsibility of self-regulation within the care services by new contractual tools (performance and quality agreements, staff guideline value agreements);

(c) improving cooperation between the state homes inspectorate and the self-regulating body of the care industry (MDK), and

(d) strengthening consumer protection (participation in local advice offerings, lists of prices and services, long-term care contracts, duty to repay in the case of poor performance, improved inclusion in the law of contract).



## **Article 8**

### **Prohibition of slavery and compulsory labour**

#### **1. Compulsory labour**

##### **(a) General remarks**

117. In accordance with Article 12 para 2 of the Basic Law, no one may be forced to carry out specific work other than in the context of the traditional, general public service duty applicable to all. In accordance with Article 12 para 3 of the Basic Law, compulsory labour is only permissible in the Federal Republic of Germany in the case of court-ordered deprivation of liberty. German constitutional law thus corresponds to Article 8 para 3 of the Civil Covenant.

118. It was reported in the fourth Periodic Report of the Federal Republic of Germany that many convicts alleged that they received insufficient remuneration for the work that they carried out as inmates and were “exploited like slaves”. The Federal Constitutional Court ruled on 1 July 1998 (file ref. 2 BvR 441/90, 2 BvR 493/90, 2 BvR 618/92, 2 BvR 212/93, 2 BvL 17/94, published in the official collection BVerfGE 98, 169 - 218) that the statutory regulation applying at that time regarding payment of inmates was unconstitutional because it was not in line with the resocialisation principle embedded in the Basic Law. Accordingly, work in prison, which is allocated to inmates as obligatory work, must receive suitable recognition. It must be suitable to convince inmates of the value of regular work to show the concrete advantage that they are able to gain for a future law-abiding life where they take personal responsibility for their actions.

119. With the fifth Act to Amend the Prison Act (Gesetz zur Änderung des Strafvollzugsgesetzes), the remuneration of inmates was given a new regulation as on 1 January 2001 in order to implement the instructions of the Federal Constitutional Court. Remuneration was increased from 5 to 9 % of the reference amount in accordance with section 18 of the Fourth Book of the Social Code. This reference amount is the average remuneration of all insured persons in the pensions insurance of wage-earners and salaried employees of the calendar year before last. Inmates now receive approximately DM 400 per month, in comparison with the previous DM 220.

120. In order to provide further recognition for work, the Act provides a day off if two consecutive months have been worked. These days off can be spent by the inmates within the prison, or can be used as additional leave from prison if inmates are suited to relaxation of prison regime. They may however save up a maximum of six days per year to bring forward their release.

##### **(b) Compensation for compulsory labour under the National Socialist regime**

121. Roughly eight million persons were deployed in compulsory labour in the German Reich and the territories occupied by Germany under the National Socialist regime and during the Second World War, in most cases under extremely inhuman conditions. Those persecuted were also robbed of their property in many cases. The Federal Republic of Germany developed a number of reconciliation programmes immediately after the end of the war in order to

compensate for persecution: Property that was available that had been expropriated as a result of persecution was returned; if it was no longer available, it was compensated for to the tune of roughly DM 4 billion. Added to this were benefits for physical injury and damages incurred in career terms, and for deprivation of liberty, including compulsory labour under imprisonment conditions, which have far exceeded DM 100 billion to date and are topped up by roughly 150,000 pensions totalling DM 1.5 billion per year.

122. If compulsory labour had to be rendered not on the basis of specific National Socialist persecution, but in the context of the events of war, reparation measures were carried out as compensation. It was a matter for the state receiving the reparations to pay individual compensation from them.

123. Independently of these comprehensive programmes, German industry and the German state undertook to establish the Foundation “Memory, Responsibility and Future” as a result of international negotiations which took place in 1999 and 2000. With this Foundation, German enterprises and the Federal Republic of Germany wish to demonstrate their historical and moral responsibility for these events and to supplement the previous compensation payments. The Foundation aims to provide assistance to the compulsory labourers and other victims of National Socialism in a manner that is unbureaucratic and most importantly, quick.

124. The Act to Establish a Foundation named “Memory, Responsibility and Future” (Gesetz zur Errichtung einer Stiftung “Erinnerung, Verantwortung und Zukunft”) came into force on 12 August 2000. It makes provision amongst other things for payments of up to DM 15,000 to victims of National Socialism who were detained in concentration camps, ghettos or comparable detention centres and were forced to work. Payments of up to DM 5,000 may also be received by former compulsory labourers who were deported from their home states to the territory of the German Reich or a territory occupied by the German Reich and were forced to work in a commercial enterprise or in the public field, and thereby were detained or subjected to conditions that were similar to detention.

125. The Act, finally, also provides for benefits to applicants who suffered property damage as a result of racist persecution within the meaning of legislation on reconciliation from major, direct and causal participation by German enterprises and have not been able to obtain redress for this.

126. A part of the Foundation is also to be devoted to future tasks which maintain the memory of the Holocaust and other wrongs committed by the National Socialists, and which are intended to help to avoid a new threat from totalitarian systems by promoting information and meeting. Half each of the Foundation’s assets amounting to DM 10 billion has been contributed by the Federal Republic of Germany and the enterprises combined in the Foundation Initiative of German Industry. From that total, DM 8.1 billion are to compensate compulsory labourers, DM 1 billion to compensate for property damage, DM 700 million will flow into the future fund and DM 200 million into general administrative expenses.

## **2. Slave trade**

127. Many initiatives have developed in the period under report to suppress modern forms of the slave trade in Europe.

128. Initial minimum standards to suppress the slave trade have been created within the European Union in the shape of the Joint Action of 27 February 1997 concerning action to combat trafficking in human beings and the sexual exploitation of children and the penalisation and cooperation obligations involved. More recently, further steps have been taken at international level to approximate legal provisions. Here, we can identify the following projects in which the Federal Government has taken an active part:

(a) The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was signed by Germany together with the United Nations Convention Against Transnational Organised Crime at the signing conference held in Palermo in December 2000. Ratification and domestic implementation are being prepared.

(b) The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography was signed by Germany in New York on the occasion of the Millennium Summit which was held in September 2000. Ratification and domestic implementation are under preparation.

(c) On 19 May 2000, the Committee of Ministers of the Council of Europe accepted Recommendation No. R(2000)11 on action against trafficking in human beings for the purpose of sexual exploitation.

(d) On 31 October 2001, the Committee of Ministers of the Council of Europe accepted the Recommendation to strengthen the protection of children against sexual exploitation.

(e) The Council of the European Union will soon accept the framework decision on combating trafficking in human beings, which sets minimum criminal law standards applying equally to all Member States.

## **Article 9**

### **Guarantees in the case of deprivation of liberty**

#### **1. Fundamental comments**

129. In accordance with Article 104 para 1 first sentence of the Basic Law, the freedom of the individual may be restricted only on the basis of a formal law, and only with due regard to the forms prescribed therein. Article 104 para 2 first sentence of the Basic Law states that only judges may decide on the admissibility or extension of deprivation of liberty. If the deprivation of liberty is not based on the order of a judge, a judicial decision must be obtained without delay (Article 104 para 2 second sentence of the Basic Law). The police may hold no one on their own authority in custody longer than the end of the day after apprehension (Article 104 para 2 third sentence of the Basic Law). Any person provisionally detained on suspicion of having committed a punishable offence must be brought before a judge at the latest on the day following the arrest. The judge must inform him/her of the reasons for detention, examine him/her and

give him/her an opportunity to raise objections. (Article 104 para 3 first sentence of the Basic Law). In accordance with Article 104 para 4 of the Basic Law, a relative of the person detained or a person enjoying his confidence must be notified without delay of any judicial decision ordering or extending deprivation of liberty.

130. Furthermore, the past consistent decisions of the Federal Constitutional Court have recognised that each accused person has the right to a fair trial. This also includes the right to receive the assistance of a lawyer at each stage of the proceedings.

131. These constitutional requirements have entered the statutes of the Federation and the Länder. If, for instance, an individual is detained in respect of a criminal offence, it must be explained to him/her at the start of the first questioning which offence he is accused of and which criminal provisions are considered. He is to be informed that they are free in accordance with the law to make a statement on the accusation or not. At the same time, he must be informed that they have the right at any time to ask questions of defence counsel of their own choice, including prior to their questioning (section 136 of the Code of Criminal Procedure [Strafprozessordnung]). If the accused asks for counsel, questioning must be postponed or interrupted until he has been able to speak with such a legal representative.

## **2. Remand detention**

132. The ordering of remand detention is only possible in accordance with the provisions of the Code of Criminal Procedure if the accused is urgently suspected of an offence, and if there is a reason for detention. Reasons for imprisonment include escape, danger of escape and the danger of collusion. These prerequisites, as well as the principle of proportionality, which is to be adhered to in any criminal procedure measure, ensure that the deprivation of the liberty of a non-convict is not the general rule, but rather the exception in criminal proceedings as they are carried out in Germany.

133. Further, the procedural requirement of Article 9 para 2 of the Civil Covenant is met in German criminal procedure law: On arrest, the accused is to be informed of the contents of the arrest warrant or, if this is not possible, to be provisionally informed of the offence of which he is suspected. In the latter case, the arrest warrant is to be announced without delay. The individual provisionally detained on the basis of an arrest warrant is to be taken before the competent judge, who has to question the accused on the subject-matter of the accusation without delay after being brought before him/her, at the latest on the next day. After three months of remand detention, an examination of detention must be carried out if the accused has by then neither applied for a review of detention, nor filed a complaint against detention, nor has a defence counsel has no defence counsel (section 117 subsection 5 of the Code of Criminal Procedure). Remand detention of longer than six months is only permissible in cases in which no judgment has yet been handed down if the special difficulty or the particular extent of the investigations or another important reason do not yet permit a judgment to be handed down and justify the continuation of detention. An accused person who is in remand detention on the basis of an arrest warrant may turn to the courts with the appeals of review of detention, of complaint against detention as well as of further complaint against detention.

134. How much one is aware in German criminal procedural law of the serious encroachment caused by ordering remand detention is also shown by a decision of the Federal Constitutional Court dated 11 July 1994 (file ref. 2 BvR 777/94, published in the *Neue Juristische Wochenschrift* 1994, p. 3219). According to the Court, the right of the accused to a fair trial with proceedings based on the rule of law and the right to a legal hearing leads to a right of the accused detainee to have his counsel inspect the investigation files if and to the extent that he requires the information contained therein in order to effectively influence the court's decision on detention.

135. Furthermore, the Federal Government has submitted a draft Bill to Regulate the Execution of Remand Detention which is currently being revised once again. A major matter to which the draft relates is precisely determining the rights and duties of the person concerned, whilst consistently respecting the presumption of innocence and attempting to improve the legal position of remand detainees. Encroachment on detainees' legal interests is to be kept as small as possible. In order to enable inmates to spend their time in detention wisely, and to avoid sub-cultural developments, the draft attempts to expand the range of what is offered in prison.

136. The statistics for the year 2000 recorded 36,683 remand detainees. Of these, remand detention of the following periods was served by the following number of detainees

up to one month	13,049 cases
1 to 3 months	8,531 cases
3 to 6 months	8,206 cases
6 months to 1 year	5,310 cases
more than 1 year	1,587 cases.

137. The number of remand detainees has fallen in comparison to the years 1997 - 1999. A total of 908,261 sets of criminal proceedings were concluded in 2000. It is therefore the exception for remand detention to be ordered.

### **3. Proceedings before international bodies**

138. The European Court of Human Rights and the European Commission of Human Rights have dealt with allegations in several sets of proceedings that German criminal prosecution authorities and courts had not adhered to Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in individual cases. The Article contains rights similar to those envisioned by Article 9 of the Covenant. All Applications alleging a violation of Article 5 para 1 of the ECHR were unsuccessful with regard to this point. For instance, the Commission of Human Rights rejected as inadmissible the Applications of several individuals who had been convicted of spying for the former German Democratic Republic (decisions in the cases of *Sdrenka against Germany* - Application No. 29791/96 - and *Gast, Popp and Tischler against Germany* - Application No. 29357/95 dated 24 June 1996). Also the

complaint of the former Minister for State Security of the German Democratic Republic Mielke against his conviction in respect of a homicide committed in 1931 remained unsuccessful (decision in the case of Mielke against Germany dated 25 November 1996, Application No. 30047/96).

139. A number of Applications which were based on a violation of Article 5 para 3 of the ECHR in respect of excessively long duration of remand detention were also very largely unsuccessful (cf. The decisions in the case of B.H. against Germany dated 13 October 1993 on a one year and eight months' duration of remand detention - Application No. 19791/92; in the case of Nells against Germany dated 6 September 1994 - Application No. 20695/92 on a duration of remand detention of one year and eleven months; in the case of Löhr against Germany dated 28 February 1996 - Application No. 28397/95 on a one year and four months' duration of remand detention). A conviction in respect of a violation of Article 5 para 3 of the ECHR was handed down in one case in which the accused was imprisoned for six years after having been in remand detention for five years and eleven months (judgment in the case of Erdem against Germany dated 5 July 2001, Application No. 38321/97). This judgment was - like all others - published in German and forwarded to the Land administration of justice in question.

140. Three judgments were handed down by the European Court of Human Rights against the Federal Republic of Germany in the period under report in respect of a violation of Article 5 para. 4 of the ECHR. The Court ruled that in spite of section 147 subsection 2 of the Code of Criminal Procedure, in accordance with which defence counsel may be refused inspection of the files prior to conclusion of the investigations if this may place the purpose of the investigation in jeopardy, counsel should be provided with all the information available in the interest of having an equal opportunity to defend the accused ("equality of arms"). This applies in particular to incriminating witness testimony and other items of evidence significant to the evaluation of the lawfulness of remand detention (judgments in the cases of Garcia Alva against Germany - Application No. 23541/94, Lietzow against Germany - Application No. 24479/94 and Schöps against Germany - Application No. 25116/94 - dated 13 February 2001). In one case in which the accused had made it clear that there was an interest in the further content of the files even after the files had been inspected, the Court judged that the criminal prosecution authorities should have offered him/her inspection of the files prior to a new appointment to examine detention, even though no further application had been made (judgment in the case of Schöps against Germany dated 13 February 2001 - Application No. 25116/94).

#### **4. Placement and care**

141. Placement without or against the will of the person concerned constitutes an encroachment on basic rights, something which is only permitted in accordance with the principle of proportionality if a remedy is impossible with less incisive measures. Such an encroachment may also only be carried out if it has a legal basis. Only a judge may order it. If in an urgent case an individual has been placed without an order by a judge, a judge must subsequently approve the action.

142. Court proceedings to order or approve placement measures in respect of mental illness or mental or emotional disability were governed nationally in 1992 in sections 70 et seqq. of the Act on Matters concerned with Non-contentious Litigation (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit - FGG). It is possible to distinguish at substantive law level between three possibilities of placement.

(a) Civil law placement by a legal representative (carer, parents, guardian, curator), since 1999 also by an agent (sections 1906 and 1631b of the Civil Code [Bürgerliches Gesetzbuch - BGB]). It is justified by a risk of self-injury to the person concerned or by the needs of healthcare (such as necessary medical examination, treatment, and medical intervention). In accordance with section 1896 of the Civil Code, this is not exclusively a matter concerning mentally ill people, but also people with a mental, emotional or physical disability.

(b) Public law placement in accordance with the provisions of Land law may take place where there is a risk of self-injury, but also - with different wording in the individual Länder - if others are placed at risk.

(c) Criminal law placement. This may be ordered by a court as a measure of security and rehabilitation if the person concerned lacks criminal responsibility with regard to a criminal offence because of a mental illness or disturbance. The execution of these measures is undertaken to protect the public, and is governed in some Federal Länder by the provisions imposing detention measures, and in others by individual sections of the statutes on the mentally ill or on placement. The statutory basis is offered by section 63 of the Criminal Code for placement in a psychiatric hospital, section 64 of the Criminal Code for placement in an institution for withdrawal, and by section 126a of the Code of Criminal Procedure for temporary placement. The Prison Act governs execution of imprisonment and measures of security and rehabilitation entailing deprivation of liberty in sections 136 (placement in a psychiatric hospital), 137 (placement in an institution for withdrawal) and 138 (application of other provisions).

143. The Care Act (Betreuungsgesetz) which entered into force as far back as the end of the last period under report, improved the protection of privacy and freedom for adults who were protected by guardianship or curatorship. The Act was once more revised by means of the Act Amending the Law on Care (Betreuungsrechtsänderungsgesetz) dated 25 January 1998, which largely entered into force as on 1 January 1999 (Federal Law Gazette Part I p. 1580) revised once more so that the following applies:

144. The possibility extant prior to the entry into force of the Care Act to place an individual under the control of a guardian, and hence to remove the ability to conduct legal transactions from them automatically and without exception, was abolished without replacement. The consequent stigmatisation of the person concerned has hence been removed. The principle of necessity applies in the context of the care that is now possible. Accordingly, the appointment of a carer is dependent on the person receiving care not being able to take care of their own affairs themselves or by means of an agent, or with other assistance (section 1896 subsection 2 of the Civil Code). Accordingly, the carer is only assigned those tasks for which the person concerned

requires support. The duration of care may not exceed the required time. The ordering of the carer must be examined after a maximum of five years (section 69 subsection 1 No. 5 of the Act on Matters concerned with Non-contentious Litigation).

145. The legal position of the person concerned has been strengthened in both the care and the placement procedures in that the persons' capacity to sue and be sued is now independent of such a person's ability to conduct legal transactions (sections 66 and 70a of the Act on Matters concerned with Non-contentious Litigation - in the placement procedure as soon as the age of fourteen has been reached) and hence has been upgraded from being a mere object of the proceedings to become their subject. The person concerned should be provided with a curator for the proceedings where this is necessary in order to defend the interests of the person concerned (sections 67 subsection 1, 70b subsection 1 of the Act on Matters concerned with Non-contentious Litigation).

146. The person concerned should on principle be heard in person prior to the appointment of a carer. The same applies to any necessary placement of the person concerned (sections 68 and 70c of the Act on Matters concerned with Non-contentious Litigation). The court is obliged to gain a direct personal impression of the person concerned before making a decision.

147. The appointment of a carer does not affect existing capacity to conduct legal transaction of the person receiving care. The carer is obliged to ensure the well-being of the person receiving care (section 1901 subsection 2 first sentence of the Civil Code). Persons receiving care should be able to shape their lives as they see fit, as far as they are able (section 1901 subsection 2 second sentence of the Civil Code). The carer is to meet the wishes of the person receiving care where this does not run counter to their well-being and can be expected of the carer (section 1901 subsection 3 first sentence of the Civil Code). The carer is to discuss important matters with the person receiving care (section 1901 subsection 3 third sentence of the Civil Code).

148. Public law coercive placement and treatment of the mentally ill is to be distinguished from the abovedescribed care in the framework of which civil law placement may become necessary. These are measures which need to be carried out by the police to avert a danger to public security and order. The legislative competence for this in the Federal Republic of Germany lies with the Länder. In many Länder the old statutes on the deprivation of liberty, which only briefly considered the special needs of the mentally ill, have now been replaced by Mentally Ill Acts (Psychisch-Kranken-Gesetze [PsychKG]). Most of these statutes provide for special aids for the mentally ill in the shape of precautionary, supportive long-term measures. In order to implement these measures, the health offices have established independent social psychiatric services, as a rule with a specialist physician taking responsibility. Precautionary assistance aims to avoid the coercive placement of the mentally ill as far as possible.

149. The new Care Act, which entered into force on 1 January 1992, also provided the occasion for the Länder to reform the existing statutes. All the new Federal Länder, and most of the old Federal Länder, have now reformed their statutes, and in some cases have completely reworded them.



## Article 10

### Protection measures for persons who have been deprived of their liberty

#### 1. Control mechanisms

150. The humane treatment of persons who have been deprived of their liberty is a constitutional duty of state authority under German law (Articles 1 and 2 of the Basic Law). As shown by the information provided on Articles 7, 8 and 9, comprehensive national and international provisions guarantee that this principle is implemented in all fields in which people are deprived of their liberty. The reports of the CPT Committee and the statements of Federal Government (cf. above at para .No. 98) show that the Federal Republic is in a continuous dialogue with the internationally independent bodies which can visit all locations where people are detained in Germany unannounced (and indeed regularly do so). Many suggestions and much information from the Committee have led to improvements in German facilities of this kind. The cooperation which has existed since the adoption of the European Anti-Torture Convention has proven its worth.

151. The establishment of a further independent mechanism at national level to investigate cases of suspicion of mistreatment by police officers at local level - which the Human Rights Committee was right to suggest in its comment No. 11 on the fourth Periodic Report (CCPR/C/79/Add. 73) - also appears not to be absolutely necessary in light of the many other existing mechanisms. In addition to the CPT system, the traditional national precautions ensure sufficient prevention in this field.

152. The abuse of detained persons is a criminal offence (this was described above at Article 7: cf. para. 94 et seq.). In accordance with the principle of mandatory prosecution (section 152 subsection 3 of the Code of Criminal Procedure - StPO) the public prosecution office is obliged to intervene in respect of all prosecutable offences if sufficient factual indications are available. It must initiate investigation proceedings as soon as it has gained knowledge of the suspicion of a criminal offence by a charge being filed, or by other means (section 160 subsection 1 of the Code of Criminal Procedure). If facts become known concerning criminal conduct on the part of individual law enforcement officers, an impartial, neutral investigation is carried out by public prosecutors, and where necessary before the courts. In the context of the principle of mandatory prosecution, the officers of the public prosecution office are also not subject to the right of superiors to give instructions provided for in section 146 of the Court Constitution Act (Gerichtsverfassungsgesetz), and consequently not to the instructions of the executive. The courts concerned with the case once the charge has been filed by the public prosecution office are independent and subject only to the law (Article 97 para 1 of the Basic Law). Also the principle of the separation of powers (Article 20 para 2 of the Basic Law) guarantees that the independent judiciary monitors respect for basic rights.

153. Outside criminal procedure, police officers - like other civil servants - are subjected to monitoring by their superior authorities and the competent ministries. Furthermore, in the context of service law, on the basis of the disciplinary statutes of the Federation and the Länder in conjunction with the Acts on Public Office (Beamtengesetze) disciplinary proceedings, in which extensive sanctions can be imposed, are applied to disciplinary offences both without criminal law relevance and in supplementation of criminal judgments.

## 2. Resocialisation in prison

### (a) Fundamental comments

154. In accordance with section 2 of the Prison Act, the purpose pursued by imprisonment is to enable inmates in future to live a life of social responsibility without crime. The Prison Act hence implements the constitutional principle of orientating prison towards the goal of resocialisation. As already reported above (at Article 8, para. 118), the Federal Constitutional Court handed down a decision on remuneration of inmates on 1 July 1998, on the basis of which a new regulation was drafted on the payment of convicts (cf. above para. 119). In this judgment it stated the following on the principle of resocialisation:

“The Constitution requires prison to be orientated with the goal of resocialising of inmates. Individual inmates derive a basic right from Article 2 para 1 in conjunction with Article 1 para 1 of the Basic Law to have this goal met in measures affecting them. The principle of resocialisation has particular importance in cases of imprisonment where a state power largely defines the conditions of an individual’s life. The Federal Constitutional Court has developed this principle from the self-perception of a legal community which has at the core of its values an obligation to promote human dignity, and to adhere to the principle of the social welfare state. Inmates are to be taught and made willing to live their lives responsibly. In future they are to be able to live under the conditions of a free society without breaking the law, and to take their own chances and risks. Resocialisation also serves to protect society itself: The latter has a direct interest in the offender not re-offending and once more causing detriment to his fellow citizens and the community (cf. BVerfGE 35, 202 and 235 et seq. - Lebach).

This constitutional resocialisation principle defines the whole prison system; it also applies to the implementation of life-long imprisonment. These inmates, too, are to be offered conditions in which they are able to develop, and to instil an ability to cope with life. Effects of the deprivation of liberty which are detrimental to the personality, especially deforming changes to the personality, are to be countered (cf. BVerfGE 45, 187, 238 et seq.). The same must apply to preventive detention. Those placed in preventive detention may also regain their freedom if they are no longer dangerous (section 67d subsections 2 and 3 of the Criminal Code).

The constitutional resocialisation principle is binding on all state powers. It targets first and foremost the legislature, which must shape the norms applying to the prison service (cf. BVerfGE 33, 1, 10 et seq.). It obliges Parliament to develop an effective resocialisation concept and to build the prison system upon it. The constitutional resocialisation principle also becomes significant for the administration and the judiciary, certainly if it is a matter of interpreting undefined legal terms or general clauses, or if Parliament has granted the enforcement authorities discretion concerning the legal consequences.”

**(b) Details relating to developments in the period under report**

155. The Federal Parliament in the Act to Suppress Sexual Crime and other Dangerous Criminal Offences (Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten) dated 26 January 1998 set a new tone concerning sexual offenders. Many domestic and foreign studies show that the danger of recidivism can be reduced in many cases in the field of sexual offences by providing the offender with more intensive therapeutic care. The successful use of therapy measures is conditional upon suitable inmates entering therapy as soon as possible. In accordance with the law applicable until January 1998, a sexual offender who was suited to therapy was sent to a general prison to serve his sentence, and was frequently provided with insufficient therapeutic care. The prison authorities took the decision as to which treatment measures were necessary, and examined whether more intensive treatment in a social therapy facility was required. Even if a transfer to a social therapy facility was considered necessary, this was only possible if both the inmate and the governor of the social therapy institution agreed. Furthermore, the places available in the social therapy facilities in the Länder were not sufficient for all inmates in need of treatment.

156. In order to improve this imperfect situation, the Act to Suppress Sexual Crime and other Dangerous Criminal Offences prescribed the obligatory transfer of treatable sexual offenders who are in need of treatment to a social therapy facility if sentenced to more than two years' imprisonment. It is conditional upon this transfer being required on the basis of an examination of the personality and circumstances of the inmate. This arrangement will enter into force on 1 January 2003. The prison authorities are, however, already now obliged to examine in the treatment examination which must be carried out at the beginning of treatment whether the transfer is required from a treatment point of view, and to take an appropriate decision which is to be repeated at regular intervals in the event of a negative decision being taken on the need for a transfer, taking account of the development of the inmate in prison.

**3. Solitary confinement**

157. In its comments on the fourth Periodic Report, the Human Rights Committee disapproved of the possibility of imposing a period of solitary confinement of up to three months and of the possibility of further extending this period (CCPR/C/70/Add. 73, comment No. 15).

158. Solitary confinement is ordered as an exception because isolation and the concomitant reduction in all environmental incentives may lead to the loss of human social skills. This insight is also reflected in the statutory structure of solitary confinement. Solitary confinement may only be imposed under strict preconditions. Additionally, the decision can be examined in full by the court (cf. also the decision of the European Court of Human Rights mentioned at para. 102).

159. Solitary confinement in prison is only permissible if it is indispensable for reasons resulting from the personality of the inmate (section 89 of the Prison Act - StVollzG). What reasons these may be is listed definitively in section 88 subsection 1 of the Prison Act. Thus, in accordance with the conduct or the mental state of the inmate there must be a considerable danger of escape or the danger of acts of violence against persons or things or the danger of suicide or self-injury. A precondition for the existence of such dangers includes concrete

indications of the current conduct, mere fears not being sufficient. To evaluate the danger of escape, for instance, it is not sufficient to solely consider past conduct, such as previous escapes. A substantial current danger must be provable with specific indications.

160. Additionally, the ordering of solitary confinement must be indispensable. The undefined legal term “indispensability” can be fully examined by a court. It means that the prison authorities must first use all other means in order to prevent the imposition of solitary confinement or to remedy its necessity, and that imposition is conditional on less incisive measures not being sufficient. Other measures which may be considered include medical, psychiatric or psychological assistance.

161. In practice, solitary confinement is ordered only by way of exception, and not for longer periods. In the case of an ongoing danger, placement in solitary confinement for a longer period is avoided by transfer to a facility with a higher level of security.

162. Under these strict prerequisites for the imposition of solitary confinement, the Federal Republic of Germany would like to retain the existing provisions.

### **Article 11**

#### **Prohibition of imprisonment on the ground of inability to fulfil a contractual obligation**

163. Germany adheres to the obligation under Article 11 of the Covenant to ensure that no one is to be imprisoned merely on the ground of inability to fulfil a contractual obligation.

164. German law on coercive enforcement provides in several provisions that imprisonment may be ordered against a debtor. This applies for instance in cases where the debtor refuses to carry out an act for which representation by another is not possible (e.g. to provide information) and where it is not possible to collect the coercive fine imposed on him/her (section 888 of the Code of Civil Procedure). Another example concerns a case in which the debtor who is to submit an affirmation in lieu of oath does not appear at the hearing or refuses without reason to give the affirmation. The court may then order imprisonment in order to force the giving of the affirmation (section 901 of the Code of Civil Procedure). These provisions are considered to be constitutional because the sanction which is incisive for the debtor can be prevented at any time. The law links imprisonment not to the ability to pay, but to non-adherence to obligations which could be met without difficulty.

165. Such constellations of facts are not related to Article 11 of the Covenant. Article 11 only provides protection from a debtors’ prison if the non-fulfilment of a contractual obligation is based exclusively on the inability of the debtor. This is clearly not the case, for instance, in the area of application of section 901 of the Code of Civil Procedure, since the debtor is certainly able to avoid or terminate detention by giving the affirmation in lieu of oath. Furthermore, the prohibition of imprisonment for debt expressly refers only to contractual obligations. The duty to give an affirmation in lieu of oath in the context of coercive enforcement, however, concerns a statutory duty towards the state.

166. The same applies to the new Insolvency Statute (Insolvenzordnung): The Federal Parliament has regulated the legal provisions on insolvency in a new statute, namely the Insolvency Statute (Insolvenzordnung) dated 5 October 1994 (Federal Law Gazette, Part I, p. 2866). In accordance with section 17 of the Insolvency Statute, inability to pay is the general reason to open insolvency proceedings. If such proceedings are applied for, imprisonment may be ordered even prior to its opening if no other means would succeed in preventing a disadvantageous change in the debtor's assets (section 21 subsection 2 first sentence of the Insolvency Statute). Detention may also be ordered at this stage of the proceedings if the debtor does not comply with his duty to provide information (imprisonment for contempt of court). Equally, once the proceedings have been opened, the insolvency court may order detention in order to enforce the debtor's obligation to provide information or to safeguard the assets (section 98 subsections 2 and 3 of the Insolvency Statute).

167. Detention is not ordered in any of these cases because the person concerned is unable to fulfil contractual obligations. Instead, it serves to secure the assets against dishonest debtors. Detention to bring about the provision of information is conditional on the person concerned indeed being able to provide the information.

## **Article 12**

### **Freedom of movement and freedom of travel**

#### **1. Freedom of movement**

168. Freedom of movement within Federal territory is guaranteed in Article 11 of the Basic Law, which protects the right to be and to reside in any place on Federal territory (cf. most recently ruling of the Federal Constitutional Court dated 20 July 1999, file ref. 1 BvQ 10/99, published in *Neue Juristische Wochenschrift* 1999, pp. 3477 - 3478, ruling dated 15 August 1996, file ref. 2 BvR 1075/96, published in *Neue Juristische Wochenschrift* 1996, pp. 3145 - 3146. Reference is made to the information in the third Periodic Report (CCPR/C/52/Add.3 paragraph 84)) on the restriction of this basic right in the case of conscripts in accordance with Article 11 para 1 of the Basic Law.

169. Article 11 of the Basic Law only guarantees freedom of movement for Germans. Foreigners may however rely not only on Article 12 of the Covenant, but also on the basic right to the free development of their personality in accordance with Article 2 para 1 of the Basic Law, if their freedom of movement is restricted within Federal territory. Article 2 para 1 of the Basic Law guarantees general freedom to act in the broad sense of the word, but is in particular subject to the reservation contained in of the constitutional order to which all formal and substantive constitutional statutes belong. If the statutory restriction of the free development of personality does not affect an inalienable field of private plans, everyone must accept state measures adhering to the principle of proportionality, which are taken in the overriding public interest (ruling of the Federal Constitutional Court dated 10 April 1997, file ref. 2 BvL 45/92, published in the official collection *BVerfGE* 96, pp. 10 et seqq. and 21).

170. The freedom of asylum-seekers to travel and to move is restricted by section 56 of the Asylum Procedure Act (*Asylverfahrensgesetz - AsylVfG*). Accordingly, asylum-seekers' permission to reside is geographically restricted to the district of the immigration authority in

which the acceptance facility lies which is responsible for accepting the alien. In accordance with section 58 subsection 2 of the Asylum Procedure Act, an asylum-seeker should be permitted to attend appointments with the United Nations High Commissioner for Human Rights and with organisations providing care to refugees to leave the place of residence to which they are assigned. In accordance with section 58 subsection 3 of the Asylum Procedure Act, no permission is necessary to attend appointments with authorities and courts where a personal appearance is necessary.

171. It should be borne in mind in the case of the geographical restriction described here that asylum-seekers' permission to reside (section 55 of the Asylum Procedure Act) is a purpose-related right of residence because it is specific to asylum and dependent on the asylum procedure, and does not constitute a residence permit in accordance with section 5 of the Aliens Act, but which at least for the duration of the asylum procedure provides lawful residence within the meaning of Article 12 para 1 of the Covenant. Until the asylum procedure is concluded, the applicant is to be available at all times in a specific place for procedural reasons so that the authorities need to make no further efforts to locate him/her. This is not a disproportionate restriction of the right to free development of personality. The Federal Constitutional Court has examined the constitutionality of the asylum law provisions on the geographical restriction of permission to reside granted to asylum-seekers, and in its ruling dated 10 April 1997 (file ref. 2 BvL 45/92, cf. paragraph 169) declared that it was in compliance with the Constitution. The geographical restriction is removed if an asylum-seeker is recognised as being entitled to asylum.

172. In the case of aliens wishing to enter via an airport and requesting asylum from the border authorities, the asylum procedure is to be implemented prior to a decision on entry if they come from a safe country of origin or do not have a valid passport and they can be accommodated in the transit area (cf. section 18a of the Asylum Procedure Act). This so-called "airport procedure" is an accelerated procedure. For instance, the Federal Office for the Recognition of Foreign Refugees is to decide on it within two days after the asylum application has been filed, and this decision taken in the proceedings to grant temporary legal protection should be examined by a court within 14 days. If these deadlines cannot be met, or if the asylum application is not proven to be evidently ill-founded, entry is to be granted in order to carry out the normal asylum procedure on domestic territory.

## **2. Freedom to leave any country**

173. Freedom to leave one's own country - Article 12 para 2 of the Covenant - is also guaranteed in the Federal Republic of Germany. This freedom, including its legal foundation, was explained in the first, second and third Periodic Reports (CCPR/C/1/Add.18, CCPR/C/28/Add.6, CCPR/C/52/Add.3).

174. The criminal law investigation of "GDR government crime" played a major role in the period under report. The criminal law prosecution of the acts leading to the death of many persons at the intra-German border (cf. on this in detail above re Article 6 paras. 63 to 70) is also a contribution towards the protection of Article 12 para 2. The German Democratic Republic GDR violated Article 12 para 2 of the Covenant on a large scale by preventing its citizens from leaving its own territory.

175. One should recall here that this practice of the GDR German Democratic Republic was also discussed and criticised in July 1984 by the Human Rights Committee (cf. Yearbook of the Human Rights Committee 1983-1984, Volume I, pp. 521-543; cf. on this also para. No. 64 above). One Committee member made the following relevant comments:

“He was not convinced that the German Democratic Republic was really complying with the provisions of article 12 of the Covenant. Everyone had the basic freedom to leave his own country; some restrictions were permitted by article 12, paragraph 3, but on three grounds only. The basic principle which determined whether or not persons might leave the German Democratic Republic was consistency with the rights and interests of that country; that seemed unduly broad when compared with the provisions of article 12, paragraph 3 of the Covenant”. (p. 533 No. 15).

176. Further objections to the arbitrary restriction of the freedom to leave any country were raised by Committee members Roger Errera (loc cit., p. 532 Nos. 7-11) and Christian Tomuschat (loc cit., p. 528 No. 18). It was not only the Western members who took this critical stance, but also representatives from the Third World. For instance, the Senegalese Committee Member Birame Ndiaye put it as follows:

“it seemed that the government of the German Democratic Republic envisaged the possibility of restricting freedom of movement on grounds other than those provided for in article 12 of the Covenant.” (loc cit., p. 533 No. 17)

177. The German Democratic Republic GDR was criticised because of its restriction of the freedom to leave any country not only with regard to the Covenant, but also in relation to the general obligation to respect human rights, as set out in Articles 1 para 3, 55 and 56 of the UN Charter. In 1970, by its Resolution 1503 (XL VIII) the Economic and Social Council initiated a complaint procedure enabling individuals to inform the Human Rights Committee via its Sub-Commission on Prevention of Discrimination and Protection of Minorities of human rights violations indicating a “consistent pattern of gross and reliably attested violations of human rights”. Only extraordinarily serious violations of rights were examined in these proceedings, the first phases of which were confidential. Around ten countries were examined per year. Of all the countries of the then Eastern Bloc, only the German Democratic Republic GDR and Albania were entered on this list from 1981 to 1983 because of the border regime (cf. P. Alston, *The Commission on Human Rights*, in: the same (ed.), *The United Nations and Human Rights. A. Critical Appraisal*, Oxford, Clarendon Press, 1992, p. 126 (151 Fn. 89); F. Newman/D. Weissbrodt, *International Human Rights*, Cincinnati, Anderson Publishing Co., 1990, p. 122). In accordance with a rule of thumb, a “consistent pattern” was presumed if at least 50 complaints were made concerning the same restriction. The German Democratic Republic GDR was finally removed from the list when it permitted several applicants to leave, enabling the total number of pending complaints to fall below 50.

178. These matters have entered the past consistent decisions of the criminal courts of the Federal Constitutional Court and of the European Courts of Human Rights, which have also dealt with these criminal proceedings (cf. paras. 68 to 70 above). The convictions of the persons responsible at that time, which have been handed down by German courts since 1993, are thus a strong contribution to the protection of the rights under Article 12 para 2 of the Covenant.

## **Article 13**

### **Expulsion**

179. The German law on aliens complies with the provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

180. An alien may be expelled under the preconditions contained in sections 45 to 48 of the Aliens Act if the residence of the alien poses a threat to public security and order or other major interests of the Federal Republic of Germany. Expulsion is decreed by means of an administrative order after the alien has been heard. An objection or a court action in response thereto have a suspensive effect. In special cases, the immediate execution of the expulsion order may be ordered, and this must be provided with written reasons. Expulsion, once effectively ordered, leads amongst other things to any residence permit that may have been issued becoming invalid. The alien may not re-enter Federal territory and remain there; he is not issued with a residence permit, even if the preconditions for entitlement apply (section 8 subsection 2 first and second sentences of the Aliens Act). These effects are as a rule time-limited on request by the alien (section 8 subsection 2 third sentence of the Aliens Act).

181. An alien may be expelled in accordance with section 46 of the Aliens Act in particular if he

- provides false information in proceedings in accordance with the Aliens Act or to obtain a standard visa in accordance with the Schengen Implementation Convention in order to obtain a residence permit or temporary suspension of deportation, or in spite of a legal duty has not cooperated in measures undertaken by the competent authorities at home and abroad who are responsible for the implementation of the Aliens Act (whereby expulsion on this basis is only permissible if the alien was expressly informed of the legal consequences of providing incorrect information prior to questioning),
- has committed a violation of legal provisions or court or official decisions or orders which is not isolated or minor in nature, or has committed a criminal offence outside Germany which is regarded as an intentional criminal offence in Germany.

182. Conviction of the offences of which he is accused is not required in the context of section 46 of the Aliens Act. In the discretionary decision on expulsion, the duration of the lawful residence and the alien's ties to Germany which require protection, the consequences of expulsion for the family members who are legally resident in Germany who live as a family with the alien, and the reasons for the temporary suspension of deportation contained in section 55 subsection 2 of the Aliens Act, must be taken into account.

183. In accordance with section 47 subsection 2 of the Aliens Act, an alien is expelled as a rule if he has for instance

- been convicted with the force of law of one or several intentional criminal offences and sentenced to at least two years' youth custody or to imprisonment without probation, or



- in the context of a public assembly or a procession which has been prohibited or dissolved has participated as an offender or participant in violent acts against people or property committed with the combined strength of a crowd in a manner posing a danger to public security.

184. An alien is to be expelled in cases of particular risk in accordance with section 47 subsection 1 of the Aliens Act. Such a case is deemed to apply if the alien

- has been sentenced with legal force in respect of one or several intentional criminal offences to at least three years' imprisonment or youth custody or, in respect of intentional criminal offences, within five years to several prison or youth custody sentences totalling at least three years, or if preventive detention was ordered in the most recent sentence with legal force, or
- has been sentenced in respect of an intentional criminal offence in accordance with the Narcotics Act, because of a breach of the peace under the preconditions listed in section 125a second sentence of the Criminal Code or in respect of a breach of the peace committed at a prohibited public assembly or a prohibited procession in accordance with section 125 of the Criminal Code with legal force to at least two years' youth custody or to imprisonment without probation.

185. Special protection against expulsion is enjoyed by the groups of aliens listed in section 48 of the Aliens Act. Accordingly, in particular aliens who have a permanent right of residence in the Federal Republic of Germany, who live in a family relationship with a German family member, or in marriage or a non-marital community with an alien who has a permanent right of residence in Germany or is recognised as being entitled to asylum or as refugees, may only be expelled for grievous reasons of public security and order. The system of "as is", "normal" and "optional" expulsion for such foreign citizens is varied in such a way that, as a rule, only individuals who meet the preconditions of section 47 subsection 1 of the Aliens Act applying to obligatory expulsion are indeed expelled, and individuals who meet the preconditions for normal expulsion in accordance with section 47 subsection 2 of the Aliens Act are only expelled on a discretionary basis ("optional").

186. Furthermore, special protection against expulsion exists in accordance with section 48 subsections 2 and 3 of the Aliens Act for minor aliens whose parents or parent with sole parental care are in Germany lawfully, and for those with a recognised entitlement to asylum.

187. An alien who is obliged to leave is to be expelled in accordance with section 49 of the Aliens Act if the duty to exit is depart can be enforced and it is not ensured that it will be implemented voluntarily, or if it appears necessary to supervise the exit for reasons of public order and security. An alien is obliged to exit under the preconditions of section 42 of the Aliens Act, and this obligation may be executed, i.e. if he does not have or no longer has a necessary residence permit (for instance because expulsion has occurred) and if for instance the administrative act by means of which the alien becomes obliged to exit is executable. In cases of deportation, the deportation prohibition contained in section 51 of the Aliens Act and any

obstacles to deportation or reasons for the temporary suspension of deportation contained in sections 53 and 55 of the Aliens Act (cf. sections 51 et seqq. of the Aliens Act paras 56 until 60; re the prohibition of deportation in the event of a threat of torture cf. paras. 100 and 101) must be complied with.

## **Article 14**

### **Guarantees in court proceedings, in particular in criminal proceedings**

188. The rule of law and the guarantee of recourse to the courts are fundamental principles contained in the Basic Law. The individual expressions of these principles have been worded by Article 14 of the Covenant. All these provisions are implemented by the rules of procedure within the jurisdiction of the Federal Republic of Germany. This was explained in detail in the first and second Periodic Reports (CCPR/C/1/Add.18, CCPR/C/28/Add.6). More recent developments are listed below by focal points.

#### **1. Access to a court**

189. In accordance with Article 103 para 1 of the Basic Law, everyone is entitled to a hearing in accordance with the law. If this right is violated by a judgment which cannot be challenged with ordinary appeals, the person concerned may claim this violation by addressing a complaint of unconstitutionality to the Federal Constitutional Court. By means of the Act to Reform Civil Procedure (Gesetz zur Reform des Zivilprozesses) dated 27 July 2001 (Federal Law Gazette, Part I, p. 1887), which entered into force on 1 January 2002, a new appellate remedy is now additionally available in the shape of a complaint of violation of the right to a hearing in accordance with the law. The complaint may be raised if a first instance judgment of a civil or labour court cannot be challenged with an appeal on points of fact and law. In future, therefore, it will no longer be necessary to file complaints of unconstitutionality. The implementation of the right to a fair trial in accordance with Article 14 para 1 first sentence of the Covenant thus becomes even faster and more effective.

190. The right to legal aid enables everyone to have access to the courts irrespective of whether they are able themselves to meet the cost of a legal dispute. The Judiciary has further expanded the legal institution under the provision contained in Article 3 para 1 of the Basic Law, which stipulates that there must be equality before the law. The third chamber of the First Senate of the Federal Constitutional Court decided on 23 June 1999 that a losing party which lacks the necessary funds is free from bearing the court costs irrespective of whether they are the plaintiff or the respondent (published in *Neue Juristische Wochenschrift* 1999, p. 3186). Henceforward, it is not only the plaintiff with entitlement to legal aid who is freed from effecting an advance costs payment, and after losing the case from paying the court costs. Also the respondent who is entitled to legal aid does not have to refund to the plaintiff the court costs they have paid if they lose; this is a matter for the state coffers.

#### **2. Principle of public trial**

191. In accordance with the German law on court constitution, hearings before the adjudicating court, including the judgments and rulings, are public. Hence, uninvolved third parties are enabled to attend court hearings ("direct public access"). The principle of direct

public access includes the possibility of press reporting from the court hearing. By contrast, public access entailing film, radio and television transmissions is not permissible (“indirect public access”).

192. The Federal Constitutional Court has repeatedly dealt with the statutory exclusion of television and radio recordings, most recently in its judgment of 24 January 2001 (file ref. 1 BvR 2623/95 and 1 BvR 622/99, published in the official collection BVerfGE 103, p. 44). The judgment relates to two complaints of unconstitutionality from a private news broadcaster which had been prevented by the respective presiding judges in both criminal and administrative court proceedings from recording the hearing live in the courtroom. The news broadcasting company took the view that the prohibition of public access to court hearings by radio and television was not compatible with the freedom of information and broadcasting guaranteed in the Constitution (Article 5 para 1 of the Basic Law).

193. The Federal Constitutional Court rejected the complaints of unconstitutionality with the reasoning that, in defining public access to the courts, Parliament had taken account of its function and the differing interests of the parties to the proceedings. The provisions achieved the goal of supervising the court proceedings and of providing access to information for the public. Also the principle of the accessibility of information for public opinion forming rooted in the principle of democracy was said not to require public access other than in the courtroom. In particular, the statutory arrangement served the interests of the protection of privacy, the requirements of a fair trial and ascertaining the truth and finding justice. It protected the right to right of a person to control the distribution of personal information since it prevented the manipulation of the content of testimony through technical processing of the television programme. Parliament was also not obliged to permit exceptions for specific sets of proceedings or sections of such proceedings since concerns were raised in all cases that there might be a risk to the right to privacy.

### **3. Rights in criminal proceedings**

#### **(a) Right to a fair trial, Article 14 paragraph 1**

194. The principle of a fair trial for criminal proceedings in Germany emerges from the guarantee of proceedings orientated towards justice in line with the rule of law. The Federal Constitutional Court allots it constitutional status - based on Article 2 para 1 in conjunction with Article 20 para 3 of the Basic Law - (cf. the decisions of the Federal Constitutional Court dated 26 May 1981, file ref. 2 BvR 215/81, published in the official collection BVerfGE 57, pp. 250, 274 et seqq.; dated 28 March 1984, file ref. 2 BvR 275/83, BVerfGE 66, pp. 313, 318; dated 22 September 1993, file ref. 2 BvR 1732/32, BVerfGE 89, pp. 120, 129). There are many examples of more concrete form being given to the principle of fairness in court rulings. For instance, the German criminal courts derive specific duties to inform from the principle of fairness in proceedings, in order to make it possible for the accused to exercise his right of defence effectively.

195. The procedural guarantees are also met by means of the statutory arrangement of the criminal law investigation procedure in the German Code of Criminal Procedure. Parliament is bound by the fair trial principle. This is clearly recognisable in many provisions of the Code of Criminal Procedure. For instance, section 136 a of the Code of Criminal Procedure contains a

number of requirements which must be met when accused persons are questioned. Any encroachment by coercion, deception, threat or similar means on the accused's decisions and free exercise of will is consequently prohibited, and even leads to the testimony subsequently not being useable even if the accused agrees to it being used.

196. Even provocation of suspects to commit criminal offences, by police informers, is permissible only within strict limits because of the principle of a fair trial. In particular, crimes in the field of unauthorised trafficking in narcotics may frequently be solved only by undercover investigations. In accordance with the case law of the highest courts, a provocation by undercover agents to commit an offence must however be justified in individual cases with the goal of solving a criminal offence of considerable significance the solving of which by other investigation methods would offer much fewer prospects for success, or would be much more difficult. The offence which is incited must be proportionate to the offence of which the person so incited is already suspected. Provocation over and above the existing suspicion causing an increase in the suspect's level of involvement in what is qualitatively a much greater wrong constitutes a violation of the fair trial principle. The Federal Court of Justice, for instance applying the principle of a fair trial in accordance with Article 6 para 1 first sentence of the ECHR, and in view of its interpretation by the European Court of Human Rights for the case of Convention-violating deployment of an agent provocateur, ruled that such a violation should be identified in the reasoning for the judgment and should be precisely compensated for when determining the legal consequences (judgment dated 18 November 1999, file ref. 1 StR 221/99, published in the official collection BGHSt, 45, pp. 321 et seqq.; judgment dated 30 May 2001, file ref. 1 StR 42/01, published in Neue Juristische Wochenschrift 2001, pp. 2981 to 2983).

197. In closely restricted exceptional cases, in accordance with German criminal procedural law a hearing may take place in the absence of the accused, such that for instance in accordance with section 231a of the Code of Criminal Procedure if the accused has intentionally and culpably caused their inability to appear. Here, too, the principle of a fair trial plays a role. Expanding the elements of the provision to cover a case in which the accused refuses to have an inability to appear which he did not cause remedied by medical measures was countered by the Federal Constitutional Court by ruling of 22 September 1993. Such a broad interpretation of the provision is said to violate the right of the accused to a legal hearing in conjunction with his right to a fair trial, at least if the medical treatment is not acceptable (file ref. 2 BvR 1732/93, published in the official collection BVerfGE 89, pp. 120 to 131).

**(b) Guarantee of the right of the accused to examine the witnesses, Article 14 para 3 (e)**

198. The guarantee of the right to examine the witnesses as a special characteristic of the principle of a fair trial in accordance with Article 6 para 3 (d) of the ECHR, which agrees with the Covenant in this respect, has led in the following case to a major modification of German law:

199. In the case to be ruled on by the Federal Court of Justice, the incriminating witness - who as the daughter of the accused had the right to refuse to give testimony - had been questioned in the investigation proceedings by the investigating judge. The accused, who at that time did not yet have defence counsel, had been excluded from attending the questioning because of a danger to the purpose of the investigation. The daughter refused to testify at the main hearing. Her

testimony was introduced to the hearing by reverting to the investigating judge. The accused was thereupon convicted. The accused lodged a complaint alleging a violation of his right under Article 6 para 3 (d) of the ECHR.

200. The Federal Court of Justice initially ruled that the right of the accused to be present when the witness is questioned in the investigation proceedings cannot be derived from this provision. In interpreting German criminal procedural law, however, the Human Rights Convention is said to require that the basic principle of the right to examine the witnesses should also be taken into account in the investigation proceedings. For this reason, it would have to be examined in such a constellation whether counsel should be appointed for the accused (counsel on principle having the right to attend such questioning by a judge). If it was a matter of questioning the central incriminating witness, who for reasons of securing the evidence had already been questioned by the judge in the investigation proceedings, and later might refuse to give testimony, counsel had to be appointed for the accused. Otherwise, the accused's guaranteed right to examine the witnesses did not apply and could no longer be guaranteed in the further proceedings. If this had been missed, the evidentiary value of the testimony introduced by the investigating judge into the proceedings would be reduced (judgment of the Federal Court of Justice dated 25 July 2000, file ref. 1 StR 169/00, published in the official collection BGHSt 46, pp. 93 to 106).

201. The guarantee of the right to examine the witnesses is also affected in the case of "hearsay witnesses" in which indirect taking of evidence is used as the basis for a conviction in a criminal court. Although the right to a fair trial leads on principle to the right to access to the direct sources of determination of the facts ("materielle Beweisteilhabe"), this form of indirect taking of evidence is not ruled out from the outset. In such cases, however, increased requirements are to be made of the evaluation of evidence (cf. Federal Constitutional Court, ruling dated 20 December 2000, file ref. 2 BvR 591/00, published in *Neue Juristische Wochenschrift* 2001, pp. 2245 to 2247). Thus, hearsay witnesses who are to introduce the knowledge of an informant into the proceedings are as a rule not sufficient as to their evidentiary value for the judicial formation of a conviction if they are not confirmed by other points of view and indications of evidence which are important in accordance with the conviction of the criminal court. The court must always be aware of the limits of its formation of conviction, must respect them, and must additionally express this in the reasoning for the judgment. Increased care is required if informants from the police or the intelligence service can only not be heard as witnesses because the competent authority refuses to reveal their identity or to approve the giving of testimony. Here, it is therefore the executive which prevents an exhaustive clarification of the facts and makes it impossible for those concerned by the proceedings to examine the personal credibility of the informants, who remain unnamed.

**(c) Right to be tried within a reasonable time, Article 14 para 4 (c)**

202. In the period under report, the Federal Constitutional Court also had the opportunity to make a statement on the requirement of expeditious proceedings entrenched in domestic law and following from the fundamental procedural right to a fair trial based on the rule of law. However, in accordance with the rulings of the Federal Constitutional Court with regard to the requirement of expeditious proceedings standardised in Article 6 para 1 first sentence of the

ECHR, avoidable delays in the proceedings are also to be expressly determined in the criminal judgment in view of the expedition of proceedings required by the principle of the rule of law as defined by the Basic Law, and should be compensated for by reducing the penalty.

203. Excessively long duration of proceedings is hence a separate reason to reduce the sentence. It appears independently in addition to the generally-applied reduction of penalty resulting from taking into account the passage of time between the offence and conviction. The impact on the penalty to be handed down is to be expressed in the criminal judgment in the form of a numerical reduction in the criminal sentence (Federal Constitutional Court, decision dated 19 April 1993, file ref. 2 BvR 1487/90, published in *Neue Juristische Wochenschrift* 1993, pp. 3254 to 3256; decision dated 7 March 1997, file ref. 2 BvR 2173/96, published in *Neue Zeitschrift für Strafrecht* 1997, p. 591), so that the extent of compensation for the breach of the Constitution can be examined. This also applies to procedural delays which occur only after the issuance of the judgment by the judge adjudicating the facts. They must also be taken into account by the court of appeal on points of law only without a special complaint being filed (Federal Court of Justice, judgment dated 21 December 1994, file ref. 2 StR 415/94, published in *Neue Juristische Wochenschrift* 1995, pp. 1101 to 1102). It may also be required in special circumstances that the proceedings be discontinued. This may be the case if the public interest in criminal prosecution has ceased to apply as a result of the excessive duration of the proceedings, the violation of the principle of expedited proceedings and the considerable burden on the accused by virtue of the proceedings to date (Federal Court of Justice, judgment dated 26 June 1996, file ref. 3 StR 199/95, published in *Neue Juristische Wochenschrift* 1996, pp. 2739 to 2740).

204. With a very long duration of criminal proceedings, therefore, three separate reasons that have to be taken into account ex officio in German criminal procedure law for reducing the sentence have evolved:

- (a) the long period of time that has passed between the offence and the judgment,
- (b) the strain caused by a long duration of proceedings, and
- (c) the violation of the principle of expedited proceedings in accordance with Article 6 para 1 first sentence of the ECHR.

**(d) Right to the free assistance of an interpreter, Article 14 para 3 (f)**

205. In a ruling dated 26 October 2000, the Federal Court of Justice (file ref. 3 StR 6/00, published in *Neue Juristische Wochenschrift* 2001, pp. 309 to 312) gave concrete form to the significance and extent of the right to the free assistance of an interpreter and stressed his role in connection with the guarantee of a fair trial. In accordance with this judgment, an accused person not able to speak the court language has the right regardless of their financial situation to the free assistance of an interpreter at each phase of the criminal proceedings - in other words also for preparatory discussions with their counsel. Also, discussions between the accused and his defence counsel to prepare the defence were said to be declarations which were submitted in the criminal proceedings. The position of the accused as a subject of the proceedings and the position of counsel as an independent body of the administration of justice did not justify burdening the accused with the cost of an interpreter for these discussions.

**(e) Article 14 para 6 - Resumption of the proceedings**

206. The Act dated 9 July 1998 to Reform the Criminal Law on Resumption (Gesetz zur Reform des strafrechtlichen Wiederaufnahmerechts) has introduced an additional reason for resumption. A set of criminal proceedings that has already been concluded with the force of law must be resumed if the European Court of Human Rights has found a violation of the ECHR or its Protocols, and the criminal judgment was based on this violation. If the violation of the ECHR has not already been corrected in the stages of appeal, and only the European Court identified the violation, resumption of the German criminal proceedings is now possible on the basis of this violation.

**Article 15**

**Nulla poena principle**

207. The fourth Periodic Report dealt with the problems arising from the criminal law investigation of GDR government crime - and here in particular with the shots fired on escapees at the intra-German border and at the Wall in Berlin - as regards the prohibition of retroactive application (CCPR/C/84/Add.5, paragraphs 83 - 87). This problem was dealt with by the highest Federal courts during the period under report. The European Court of Human Rights also expressed its opinion on this matter.

208. High office-holders of the German Democratic Republic, namely Fritz Streletz (Deputy Minister of Defence), Heinz Kessler (Minister of Defence) and Egon Krenz (Head of the Council of State) have now been found guilty. Berlin Regional Court also convicted the three accused persons in respect of triple manslaughter committed in concurrence of offences, and the accused Krenz in respect of a further manslaughter. The subject-matter of the conviction was the killing of four people who, unarmed and without endangering others, wished to escape between 1984 and 1989 from the German Democratic Republic over the intra-German border. The convictions have been confirmed by the Federal Court of Justice and by the Federal Constitutional Court as being constitutional.

209. The Grand Chamber of the European Court of Human Rights ruled in two judgments handed down on 22 March 2001 that Germany did not violate Article 7 para 1 of the European Convention on Human Rights by convicting senior GDR functionaries (and - in a further ruling - a GDR border guard) in respect of homicide at the border between the two German states. In particular, the Applicants had alleged before the Court in Strasbourg that the acts had not been punishable in accordance with GDR law or in accordance with international law at the time when they were committed, and that their subsequent sentencing by the German courts hence violated the prohibition of retroactive application specified in Article 7 para 1 of the European Convention of Human Rights. They furthermore called on Article 1 and Article 2 para 2 of the Convention. The Strasbourg judges expressly disagreed: the GDR regime had clearly violated its citizens' human right to life and freedom of movement. This had also been wrong in accordance with GDR law as it applied at that time - as the German courts had correctly emphasised. In the view of the Court, it is also legitimate for a state based on the rule of law to

initiate criminal prosecution against individuals found guilty of major crimes under a previous regime. It was also not possible to object to the courts of the democratic successor state having interpreted and applied the statutory provisions applying at the time of the offence in the light of rule of law principles.

210. The Court found that the conviction had its statutory basis in the criminal law of the German Democratic Republic as it applied at the time the offences were committed. Even against the background of the fact that it was the goal of the state practice of the German Democratic Republic to protect the border between the two German states “at any price” in order to guarantee the existence of the German Democratic Republic, this state reasoning should have been limited by the Constitution and the principles entrenched in the statutory provisions of the German Democratic Republic. Since the principle of protecting human life was set out in the Constitution, in the People’s Police Act (Volkspolizeigesetz), and in the Borders Act (Grenzgesetz) of the German Democratic Republic, the Applicants were not able to call on a practice of GDR authorities which contradicted this, especially since the right to life was already a supreme legal interest on the scale of values of internationally-recognised human rights at the time of commission of the offences. The Court emphasised that a state practice as it was handled in the German Democratic Republic as to the border regime, and which crassly violated basic rights, and above all the right to life, was not protected by Article 7 the Convention. A practice which undermines one’s own legislation, which actually should form its basis, could not be regarded as a “law” within the meaning of Article 7 of the Convention.

## **Article 16**

### **Recognition as a person before the law**

211. Reference is made here to the information provided in the first and fourth Periodic Reports re Article 16 (CCPR/C/1/Add. 18 and CCPR/C/84/Add. 5 paragraph 88). No more recent developments have emerged in this respect. Reference is made to the information at paragraphs 143 - 149 as to the group of topics concerned with guardianship and curatorship.

## **Article 17**

### **Protection of privacy**

#### **1. Amendment to Article 13 of the Basic Law and section 100c of the Code of Criminal Procedure**

212. The Act dated 26 March 1998 Amending the Basic Law (Federal Law Gazette Part I p. 610) amended Article 13 of the Basic Law (Basic right of the inviolability of the home) with the main aim of facilitating acoustic monitoring of dwellings for repressive purposes, and of placing this practice on a constitutional footing. This was necessary in order to effectively combat organised crime, which increasingly threatens citizens and the state in the Federal Republic of Germany.



213. Being aware of the particular significance of the inviolability of the home, Parliament put in place considerable rule-of-law restrictions and imposed strict preconditions on the acoustic monitoring of dwellings. Thus, the order given by a judge, on principle by a panel of judges, the obligatory time-limitation of orders, the substantive restriction to prosecution of particularly grievous criminal offences, and parliamentary control through a duty to notify is the subject of Constitutional regulation. At the same time, the monitoring of dwellings - already permissible in accordance with the previous constitutional law - was given additional constitutional restrictions for preventive purposes.

214. The essentials of the statutory structure of the acoustic monitoring of dwellings, which was added to the Code of Criminal Procedure in 1998, can be outlined as follows: the precondition for ordering surveillance with technical means of the spoken word spoken in a dwelling, and not publicly, is the suspicion of a criminal offence included in a specific list of criminal offences (section 100c subsection 1 No. 3 of the Code of Criminal Procedure). The encroachment is only permissible if the investigation of the facts or ascertaining the whereabouts of the offender by other means would be disproportionately more difficult, or would have no prospects of success. If a dwelling other than that of the accused is to be monitored, this is only permissible if one may assume on the basis of specific facts that the accused is in this dwelling, that the measure in dwellings of the accused only will not lead to the investigation of the facts or to ascertaining the whereabouts of the offender, and that carrying out the investigation by other means would be rendered disproportionately more difficult or would have no prospects of success.

215. By supposing that other investigation measures must be disproportionately difficult or have no prospects of success, Parliament lends expression to the particularly strict subsidiarity of the measure. Added to this are further security measures: The competent authority for ordering the acoustic monitoring of dwellings is on principle a so-called state protection chamber of the Regional Court which is composed of three professional judges. In exigent circumstances, the order may also be given by the presiding judge of this state protection chamber. The order may however not be issued by the public prosecution office or the police. The measure is not permissible from the outset if it would subsequently encroach on specific rights to refuse to testify for professional reasons. In this way, for instance, the surveillance of conversations would be ruled out between the accused and his defence counsel in his capacity as counsel. As with the other measures, the persons concerned are to be informed once the measures have been completed.

216. The public prosecution offices are subjected in implementing the acoustic monitoring of dwellings to strict statutory duties to report towards the Land Ministries of Justice (section 100e subsection 1 of the Code of Criminal Procedure). The Federal Government, in turn, is obliged by law to inform the Federal Parliament on the basis of the information provided annually by the Länder of the acoustic monitoring of dwellings carried out (section 100e subsection 2 of the Code of Criminal Procedure). Hence, parliamentary control is provided by law of this encroaching measure that is sensitive in terms of basic rights.

217. The Federal Government submitted the latest report of this kind, referring to the year 2001, which has not yet been published, in the summer of 2002. The previous report referring to 2000 was published as a Federal Parliament printed paper (Federal Parliament printed paper 14/6778). It is possible to deduce from this report more details as regards the

occasion, the extent, the duration, result and costs of the measures of the acoustic monitoring of dwellings. Furthermore, on 30 January 2002 the Federal Government submitted a detailed report of its experience with regard to the impact of monitoring dwellings using technical means (Article 13 paras 3 to 5 of the Basic Law, sections 100c to 100f of the Code of Criminal Procedure) which includes an evaluation of the legal consequences and a constitutional and crime policy evaluation of the monitoring of dwellings implemented from 1998 to 2000. This report enables Parliament to assess the consequences of legislation, and hence makes possible additional control of encroachment measures that are relevant to basic rights (published in Federal Parliament printed paper 14/8155).

## **2. New line of consistent decisions on criminal procedural law**

218. The rights under Article 17 of the Covenant are also taken into consideration in rulings on criminal procedural law. The German Code of Criminal Procedure guarantees that no one affected by criminal law investigations is subject to arbitrary encroachment on their basic rights. In addition to the written elements of an offence in criminal procedure provisions relating to authorisation, the principle of proportionality is a precondition for the lawfulness of any criminal law investigation measure. This principle, which is derived from the principle of the rule of law in Article 20 para 3 of the Basic Law and from the freedom guaranteed in the basic rights, requires that a measure must be suited and required to achieve the desired purpose, taking account of all personal and factual circumstances of the individual case; this is not the case if less intrusive means would be sufficient. Furthermore, the encroachment constituted by the measure may not be disproportionate to the significance of the case or to the strength of the existing suspicion.

219. By order of 27 May 1997 (file ref. 2 BvR 1992/92, published in the official collection BVerfGE 96, pp. 44 et seqq.) the Federal Constitutional Court found, for instance, that a judge may only order a dwelling to be searched if he has become convinced on the basis of an examination carried out on his own responsibility that the measure was proportionate. The judicial order had to create the basis for the specific measure, and had to define the contexts, limits and goals of the search. This could no longer be presumed six months after the judicial order had been handed down, so that a search could then no longer be based on that order.

220. Another example of the past strictly consistent decisions of the Federal Constitutional Court in this field lies in its ruling dated 30 April 1997 (file ref. 2 BvR 817/90, 728/92. 802 & 1065/95, published in the official collection BVerfGE, Vol. 96, pp. 27 et seqq.). The Federal Constitutional Court found in this case that a complaint against a judicial search order may not be rejected as inadmissible simply because it has been overtaken by the proceedings as a result of its execution and that the measure was hence finished.

221. By judgment of 20 February 2001 (file ref. 2 BvR 1444/00, published in the official collection BVerfGE 103, p. 142) the Federal Constitutional Court considered a complaint of unconstitutionality against the rulings of the Local and Regional Courts confirming a dwelling search to be admissible and well-founded, and referred the proceedings back to the Local Court for a new ruling. The search had not been ordered by a judge because of its urgency. The Federal Constitutional Court, by contrast, stressed that the ordering of a dwelling search in accordance with the concept contained in Article 13 para 2 of the Basic Law must on principle be entrusted to a judge, and that ordering by a public prosecution office and the police where a

delay is likely to jeopardise the success of the investigation in exigent circumstances was subjected to strict preconditions. At the same time, it emphasised the need for factual and legal precautions to guarantee the judicial competence provided for by the Constitution as a rule (e.g. emergency service at night and at weekends) and referred to the unrestricted judicial control available in defining the term “where a delay is likely to jeopardise success” (“in exigent circumstances”).

### **3. Data protection**

#### **(a) The new Federal Data Protection Act 2001 (Bundesdatenschutzgesetz)**

222. Details were already provided in the fourth Periodic Report on the Federal Data Protection Act dated 20 December 1990 (CCPR/C/84/Add. 5, paragraphs 94 to 97). The new Federal Data Protection Act dated 18 May 2001, which entered into force on 23 May 2001 (Federal Law Gazette Part I p. 904), serves initially to implement Parliament and Council Directive dated 24 October 1995 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data (OJ EC No. L 281 p. 31).

223. The Act contains further modernisation elements. For instance, the principle of data avoidance and economy in the use of data was entrenched in section 3a of the Federal Data Protection Act. Section 9a of this Act included a provision on data protection audits. Accordingly, providers of data processing systems and data processing programs, as well as data processing agencies, may have their data protection concept as well as their technical facilities checked and evaluated by independent, approved experts, and may publish the result of the examination. More precise requirements concerning checking and evaluation, the procedures and the selection and approval of the experts, will be governed by a separate statute. Further modernisation elements contain the provisions on video monitoring and on data processing on chip cards. In a second stage, the Federal Government intends to introduce a fundamental modernisation of the law on data protection.

#### **(b) Transfer of data to third states**

224. In addition to data transmission within the European Union, data transmission to third states plays an ever increasing role. The legal starting point is the transfer of personal data to third countries governed by Chapter IV of the EC Data Protection Directive, which has been reflected in sections 4b and 4c of the Federal Data Protection Act. In accordance with Article 25 of the directive and section 4b subsections 2 and 3 of the Federal Data Protection Act, the transfer of personal data to third countries is permissible only if a suitable level of data protection is guaranteed there.

225. The Federal Government also works actively to draft and develop internationally applicable frameworks for data protection. For instance, it has been possible with the USA after long controversies to agree on provisions on the transfer of personal data from the Member States of the EU to the USA. The European Parliament has approved the result of the negotiations achieved by the EC Commission with the participation of the Member States, the “SafeHarborPrinciples”, in July 2000. The “SafeHarbor” arrangement provides that the US Department of Trade will keep a list of U.S. enterprises which have publicly committed themselves to the principles of the SafeHarbor in order to obtain the advantages of the system

(web.ita.doc.gou/safeharbor/SHList.hsf/WebPages/Safe+Harbor+List). Currently, there are almost 200 of these enterprises. Anyone joining the SafeHarbor system on the U.S. side is safe against having their data traffic restricted, whilst European enterprises, in turn, are told in the interest of the Union's citizens to which U.S. firms data may be transferred without requiring additional guarantees.

## **Article 18**

### **Right to freedom of conscience and religion**

#### **1. Past consistent court decisions on the right to freedom of conscience and religion**

226. The freedom of religion, conscience and confession is guaranteed in Article 4 of the Basic Law. The Federal Constitutional Court handed down two important decisions in this field in the period under report.

227. By judgment of 19 December 2000, the Federal Constitutional Court considered a complaint of unconstitutionality by the Jehovah's Witnesses against a refusal to recognise them as a corporation under public law by the Federal Administrative Court to be admissible and well-founded, referred the case back for a new ruling, and in doing so made clear the principles for the recognition of religious communities as corporations under public law (file ref. 2 BvR 1500/97, published in the official collection BVerfGE, 102, pp. 370 to 400).

228. In the context of the Basic Law, the status of a corporation under public law offered to religious communities in accordance with Article 140 of the Basic Law in conjunction with Article 137 para 5 second sentence of the Weimar Constitution (Weimarer Reichsverfassung) is a means to develop freedom of religion. In accordance with these provisions, a religious community can at its request obtain the rights of a corporation under public law if as a result of its constitution and the number of its members it seems likely to exist for a protracted period. The religious communities are given specific sovereign powers with corporate status. These and other advantages make it easier for them to structure their organisations and their work in accordance with the principles of their religious self-perception and to obtain the resources necessary for this, for example in the shape of funding.

229. In accordance with past consistent decisions, the religious community must guarantee as a further precondition for recognition as a corporation under public law that it respects the current law, in particular that it will exercise the sovereign power entrusted to it only in compliance with its constitutional and other statutory obligations. According to the above decision of the Federal Constitutional Court, however, no loyalty towards the state may be required over and above this. This is said to already emerge from the fact that the complainant which had aimed as an association to exercise and promote a religious confession and to proclaim the faith of its members was a beneficiary of the basic right of the freedom of religion under Article 4 paras 1 and 2 of the Basic Law. Whether an applicant religious community was to be denied status as a corporation under public law was determined not in accordance with its beliefs, but by its conduct. The principle of religious and philosophical neutrality prevented the state from evaluating the beliefs and the teaching of a religious community as such (loc. cit., p. 394).

230. In a ruling dated 16 May 1995, the Federal Constitutional Court declared a provision of the Bavarian School Regulations (bayerische Schulordnung) to be unconstitutional in accordance with which a cross had to be affixed to the wall of each classroom (file ref. 1 BvR 1087/91, published in the official collection BVerfGE 93, pp. 1 et seqq.). It stated as grounds that the attachment of a cross or of a crucifix in the classrooms of an obligatory state school which is not a confessional school breached Article 4 para 1 of the Basic Law. The latter was said to leave it to the individual to decide which religious symbols to recognise and revere, and which to reject. The state may not create a situation in which the individual would be left without the opportunity to avoid being subjected to the influence of a specific faith, the actions in which the latter manifested itself, and the symbols by which it portrayed itself. The freedom of faith contained in Article 4 para. 1 of the Basic Law led to the principle of state neutrality towards the various religions and confessions (loc. cit., pp. 15 et seq.).

231. Article 4 para 3 of the Basic Law, finally, guarantees the right to refuse to render war service for reasons of conscience. This has been described in the fourth Periodic Report (CCPR/C/84/Add.5; note 106 f).

## **2. Further training of judges**

232. In its Concluding Observations on the fourth Periodic Report, the Human Rights Committee expressed its concern that judges in the Federal Republic of Germany were influenced by the state in their attitude to specific religious groups (CCPR/C/79/Add.73, note 16: “The Committee also recommends the State party to discontinue the holding of “sensitizing” sessions for judges against the practices of certain designated sects.”).

233. Legal training provides the knowledge and skills necessary to enter the profession of a judge. Life-long further training is necessary in order to exercise this office properly. The nature of that further training is left up to the judges themselves. There is no duty for judges to attend specific further training events in the Federal Republic of Germany.

234. The German Judicial Academy, which provides national further training of judges of all jurisdictions, as well as public prosecutors, offers a wide variety of further training events. The Academy is jointly supported by the Federation and the Länder. In addition to events on special legal areas, events are also organised on coping with everyday work and on working conditions, with a conduct-orientated or interdisciplinary orientation, conferences in a historical perspective, on current societal trends or to gain social competence. In this context, a conference is offered once per year relating to so-called sects and other manifestations on the psycho market and the esoteric scene, with their psychological, sociological and legal implications.

235. On the basis of individual, voluntary applications, the participants in the individual conferences are selected by their employers and registered for the conference. Participation in all events is voluntary. For the judiciary, this conference is only one possibility among a large number of sources to gain information on the prerequisites, circumstances and consequences of specific societal trends. Such a conference is a discussion forum, not a systematic training course, nor indeed is it a “sensitization programme”.

236. Judges are independent in the Federal Republic of Germany. The consequence of this independence is that judges exclusively determine for themselves whether and how to accept and evaluate individual comments by experts or academics at conferences. The state may not prescribe a specific evaluation to a judge. It is therefore not possible to allege an attempt by the Federal Republic of Germany to portray a specific picture of a certain group.

## **Article 19**

### **Freedom of expression**

237. Article 5 para 1 of the Basic Law guarantees comprehensive protection of the freedom of expression, and covers the freedom of opinion, and of the press, radio and film. In accordance with past consistent decisions of the Federal Constitutional Court, the freedom to express opinions is one of the “uppermost human rights” of all, facilitating constant intellectual discussion, and is hence constitutive for a democratic community (for instance already in the decision dated 25 January 1958, file ref. 1 BvR 400/51, published in the official collection BVerfGE 7, pp. 198 and 208). The freedom of the press and radio is essential to their task of making available comprehensive information reflecting the variety of the extant opinions, and of forming and asserting opinions themselves, making them a major element of a free state, and hence indispensable for modern democracy (cf. the decision of the Federal Constitutional Court dated 6 November 1979, file ref. 1 BvR 81/76, published in the official collection BVerfGE 52, pp. 283 and 296). On the basis of this special significance of the freedom of expression, the Federal Constitutional Court frequently had the difficult task in the period under report of determining the limits placed on freedom as regards the rights of others. Two decisions can be mentioned by means of example:

238. In a ruling of the 1st chamber of the First Senate dated 25 November 1999 (file ref. 1 BvR 755/98 et al., published in the *Neue Juristische Wochenschrift* 2000, p. 1859) the Federal Constitutional Court granted the complaint of unconstitutionality of the SAT 1 television station against the court prohibition to broadcast a film on the “soldier murderers of Lebach” brought about by one of the offenders. The reason given was that the freedom to determine programming was at the core of broadcasting freedom and that the prohibition to broadcast a specific programme therefore affected the core of the freedom to broadcast. This encroachment could not be justified per se with the protection of the criminal offender’s right to privacy which covered the right to reintegration after serving a sentence. Reports by a television station quite some time after an offence not intending to identify the offender by means of the programme did not give the offender the right not to be confronted in public by their offence at all. Thereby, the Federal Constitutional Court provided further information with regard to the statements it had made in its 1973 Lebach decision, which had prevented the broadcasting of a television documentary on the “The soldier murderers of Lebach” referring to the interest of the then complainant in the resocialisation, now favouring the freedom of broadcasting (file ref. 1 BvR 536/72, published in the official collection BVerfGE 35, pp. 202 - 245).

239. A complaint of unconstitutionality striven for by the “Neues Forum” association against the court prohibition to publicly disclose a list of unofficial staff (“Inoffizieller Mitarbeiter”) of the Ministry for State Security (Ministerium für Staatssicherheit) of the German Democratic Republic was not accepted for adjudication by the First Chamber of the First Senate of the Federal Constitutional Court by ruling of 23 February 2000 (1 BvR 1582/94, published in the

Europäische Grundrechtezeitschrift 2000, p. 242). The Court however pointed out that the courts during the stages of appeal had attached too little weight to the complainant's interest in publication, thereby underestimating his position in terms of basic rights. In particular, in contradistinction to the right of privacy of a person named there by name, it had not been sufficiently considered that the publication of the list had been connected to a question greatly affecting the public. With the decision, the Court stresses its past consistent decisions stating that the significance of freedom of expression increases as against the legal interests of third parties where the expression of opinion concerns a question significantly concerning the public as a whole.

240. The freedom of information granted by Article 19 para 2 of the Covenant is nationally guaranteed by Article 5 para 1 second half of the first sentence of the Basic Law, and supplements the freedom of expression from the point of view of the recipient. Hence, the communication process is comprehensively protected in the interest of free, individual, public opinion formation.

241. The Court also dealt in the period under report with the need for information of aliens living in Germany. In its ruling of 9 February 1994 (file ref. 1 BvR 1687/92, published in the official collection BVerfGE 90, p. 27) the Federal Constitutional Court confirmed and continued its past consistent decisions on the installation of parabolic antennas in rented property. It expressly extended the protection of the freedom of information to cover foreign sources of information and the acquisition and use of technical equipment making it possible to receive it. Furthermore, it pointed out that in weighing up between the interests of tenants and landlords, even if supplying cable connection, the need for information for aliens permanently living in Germany must be sufficiently accommodated. In view of the small number of foreign stations carried by the German cable network, it was possible in most cases to obtain sufficient information only by using satellite equipment.

## **Article 20**

### **Prohibition of incitement and propaganda for war**

242. The domestic transposition of Article 20 of the Covenant into the German Criminal Code has been discussed in the previous Periodic Reports. A whole series of initiatives have been taken in order to suppress racism and xenophobia within the meaning of Article 20 para 2 of the Covenant.

243. In the framework of the European Union's Council Joint action to combat racism and xenophobia (OJ No. L 185/5), in order to suppress racism and xenophobia, the Federal Republic of Germany has undertaken to establish effective judicial cooperation in relation to less serious criminal offences which is based on the types of conduct listed below. Furthermore, if necessary for the purposes of cooperation, either these modes of conduct are to be made punishable, or an exception is to be made to the principle of dual criminality until possible acceptance of the required provisions. The following are concerned:

- public incitement to discrimination, violence or racial hatred,

- public defence, for a racist or xenophobic purpose, of crimes against humanity and human rights violations,
- public denial of crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement dated 8 August 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin,
- public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia, and
- participation in the activities of groups, organisations or associations which involve discrimination, violence, or racial, ethnic or religious hatred.

244. The relevant modes of conduct are punishable in the Federal Republic of Germany inter alia as public incitement in accordance with section 130 of the Criminal Code, disseminating means of propaganda of unconstitutional organisations in accordance with section 86 of the Criminal Code, disseminating symbols of unconstitutional organisations in accordance with section 86a of the Criminal Code, and degrading confessions, religious communities and philosophical associations in accordance with section 166 of the Criminal Code.

245. In the context of the Declaration of the 77th German-French Summit on 12 June 2001, the Federal Republic of Germany together with France also spoke in favour of including the prevention of right-wing extremist and xenophobic criminal offences in the mandate of the European Crime Prevention Network adopted by the Council of the European Union (Justice and Home Affairs) in March 2001.

246. Public incitement, which is punishable in accordance with section 130 of the Criminal Code, is increasingly committed with the aid of the Internet. It is therefore a major concern of the Federal Government to suppress right-wing extremism on the Internet, in particular racial hatred and xenophobia. Where, for instance, a homepage demonstrates content or symbols of unconstitutional organisations inciting to hatred and violence, this is punishable in accordance with sections 86, 86a and 130 of the Criminal Code. The criminal prosecution authorities initiate investigation proceedings here. In order to support the criminal prosecution authorities and constitutional protection bodies, an Internet investigation tool called "INTERMIT" has been developed making it possible to find such pages automatically in future. Furthermore, the security authorities are approaching Internet providers and online services in order to motivate them to prevent right-wing extremist content from appearing on the Internet. They also work together closely with non-governmental organisations and support them in their efforts to influence operators and providers of right-wing extremist Internet pages with the aim of removing hate slogans from the Internet.

247. A particular cause of problems in the field of right-wing extremist activities on the Internet is in particular the trend towards posting pages via foreign - especially U.S. - servers. Against this background, the Federal Ministry of Justice, together with the Simon Wiesenthal Center in Los Angeles and the Friedrich Ebert Foundation, organised the international



conference entitled “Dissemination of hate on the Internet” in Berlin on 26 and 27 June 2000. The “Berlin Declaration” adopted at this conference is intended draw attention to this topic so that the political sphere, industry and civil society form a global alliance to suppress the dissemination of hatred against minorities on the Internet. It should be ensured that in the future the Internet can make its contribution towards peaceful co-existence between peoples as a medium of free discussion between all cultures. The goal of these efforts is to create a global consensus of values in order to be able to agree internationally on at least a minimum list of criminal provisions to determine which acts are punishable and which excesses of the freedom of expression are not acceptable, but will be prosecuted under criminal law.

248. The Convention on Cybercrime was opened for signature at the Council of Europe on 23 November 2001 and signed by 30 states, including Germany, (Council of Europe Conventions ETS No. 185). On 25 April 2002, a committee of experts of the Council of Europe completed the debate on a First Additional Protocol to this Convention which concerns the suppression of the dissemination of racial hatred and xenophobia on and via the Internet. The Additional Protocol is to be presented to the Parliamentary Assembly of the Council of Europe in autumn 2002.

249. The Federal Court of Justice ruled by its judgment dated 12 December 2000 that success related to an offence covered by section 130 subsection 1 of the Criminal Code or section 130 subsection 3 of the Criminal Code (criminal liability for denying the Holocaust) occurs in the Federal Republic of Germany, and hence prosecution by German criminal prosecution authorities is possible, if an alien posts on the Internet comments drafted by him/her on a foreign server which are accessible to Internet users in Germany if the comments are specifically apt to disturb the peace in Germany. Aptness to disturb the peace applies if the offender creates a source of danger apt to seriously disturb peaceful co-existence between the individual groups of the population, and to disturb individual groups of the population in their feeling of security and in their confidence the stability of law. Sufficient aptness to disturb public peace particularly in the Federal Republic of Germany emerges if trouble-free access to the publications is available to any Internet user in Germany, and especially also if Internet users are among the group targeted by the publication. This may emerge amongst other things from the content almost exclusively referring to Germany (file ref.: 1 StR 184/00, published in the official collection BGHSt 46, pp. 212 to 225, in particular pp. 219 et seq.). Under these preconditions, therefore, German criminal jurisdiction also applies if someone provides such material on a foreign server.

250. In the context of the 2001 Budget Act (Haushaltsgesetz) the German Federal Parliament approved funds of DM 10 million to benefit the victims of right-wing extremist attacks. This benefit, granted on a voluntary basis, to which there is no legal right, is to be regarded as an act of solidarity with those concerned on the part of the state and its citizens. At the same time, it is to set a clear signal disowning such attacks. Right-wing extremist attacks are, in particular, criminal offences which are committed on the basis of xenophobic or anti-Semitic motives. DM 2.64 million had been allocated by the end of 2001. The amount of the individual compensation payments was between DM 500 and 500,000. Funds of Euro 2.5 million have been provided for 2002. (Further information on the suppression of right-wing extremist and xenophobic manifestations can be found in the comments on Article 26, paragraphs 326 et seqq.)

## Article 21

### Freedom of assembly

251. Freedom of assembly is guaranteed in Germany by means of Article 8 para 1 of the Basic Law, in accordance with which all Germans have the right “to assemble peacefully and unarmed without prior notification or permission”. This right to assemble in the open air may be restricted by means of a statute in accordance with Article 8 para 2 of the Basic Law or on the basis of a statute. The relevant provisions are contained, above all, in the Assembly Act (Versammlungsgesetz), the original form of which is from 1953.

252. The interpretation of this Act is determined in a landmark ruling handed down in 1985 by the Federal Constitutional Court, in which the Assembly Act is interpreted in compliance with the Constitution in the dispute relating to police restrictions and prohibitions of partly violent assemblies directed against the construction of an atomic power plant in Brokdorf (ruling dated 14 May 1985, file ref. 1 BvR 233, 341/81, published in the official collection BVerfGE 69, pp. 315 et seqq.). The court holds immovably to this past consistent decisions. Hence, the legal situation in Germany is characterised by a high degree of continuity, both as regards the legal basis and as to its interpretation.

253. Freedom of assembly, accordingly, may be restricted by statute or on the basis of a statute only in order to protect other equivalent legal interests and in strict adherence to the principle of proportionality. The competent authorities may prohibit an open air assembly or subject it to specific restrictions (‘conditions’) relating to the way in which the assembly is carried out if in accordance with the circumstances recognisable at the time of issuance “public security or order” will be directly placed at risk if the assembly or procession takes place.

254. The term “public security” is understood in past consistent decisions of the Federal Constitutional Court as “the protection of central legal interests such as life, health, freedom, honour, ownership and property of the individual”, as well as the “inviolability of the legal order” and the “inviolability of state institutions”. Particular significance attaches to the inclusion of the “inviolability of the legal order” in the area protected by public security. This means that the commission of criminal offences, as a disturbance to public security, justifies the intervention of the assembly authorities or the police. The abovementioned landmark ruling of the Federal Constitutional Court emphasised here that police measures in this case must on principle target the person(s) causing the disturbance, and that the right of peaceful assembly of the peaceful majority of participants in the assembly may not be impaired by the appearance of violent individuals.

255. The Federal Government, the Federal Parliament and the Federal Council transferred their seats from Bonn to Berlin between 1998 and 2001, and for this replaced the previous “Pacified Precincts Act” (Bannmeilengesetz) for the spatial protection of the functioning of Parliament and of several supreme Federal bodies in 1999 by the “Act on Pacified Precincts for Constitutional Bodies of the Federation” (Gesetz über befriedete Bezirke für Verfassungsorgane des Bundes). In order to protect the functioning of Parliament, the Act provides a prohibition to enter a certain area for assemblies within a radius around the Parliament and Federal Council

buildings (now closer than in Bonn). Assemblies are permitted in the pacified precinct if disturbances to the functioning of Parliament and of access to its buildings will not be a cause for concern. In contrast to the previous law, prohibited, unauthorised assemblies in the pacified precinct are no longer criminal offences, but only administrative offences - in other words administrative wrongdoing.

## **Article 22**

### **Freedom to associate and form coalitions**

#### **1. Freedom of association**

##### **(a) Freedom of association and parties**

256. In accordance with Article 21 para 1 of the Basic Law, the parties participate in the forming of the political will of the people. They may be freely formed; their internal order must correspond to democratic principles. Parties which by reason of their aims or the behaviour of their adherents seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany may be prohibited. This is provided for by Article 21 para 2 of the Basic Law, which characterises the principle of a “defensive” democracy expressed in several provisions of the Basic Law: The forces of democracy should not be required to look on passively as opponents of the free, democratic basic order use the liberality and tolerance of the constitutional order against it. However, in accordance with Article 21 para 2 of the Basic Law, the decision on whether a political party is unconstitutional is reserved to the Federal Constitutional Court. In accordance with section 43 subsection 1 of the Federal Constitutional Court Act, an application for the Federal Constitutional Court to determine unconstitutionality may be filed by the Federal Parliament, the Federal Council or the Federal Government.

257. The fact that the National Democratic Party of Germany (NPD) plays a central role in the increase in right-wing extremist activities which has been registered in recent years has moved the Federal Government to apply for the NPD to be declared unconstitutional by the Federal Constitutional Court. The NPD is increasingly successful in attracting supporters amongst juveniles with a propensity to violence, attempts to turn social protest into fundamental enmity towards democracy and the rule of law, and disseminates, in a near-National Socialist manner, unconstitutional concepts of a totalitarian state and social order. Racist and anti-Semitic agitation is given a forum in the organisational framework of a party.

258. Furthermore, the Federal Parliament and the Federal Council have also applied to have the NPD declared unconstitutional. In this way, all three constitutional bodies entitled to apply have made it clear that the forces of democracy do not tolerate organised anti-Semitism and racism.

##### **(b) Prohibitions of extremist associations**

259. At the end of 2001, there were 141 (2000: 144)<sup>1</sup> right-wing extremist organisations and associations in the Federal Republic of Germany, 128 left-wing extremist groups (2000: 138) and 65 (2000: 66) foreign extremist organisations represented in Germany. The number of

individuals in 2001 was roughly 49,700 (2000: 50,900)<sup>2</sup> in the right-wing extremist area, roughly 32,900 (2000: 33,500) in the left-wing extremist area and roughly 59,100 (2000: 58,800) are in extremist foreign organisations.

260. In accordance with Article 9 para 2 of the Basic Law, associations the objects or activities of which conflict with the criminal laws, or which are directed against the constitutional order or the concept of international understanding, are prohibited. In accordance with section 3 of the Associations Act (Vereinsgesetz), prohibition is ordered in the case of nationally-active associations by the Federal Minister of the Interior. The possibility of such a prohibition of associations is one of the elements of so-called “defensive” democracy expressed in several provisions contained in the Basic Law.

261. The Federal Minister of the Interior has issued nine prohibitions of extremist associations since September 1993 - six extremist foreign organisations and three right-wing extremist or right-wing extremist-neo Nazi associations.<sup>3</sup>

262. If the activities and the organisation of an association are restricted to a Federal Land, the Ministers of the Interior of the Länder are responsible for prohibitions. The Federal Government has become aware of 23 such prohibitions in this context in the period under report. They referred to 14 foreign extremist organisations, seven right-wing extremist/neonazi associations and two general criminal associations.

## **2. Trade union associations**

263. In its Concluding Observations on the fourth Periodic Report, the Human Rights Committee expressed its wish to be informed of the right to form and join trade unions and expressed its concern as to the prohibition to strike for public servants (“...an absolute ban on strike by civil servants who are not exercising authority in the name of the State and are not engaged in essential services...”) (CCPR/ C/ 79/ Add. 73, notes 18 and 19).

264. Through the freedom of the right to form associations to safeguard and improve working and economic conditions, Article 9 para 3 of the Basic Law also guarantees the freedom to pursue this goal together. The persons concerned may determine both for themselves and on their own responsibility, on principle free from state influence. Elements of the guarantee are the freedom to form and accede to and, the freedom to leave the association or to remain therein and the protection of coalitions as such and their right to pursue the purposes named in Article 9 para 3 of the Basic Law. These include concluding collective agreements by means of which the coalitions govern on their own responsibility in particular wage and other working conditions, largely with no state influence, in a field in which the state has far removed its competence for regulation.

265. In accordance with the view held here, the special duties of loyalty under the law on the civil service would be contradicted if civil servants had a right to strike. Civil servants with life tenure are guarantors of the lawful, effective, unbiased performance of major public tasks. A strike by civil servants would burden the public unacceptably, and would impede the freedom of Parliaments to make decisions. Civil service employment with life tenure is governed exclusively by state legal standards. Hence, only Parliaments may determine the duties and rights of civil servants, including their payment and pension provision.

266. By joining the civil service, civil servants voluntarily forego certain rights. This concession however is contrasted by the special duty of care of the employer, which also expresses itself amongst other things in employment for life, ensuring the independence of civil servants. The legal relationship for civil servants must be structured consistently - in accordance with the constitutional instructions. Regarding the ban on strikes, no distinction can be made as to the specific tasks performed. There is no distinction made in the duties by functions performed by civil servants.

267. Furthermore, it is not possible to distinguish by the nature of the work - for instance by the criterion of the core area of sovereign tasks in contrast to activities which do not concern this core area - as suggested by the Committee. Civil servants have no right to perform a specific task or to be able to continue a task performed by them. It is a decision for the employer to deploy the civil servant for other tasks, in other words to be able to transfer him/her within a unit. A major element of service law is hence to guarantee employees' mobility. The mobility required for the public administration would however be gravely disadvantaged if civil servants had different legal status depending on the task they performed. This would make a change of the field of work, transfers and secondments difficult since they would mean altering rights and duties, and it would not be possible to entrust the civil servant relatively easily with new tasks.

## **Article 23**

### **Protection of marriage and the family**

#### **1. Protection of marriage and the family**

268. In accordance with Article 6 para 1 of the Basic Law, marriage and the family are under the special protection of the state. Family law is governed by the Civil Code (sections 1297 to 1921 of the Civil Code). It deals with marriage (entering into, effects of marriage, property regime, divorce), consanguinity (descent, maintenance, parental custody, acceptance as a child) and guardianship, legal care and curatorship.

269. Marriage and the family are also protected in other fields of law. In inheritance law, the family is protected by family inheritance law. For instance, spouses - and from 1 August 2001 also same-sex partners (who live in same-sex partnerships established in accordance with the Act on Registered Partnerships [Lebenspartnerschaftsgesetz]) - and relatives are considered as statutory heirs (sections 1924 to 1931 of the Civil Code, section 10 subsections 1 and 2 of the Act on Registered Partnerships). Also in the case of disinheritance, the children, the parents and the same-sex partner receive the obligatory portion amounting to a minimum share of the estate of one-half of the statutory inheritance part (cf. sections 2303 et seqq. of the Civil Code and section 10 subsection 6 of the Act on Registered Partnerships). The family is protected in procedural law by the right to refuse to testify.

#### **2. Protection of children against violence**

270. The express prohibition of corporal punishment, emotional injury and other inhumane educational measures has applied in Germany since November 2000. Children have a right to non-violent education (section 1631 subsection 2 of the new version of the Civil Code; Act to Outlaw Violence in Education and to Amend the Law of Child Maintenance (Gesetz zur

Ächtung der Gewalt in der Erziehung und zur Änderung des Kindesunterhaltsrechts) dated 2 November 2000, Federal Law Gazette Part I p. 1479). The facilities of child and youth assistance also advise parents on how conflicts within families can be resolved without violence.

### **3. Living apart/divorce**

271. Any spouse may give up marriage without legal restrictions and live separately from the other spouse. Whilst living apart, one spouse may demand suitable maintenance from the other spouse, depending on the spouses' income and assets (section 1361 of the Civil Code).

272. A marriage may only be dissolved by means of a court judgment at the request of one or both spouses (section 1564 subsection 1 first sentence of the Civil Code) if it has failed. This is irrefutably presumed in accordance with section 1566 subsection 1 of the Civil Code if the spouses have been separated for one year and both spouses file for divorce, or if the respondent agrees to the divorce. After a separation period of three years, it is irrefutably presumed that the marriage has failed without requiring a statement by the parties in the proceedings (section 1566 subsection 2 of the Civil Code). Continuation of a failed marriage is possible if and as long as maintenance of the marriage is necessary in exceptional cases in the interest of the minor children resulting from the marriage, or if and as long as, because of unusual circumstances, the divorce would constitute such hardship for the respondent who refuses it that the maintenance of the marriage appears necessary in exceptional cases, even if one takes the interests of the plaintiff into account (section 1568 of the Civil Code).

273. If the spouses live in the statutory property regime of the community of surplus, the surplus gained during the time of the marriage is to be compensated for between the spouses in the event of divorce (section 1372 et seqq. of the Civil Code). An exception applies if the equalisation of the surplus would be grossly unfair. This may be the case in particular if the spouse who has made the lower surplus has culpably not met the economic obligations arising from the marriage (section 1381 of the Civil Code) for a longer period. No consideration is given to the reason for the divorce.

274. The applicable maintenance law presumes for the post-marital maintenance of the spouses the principle that each divorced spouse must cover their own economic needs on their own responsibility. Only in cases of special need does the law make provision for a post-marital right of spouses to maintenance in sections 1570 - 1576 of the Civil Code.

275. The maintenance elements of sections 1570 et seqq. of the Civil Code are all linked to needs relating to marriage. These are:

- maintenance to care for a joint child,
- maintenance because of a reduced ability to work or because of age,
- maintenance because of unemployment, and
- maintenance for the time of training.

276. Added to this is maintenance for general reasons of fairness. This need however only leads to a right to maintenance if it applies at the time of the divorce or at another time soon after the divorce. A need coming about years after the marriage has been dissolved, caused for instance by loss of job, by contrast, does not give rise to maintenance rights against the divorced spouse.

277. Since the joint standard of living achieved in a marriage is to be regarded as the result of the contribution of both spouses, the law links in determining the amount of maintenance in section 1578 of the Civil Code on principle to the living conditions achieved during marriage in order not to force a needy spouse to undergo a reduction of social circumstances as the result of a divorce.

278. The pension rights adjustment effected on divorce replaces the prospect of a surviving dependants' pension lost by means of the divorce and ensures the even distribution of the entitlements to old-age pension or pension for reduced ability to work acquired during the marriage. It is based on the concept that pension entitlements acquired during the marriage derive from the work of both partners together and serve to ensure that the needs of both are met on conclusion of working life. The divorcee who acquired the lower pension entitlement during the marriage receives as compensation against the former partner half the difference in value between the pension entitlements already acquired on both sides. Pension rights adjustment particularly benefits women who brought up children during the marriage or worked within the family in another way. It creates for the spouse entitled to compensation his own right against his pension organisation to a pension to be paid independently of that of the former partner.

#### **4. Marriage property law**

279. The statutory property regime is the community of surplus (section 1363 of the Civil Code). In accordance with section 1363 subsection 2 of the Civil Code, the assets of the man and of the woman do not become the spouses' joint assets. At the end of the community of surplus (be it through death, divorce or dissolution of the marriage contract) the surplus acquired by the spouses is adjusted.

280. The spouses may change the marital property regime by means of a contract (section 1408 of the Civil Code). One of the solutions provided by the law is complete separation of property (section 1414 of the Civil Code). It differs from the statutory property regime of the community of surplus in particular by the fact that compensation for the surplus is ruled out. A further statutorily governed property regime is community of property. In this case, it is possible to rule that the assets of the man and the assets of the woman become joint assets (section 1416 of the Civil Code). This property regime is however now rare. Similar possibilities have existed since 1 August 2001 to set the property regime for same-sex partners.

#### **5. Equal rights in the law on names**

281. The principle of equal rights between spouses (Article 3 para 2 first sentence of the Basic Law) has also been implemented by means of the Act Governing the Law on Family Names (Familiennamensrechtsgesetz) dated 16 December 1993, also with regard to the married name.

The obligation incumbent on the spouses to have a common family name has been repealed. Hence, the preference declared unconstitutional by the Federal Constitutional Court by its ruling of 5 March 1991 of the family name of the man becoming the married name, if the spouses were unable to agree, has been repealed.

## **6. Protection of the family in fiscal law**

282. State protection of the family is expressed in the taxation of the parents in the family benefits equalisation which has been applicable since 1 January 1996. Accordingly, the share of the income which the parents have to spend to ensure their children's minimum standard of living is not taxed. This is achieved either via the monthly child benefit paid as a tax refund, or via tax-free amounts for children that are deductible from the fiscal basis of assessment when the income tax assessment is effected, whilst child benefit with its fiscal impact is offset. However, whilst only the children's material minimum standard of living was initially made tax-free for the parents, since 1 January 2000 children's care needs, and from 1 January 2002 also their educational and training needs have been included in the tax-free minimum standard of living. The tax-free amount for children to be assessed for the material minimum standard of living is Euro 3,648 (DM 7,134) from 2002 onwards, whilst the tax-free amount applicable from 2002 onwards for care and education or training is Euro 2,160 (DM 4,224). In the course of this development, the monthly child benefit for the first and second child has been increased several times since 1996 from its original level of DM 200 to Euro 154 (DM 301.20) per child, which has applied since 1 January 2002. From this time, child benefit for the first three children is Euro 154 (DM 301.20) each and from the fourth child Euro 179 (DM 350) each. State protection of the family in fiscal law is also expressed in other provisions. Thus, from 2002 onwards, expenditure on child care up to Euro 1,500 per child under the age of 14 reduces the parents' fiscal basis of assessment if they are employed or ill. This applies to care costs if they exceed Euro 1,548 per child. Furthermore, parents may claim a tax-free amount to meet a special need of up to Euro 924 per year for children who are of age and who are accommodated elsewhere for the purposes of training.

## **Article 24**

### **Children's rights**

283. Children's rights have gained considerable significance in the Federal Republic of Germany. This development was caused not least by the UN Convention on the rights of the Child. With the ratification of the Convention in 1992, Germany entered into an obligation to implement the rights recognised in the Convention domestically through "all appropriate legislative, administrative, and other measures". Further improvements have taken place, especially in recent years, over and above an already high standard of accommodation of children's rights in the Constitution and in legislation.

### **1. The new law on parent and child**

284. The law of parent and child of the Federal Republic of Germany, which in particular governs the right of descent and the legal relationship between minor children and their parents, was comprehensively reformed and modernised in the period under report. The Act to



Reform the Law on Parent and Child Matters (Gesetz zur Reform des Kindschaftsrechts) dated 16 December 1997 (Law on Parent and Child Matters Reform Act [Kindschaftsrechtsreformgesetz], Federal Law Gazette Part I p. 2942) entered into force on 1 July 1998.

285. The Law on Parent and Child Matters Reform Act has largely removed the differences remaining until then in the legal status of children born in and out of wedlock. In particular the rules relating to the right of descent were reformed on this occasion; The terms “in wedlock” and “out of wedlock” are no longer used in the Act. The provisions regulated in a previous Part on descent out of wedlock and on legitimising children born out of wedlock have been removed in the course of the reform. In response to medical progress in reproductive medicine, a statutory provision on the descent of the child from the mother has been added for the first time. The provision contained in section 1591 of the Civil Code determines that the mother is the woman who gave birth to the child. This regulation is to remove any incentive towards surrogate motherhood, which in any case is prohibited in Germany by law.

286. As to the child’s descent from the father, the allocation of the child to the spouse of the mother was retained on principle (section 1592 No. 1 of the Civil Code). However, it was made easier to remove this presumption of fatherhood for children who come into the world after divorce proceedings have become pending.

287. In accordance with Article 18 para 1 of the United Nations Convention on the Rights of the Child dated 20 November 2000, the new law of parent and child strengthens the principle of responsibility of both parents for the education and development of the child. This applies on principle irrespectively of whether the child’s parents are married to one another. The new law of parent and child enables parents who are not married to one another when their child is born to assume joint parental custody for their child. They do so either by submitting joint custody declarations (section 1626a subsection 1 No. 1 of the Civil Code) or by subsequently marrying (section 1626a subsection 1 No. 2 of the Civil Code). The custody declarations may already be submitted prior to the birth of the child (section 1626b subsection 2 of the Civil Code). If no custody declarations are submitted, and if the parents do not marry, the mother has sole parental custody (section 1626a subsection 2 of the Civil Code).

288. Parents who are married when the child is born are entitled to joint parental custody anyway. In the case of separation or divorce of parents, who exercise joint parental custody either on the basis of marriage or of joint custody declarations, the provision contained in section 1671 of the Civil Code enables the parents to continue to exercise joint custody even after separation or divorce. The parental powers to decide are then shared as follows in accordance with section 1687 of the Civil Code: The reciprocal agreement of both parents is required for all matters which are of considerable importance to the child (section 1687 subsection 1 first sentence of the Civil Code). The parent with whom the child generally lives with the agreement of the other parent, or on the basis of a court ruling, has the power to decide alone in matters of daily life (section 1687 subsection 1 second sentence of the Civil Code). As long as the child is with the other parent with the agreement of this parent or on the basis of a court ruling - for instance on the right of access - the latter has power to decide alone in all matters of actual care.

289. With the reform of the law on parent and child matters, the parents who are joint holders of parental custody, after their separation and divorce, are advised but not forced to continue joint parental custody. On request, the court transfers sole custody to the applying parent if either the other parent agrees (unless the child in question has reached the age of 14 and objects to the transfer) or if it is to be anticipated that the withdrawal of joint custody and transfer to the applicant is in the best interests of the child. If this is not the case, or if the parents do not make an application for allocation of sole custody, joint custody is retained.

290. The significance of contact between the child and both parents is also taken into account in the reform of the law of access. In contradistinction to the legal situation applying in accordance with previously applicable law, the parents' right of access is regulated uniformly irrespective of whether the child's parents are married. Furthermore, a right of access has been created for grandparents, siblings and other persons typically close to the child (section 1685 of the Civil Code). For the first time, the right of access was structured not only as a right of the parents, but also as a right of the child. The child's and the parents' right of access may only be restricted or ruled out if this is necessary in the best interests of the child. A family court ruling which restricts or rules out the right of access for some time may only be handed down if the best interests of the child would otherwise be placed in jeopardy (section 1684 subsection 4 of the Civil Code).

291. The goal of children being able to grow up in an environment as free of violence as possible is served by the Act to Outlaw Violence in Education and to Amend the Law on Child Maintenance (Gesetz zur Ächtung der Gewalt in der Erziehung und zur Änderung des Kinderunterhaltsrechts) which has been in force since November 2000 dated 2 November 2000, Federal Law Gazette Part I p. 1479 (cf. para. 270 above). The Act to Further Improve Children's Rights (Gesetz zur weiteren Verbesserung von Kinderrechten) which has been in application since 12 April 2002 (Federal Law Gazette Part I p. 1239) makes it easier for the courts to remove persons who perform acts of violence on a child, or otherwise place the best interests of a child at a considerable disadvantage, from the child's immediate vicinity. In particular, the courts are expressly afforded the power to eject such a person from the dwelling in which the child (also) lives. By these means, the child can now remain in the environment (and with the persons who are close to him/her) to which he is accustomed and the disturbing influence can be removed. Previously, the child was removed from the family in most cases and placed in a home or in a foster family when such incidents took place.

292. The rights and the position of the child as a separate legal person are also expressed in the court proceedings regulating parental custody and access to the child. Before the court reaches an arrangement on parental custody or access, it must on principle hear the child in person. In the event of there being a conflict of interest between the child and his statutory representatives, the possibility has been created and in specific cases indeed the obligation exists for the family court to appoint a special representative for the child to represent his interests (section 50 of the Act on Matters concerned with Non-contentious Litigation - FGG). In custody and access cases, children who have reached the age of 14 may submit a complaint against family court rulings independently and without the participation of their statutory representative (sections 59 of the Act on Matters concerned with Non-contentious Litigation). These procedural rights correspond to the rights of the child as derived from the European Convention dated 25 January 1996 which Germany ratified in April 2002. The Convention has applied to Germany since 1 August 2002.

293. Special weight was also attached to improving advice to parents and children in the event of the parents' separation and divorce. Both the parents and the children, as well as others who may be entitled to access, have a legal right to advice by the Youth Welfare Office or independent youth welfare organisations. Efforts to reach an out-of-court settlement are supported both in court proceedings and in youth welfare.

## **2. Principle of non-discrimination**

294. The principle of equal treatment contained in Article 3 of the Basic Law prohibits all discrimination; this means that children are also protected.

295. Some Federal Länder have express provisions on non-discrimination. For instance, the Implementation Act of the Land of Berlin in respect of the Eighth Book of the Social Code (Ausführungsgesetz des Landes Berlin zum Sozialgesetzbuch Achtes Buch - SGB VIII) prescribes that youth welfare benefits should serve to bring about equal rights for women and men, and that youth welfare must promote amongst other things tolerance in dealing with people of same-sex sexual orientation.

### **(a) Foreign children**

296. Foreign children may not be discriminated against in Germany; they and their parents are given the necessary scope to retain their cultural identity. Caring for one's own cultural life, using one's own language and confessing one's own religion are constitutionally protected by the right to the free development of the individual's personality and the freedom of religion (Article 2 para 1 and Article 4 paras 1 and 2 of the Basic Law).

297. The full social and vocational integration of foreign young people living lawfully in Germany is a focal point of the aliens policy of the Federal Government. Integration is promoted by means of a legal framework which makes secure residence and labour market status possible, and hence makes it easier for them to plan their lives. For instance, until the end of 1999 there was a right to naturalisation for young aliens between the ages of 16 and 23 if they renounced or lost their previous nationality, had been lawfully resident in Germany for eight years, had attended school in Germany for six years and had not been convicted of a criminal offence. This regulation was replaced by new provisions as on 1 January 2000 (cf. on this paras. 378 et seq. and paras. 332 below). The Act to Reform Nationality Law (Gesetz zur Reform des Staatsangehörigkeitsrechts) dated 15 July 1999 created a modern nationality law, and a central goal of the integration policy of the new Federal Government was thereby realised. In addition to making naturalisation generally easier, *ius soli* has been introduced in addition to the remaining *descendancy* principle: Children born to foreign parents from 1 January 2000 onwards now gain German nationality from birth if one parent has lawfully had his habitual place of residence in Germany for eight years and has a steady residence status (section 4 subsection 3 of the Nationality Act [Staatsangehörigkeitsgesetz]). This is linked to the so-called option model: Anyone who in future acquires German nationality on birth in Germany as the child of foreign parents, whilst at the same time acquiring foreign nationality by descent, must choose between German and the foreign nationality when coming of age. If they choose German nationality, they are obliged to prove the relinquishment or loss of the foreign nationality before turning 23 (section 29 of the Nationality Act).

298. A time-limited transitional regulation afforded a right to naturalisation to foreign children who lawfully had their habitual place of residence in Germany on 1 January 2000 and had not yet reached the age of ten if the parents already had a steady residence status when they were born. On principle, these children must also exercise this option. The acquisition of nationality is the start of social integration in both cases. With the modernisation of the law on nationality, furthermore, the general naturalisation period was reduced from 15 to eight years; spouses and minor children may also be naturalised in accordance with the Aliens Act, even if they have not been lawfully in Germany for eight years.

**(b) Special protection for girls**

299. Men and women have the same legal rights in Germany in accordance with Article 3 para 2 of the Basic Law. Irrespective of this, actual inequalities remain between boys and girls which need to be removed.

300. The Federal Government undertook to implement the Platform for Action of the 1995 Fourth World Conference on Women in Beijing. One of the twelve focal points in the framework of the strategic goals and measures in the Platform for Action is devoted to the topic of "Girls". Accommodating the interests of girls and young women is integrated into all fields of policy within the meaning of "gender mainstreaming". A high status attaches to the interests of girls in child and youth policy. In the context of the reorganisation of the law on child and youth welfare, the obligation to take account of the differing situations of girls and boys, to reduce disadvantages and to promote equal rights for girls and boys has been anchored in Federal law for the first time.

301. This makes it clear that a gender-differentiated approach is necessary in all youth welfare fields, and that it has to be implemented. The term "work with girls as a cross-sectional task" was coined in the national discussion between experts. It makes it clear that promotion of girls may not be regarded as a special area or an additional task of child and youth welfare, but should be defined as an integral element. It may not be a matter therefore only of targeted offerings for girls, but especially and in particular of a clear perspective which permits one to take the point of view of differentiation between the genders for all areas. Consequently, action is also called for for adequate forms of participation which actually take girls' interests into account.

302. Achieving the above tasks is a matter for the Federal Government in the field of child and youth policy firstly by means of the Child and Youth Plan of the Federation. The promotion of girls is to be accommodated as a cross-sectional task within all programmes of the Child and Youth Plan. This is a matter of differentiating between situations and development in offerings of youth welfare in all circumstances in which special differentiating offerings are called for or offered.

303. Special emphasis is set by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth in the shape of the pilot programme entitled "Girls in Youth Welfare", which is currently in its second phase. In the first phase of the programme from 1991 to 1996, central measures and model projects, as well as various concepts were developed and tested - in particular in favour of socially disadvantaged girls - giving considerable impetus for work with girls, especially in the new Federal Länder. The second phase, which started in 1997, focuses on

the further development of the existing youth welfare structures. With the aim of “Participation as active sharing” and “Integration as equivalent involvement”, a variety of especially innovative concepts of social work with girls, political education, youth welfare planning and gender-specific work with boys are being tried. The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth provided funds for this programme totalling almost DM 27 million in the period from 1994 to 1999.

304. Equal rights between the genders must also be safeguarded in education policy. The stage is being set in education and training for access to qualified occupational development. There is hence a need to open up a broad spectrum of occupational possibilities for girls and young women at an early stage. In the framework of coeducation, promotional measures for girls should be ensured in particular in the natural science and technical fields in order to enable girls’ skills to develop better in these subjects. Special measures are also needed for greater participation by young women in technology-orientated vocational training and jobs.

**(c) Equality for children born out of wedlock**

305. A special characterisation of the principle of equal treatment in the Constitution is contained in Article 6 para 5 of the Basic Law, in accordance with which the same conditions for their physical and emotional development and for position in society are to be created by means of legislation for children born out of wedlock as for children born in wedlock.

306. The Act on the Position of Children born out of Wedlock under Inheritance Law (Gesetz über die erbrechtliche Stellung des nichtehelichen Kindes (Inheritance Law Equality Act [Erbrechtsgleichstellungsgesetz]) dated 16 December 1997 (Federal Law Gazette Part I p. 2968) abolished the provisions on the special right of inheritance for children born out of wedlock, thereby affording children born out of and in wedlock the same rights in terms of inheritance. An exception exists only for persons born before 1 July 1949, unless the out-of-wedlock father had his habitual place of residence in the German Democratic Republic on 2 October 1990. This provision takes account of the different legal developments in the two parts of Germany and grants those concerned in each case the required protection of confidence.

**Article 25**

**Civil rights**

**1. Measures of the Federation and the Länder concerning  
appointment to the public service**

307. In its Concluding Observations on the fourth Periodic Report, the Human Rights Committee expressed its concern as to the German appointment practice in the public service with a view to Articles 18 and 25 of the Covenant (CCPR/C/79/Add.73, paragraphs 16 and 17). The Federal Government takes the Committee’s comments very seriously, but in the final analysis is unable to share its concern.

308. Only persons may be appointed as civil servants with life tenure who will ensure that they will stand up for the free, democratic basic order within the meaning of the Basic Law at all times. For this, an evaluation takes place in each specific case on the basis of the conduct of the applicant and of his statements. Each employer decides the question for himself for his area of competence.

**(a) Members of so-called sects and psycho groups**

309. The Human Rights Committee expresses its concern that membership of so-called sects and psycho groups as such might be able to prevent appointment to the public service in some Länder of the Federal Republic of Germany (No. 16 of the Concluding Observations).

310. In response to a survey following on from this, the Länder have stated that, in accordance with Article 33 para 2 of the Basic Law, the relevant criteria applying to them for appointment to the public service are an individual's aptitude, qualifications and professional achievements. Membership of a sect alone ("as such") cannot prevent entry into the public service.

311. The Land of Bavaria however pointed out that membership of an association of which claiming absoluteness and the total discipline and submission of members to the goals of the organisation are characteristic may give rise to doubt as to the applicant's aptitude. Submission to such an organisation could lead to a conflict with the official duties of a civil servant or employee. Applicants for appointment to the Bavarian public service therefore had to complete a questionnaire intended to clarify the applicant's relationship with the Scientology Organisation. If doubt arose on the basis of the information as to the applicant's aptitude, the latter was given the opportunity to remove this doubt. One individual had not been appointed in 2001 because of a lack of aptitude in connection with membership of the Scientology Organisation.

312. The practice of the Länder of deciding on appointment to the public service in individual cases using the above criteria (aptitude, qualifications and professional achievements) is not objectionable with a view to Article 25 (c) of the Covenant. A violation of Article 18 of the Covenant (Freedom of religion) is also not to be feared as to members of the Scientology Organisation in the view of the Federal Republic of Germany. This association - as already variously explained to the United Nations - is not a religious or philosophical community, but an organisation aimed at economic gains and acquisition of power (cf. Note Verbale of the Permanent Representative of the Federal Republic of Germany to the United Nations in Geneva dated 21 July 1999 to the Office of the United Nations High Commissioner for Human Rights, Ref.: Pol 383.25/2.4, Note no. 240/99, which referred to the statement of the Federal Republic of Germany dated 22 April 1994, pp. 13 et seqq.; cf. also the statement of the Federal Republic of Germany regarding the letter of the special rapporteur of the Human Rights Committee on religious intolerance dated 20 October 1994, p. 3, C/ SO 214(36-8)). However, even if one were to presume protection by Article 18 to apply, the examination of the aptitude of an applicant for the public service would be justified as to membership of such an association by Article 18 para 3 of the Covenant. It would be necessary in order to guarantee the working of the public service, and hence to protect public security and order.

313. Additional reference is made to the fact that all sets of proceedings initiated against Germany by the Scientology Organisation in accordance with ECOSOC Resolution 1503 have been unsuccessful (cf. most recently the Communication of the United Nations High Commissioner for Human Rights dated 24 September 1999 on the deliberations of the Working Group on Communications of the Sub-Commission on the Promotion and Protection of Human Rights dated 19 to 30 July 1999 (Ref.: G/SO 215/13).

**(b) Dismissal of members of the public service in the German Democratic Republic**

314. The Human Rights Committee furthermore expresses its concern as to the criteria used to determine the continued employment or dismissal of public servants of the German Democratic Republic after the Unification of the two German States, and proposes that the criteria be given further concrete shape (note 17 of the Concluding Observations).

315. The Federal Republic of Germany would like to point out that the special provisions contained in the Unification Treaty regarding ordinary dismissal of workers and on the dismissal of civil servants on probation (in particular because of working for the Ministry of State Security of the German Democratic Republic) are no longer in effect (the provisions regarding the ordinary dismissal of workers as on 1 January 1994 and those relating to the dismissal of civil servants on probation as on 1 January 1997). In the case of civil servants, dismissal because of their conduct in the German Democratic Republic (e.g. work for the Ministry of State Security) is now only possible in accordance with the general provisions of civil service law applicable to all civil servants; there is no longer a special law in this case applying to persons who worked for the German Democratic Republic.

316. The possibility still exists for wage-earners of extraordinary dismissal in accordance with the provision contained in Annex I Chapter XIX Subject Area A Section III No. 1 of the Unification Treaty, which expressly refers to the Covenant and reads as follows:

“An important reason for extraordinary dismissal shall in particular apply if the employee

1. has violated the principles of humanity or the rule of law, in particular the human rights guaranteed in the International Covenant on Civil and Political Rights dated 19 December 1966 or the principles contained in the Universal Declaration of Human Rights dated 10 December 1948, or

2. worked for the former Ministry of State Security / Office of National Security and hence retention in employment appears unacceptable.”

317. It was the aim of the Unification Treaty to incorporate most of the employees of the GDR public service into the public service of the Federal Republic of Germany, and to continue to employ them unless shortcomings in aptitude are ascertained in individual cases within the meaning of Article 33 para 2 of the Basic Law. Parliament's assessment forming the basis of the special dismissal elements that an employee who worked for the Ministry of State Security (MfS) on principle does not meet the requirements of Article 33 para 2 of the Basic Law for employment in the public service of the Federal Republic of Germany however appears to be indispensable. The Ministry of State Security (MfS) was a central element of the GDR's totalitarian power apparatus, and functioned as a tool of political control and of suppression of

the population. It served in particular to survey, deter and eliminate those in political disagreement with the regime and those wishing to leave the country. This work aimed to violate rights to freedom which constitute a democracy. Active support of the repression apparatus serving to ensure the dominance of the one-party system allows one to presume a lack of aptitude within the meaning of Article 33 para 2 of the Basic Law since the reliability of the employee and his innate willingness to respect civil rights and the rule of law as binding is doubtful in the long term.

318. Work for the Ministry of State Security (MfS) nevertheless does not automatically lead to dismissal. Therefore, it is also necessary for there to be a determination that it is unacceptable to continue employment. "Unacceptable" is an undefined legal term the application of which is fully subject to court control, which has now been given concrete form by the past consistent court decisions. The important aspect is, hence, whether the previous work of the employee - not his political opinion - including taking account of the principle of proportionality, poses such a burden on employment that continuation is ruled out by objective standards. Here, an evaluation of the case in line with individual-case aptitude should be carried out in which, in addition to the concrete burden for the employer, the extent of involvement of the person concerned should also be taken into account (Federal Administrative Court, decision dated 13 December 1998, file ref. 2 C 26/97, published in the *Neue Juristische Wochenschrift* 1999, pp. 2536 and 2537; Federal Constitutional Court, decision dated 8 July 1997, file ref. BvR 1934/93, published in the official collection, BVerfGE 96, pp. 189 and 198 et seqq.).

319. Accordingly, the Federal Constitutional Court also considered the dismissal of employees who for instance worked as full-time employees or senior functionaries of the former SED, of a mass organisation or of a social organisation - hence representing the former unjust system - to be in principle permissible, such permissibility requiring consideration of all the circumstances of the individual case in the prognosis that has to be carried out (Federal Constitutional Court, decision dated 21 February 1995, file ref. 13 Sa 31/ 93, published in the official collection BVerfGE, Vol. 92, pp. 140 and 152 et seqq.; decision dated 8 July 1997, file ref. 1 BvR 1243, 1247/ 95 and 744/96, Vol. 96, pp. 152 and 165 et seqq.). The European Court of Human Rights also rejected Applications against the Federal Republic of Germany which former employees of the German Democratic Republic had filed in respect of their dismissal (Volkmer against Germany, decision dated 22 November 2001, Application No. 39799/98; Knauth against Germany, decision dated 22 November 2001, Application No. 41111/98; Bester against Germany, decision dated 22 November 2001, Application No. 42358/98; Petersen against Germany, decision dated 22 November 2001, Application No. 39793/98; available on the Internet at <http://hudoc.echr.coe.int>).

320. It does not appear necessary to further define the criteria against this background.

## **2. Access to public offices for EU aliens**

321. With the Tenth Act to Amend Provisions of Service Law (*Zehntes Gesetz zur Änderung dienstrechtlicher Vorschriften*) dated 20 December 1993, the Federal Republic of Germany affords to nationals of other EU Member States the same status as Germans when considering their appointment as a public servant with life tenure. Article 48 para 4 of the EC Treaty has thereby been transposed into German law.



322. Only the performance of tasks which may be carried out exclusively by members of the public service who themselves are members of the community of states to whose interests it relates are excluded from the fundamental opening up of access. The exception was deliberately left open, bearing in mind increasing European integration by virtue of which nationality is rapidly losing significance for the performance of the tasks of public administration. The Federation and the Länder have agreed to application criteria for this exception by means of which this reservation for own nationals is already less stringent than the criteria with which the caselaw of the European Court in Luxembourg permits tasks to be reserved for Germans. Thus, for instance, in accordance with the case-law of the European Court the performance of police tasks as a whole fall within the national reserve area, whilst in accordance with the criteria agreed between the Federation and the Länder in Germany in fields of administrative intervention (interference with rights and freedoms) only those functions are to be reserved to German nationals by means of which fundamental decisions are taken or prepared in relation to their actual implementation (e.g. a police squad leader).

### **3. Suffrage for foreigners**

323. The right to vote and stand for office in local elections (cf. for details the fourth Periodic Report, CCPR/C/84/Add.5, paragraphs 164 et seqq.) on the basis of the Maastricht Treaty and in accordance with Article 28 para 1 third sentence of the Basic Law for nationals of the Member States of the European Union (Union citizens) living in Germany has now been transposed into national law by means of the Election Acts (Wahlgesetze) of the individual Federal Länder in accordance with Council directive 94/80/EC dated 19 December 1994. Union citizens have firstly participated in the elections to the borough assemblies in Berlin on 22 October 1995. Since then, Union citizens who can vote have participated in all local elections in Germany.

324. Furthermore, the Coalition Agreement dated 20 October 1998 suggested as an element of the overall integration policy concept of the Federal Government the introduction of a general right to vote in local elections which - in derogation from the regulation contained in Article 28 para 1 third sentence of the Basic Law - is also to be granted to nationals of non-EU states. The Agreement states as follows:

“To promote integration, those foreigners living here who do not possess the citizenship of an EU Member State shall also receive the right to vote in district and local elections.”

325. The Basic Law must be amended in order to carry out this project. In accordance with Article 79 para 2 of the Basic Law, two-thirds of the members of the Federal Parliament and two-thirds of the Federal Council must vote for it. In view of these qualified majority requirements, such a draft Bill may only be adopted by means of intra-party consensus. The Federal Government will therefore not be able to initiate the legislative steps to reform the right of aliens to vote in local elections until the necessary broad support becomes visible in Parliament and in the Federal Council.

## **Article 26**

### **Protection against discrimination**

#### **1. Initiatives against xenophobia**

326. The Federal Government views the suppression of xenophobia - in particular of right-wing extremist statements and attacks - as a focus of its policy, and in this it complies with the statement by the Human Rights Committee in its Concluding Observations on the fourth Periodic Report (CCPR/C/79/Add. 73, comment 12;). A wide range of programmes against right-wing extremism, xenophobia and intolerance have been drafted in the period under report and are being implemented. The Federal Government will continue to pursue these approaches with the required consistency. Here, it is not unaware that this is a phenomenon which is based on a multiplicity of cause and effect connections. Accordingly, right-wing extremism and intolerance are suppressed in a bundle of preventive and repressive measures dealing with the problem at several levels:

##### **(a) Strengthening civil society and civil courage**

327. The vast majority of citizens in Germany recognise democracy and the state of law, and oppose violence and extremism. Many civil society action associations are strongly committed to these goals. These initiatives are important; they deserve recognition and support. The continuing expansion of right-wing extremist thinking and right-wing extremist attacks, however, shows that the fight against right-wing extremism must be placed on an even broader footing.

328. In order to suppress right-wing extremism and xenophobia, additional funding amounting to a total of DM 100 million was provided to the Federal budget in 2001 alone: DM 30 million for a programme in the Child and Youth Plan of the Federation "Measures against violence and right-wing extremism", DM 5 million for the promotion of model projects to advise, train and support initiatives against right-wing extremism in the New Federal Länder, and another DM 5 million to promote model projects which provide advice to victims and potential victims of right-wing extremist criminal acts and violent acts in the New Federal Länder. In addition to this, another DM 10 million is available for victim compensation and emergency assistance following right-wing extremist attacks. In continuation of these programmes, the Federal Government is providing Euro 10 million in 2002 for the programme entitled "entimon - together against violence and right-wing extremism", another Euro 10 million for "CIVITAS - initiative against right-wing extremism in the New Federal Länder", as well as Euro 2.5 million to compensate victims of right-wing violence.

329. Over and above this, the Federal Government doubled the annual funds provided from the European Social Fund for the "XENOS" programme in June 2001 to DM 50 million. With "XENOS - living and working in a multifarious environment", the Federal Government has developed a programme through which to promote projects which help expand the mutual understanding of German and foreign young people and adults, as well as helping them to learn and work together. Civil society structures are to be strengthened and local cooperation and partnerships supported. For projects in the context of "XENOS", the Federal Government is

providing funding amounting to a total of roughly Euro 75 million from the European Social Fund for a period of three years. These projects are on principle co-funded to the same amount by the Länder and local authorities (in addition to several of the programmes mentioned in paras. 339 and 330 cf. paras. 362 et seqq.).

330. In cooperation with existing organisations, local initiatives and individuals who are committed to the suppression of all forms of extremism and xenophobia, the Federal Government has initiated the national “Alliance for Democracy and Tolerance - against extremism and violence”. The Alliance collects and mobilises powers tackling, with a variety of ideas, violence motivated by xenophobia, racism and anti-Semitism; is also establishes contacts and promotes the exchange of information and experience. Since it was officially founded on 23 May 2000 under the motto “Look - Act - Help” the Alliance is attracting a great deal of support. More than 900 initiatives have so far joined the Alliance. The entimon, CIVITAS and XENOS programmes - combined in the programme of action “Youth for Tolerance and Democracy - against right-wing extremism, xenophobia and anti-Semitism” - are also a part of the Alliance.

**(b) Promotion of integration**

331. Promotion of integration for all immigrants living in Germany permanently and lawfully is considered by the Federal Government to be a most important contribution towards the prevention of xenophobia, racism and discrimination. A major core of integration policy lies in the reform of the nationality law which entered into force on 1 January 2000 (cf. on this paras. 379 et seq. below, as well as paras. 298 et seq.). The introduction of ius soli entrenched therein, in accordance with which from 1 January 2000 children born in Germany to foreign parents gain German nationality at birth under certain preconditions, and other relaxations of naturalisation introduced by the statutory reform, such as shorter periods for naturalisation, promote the integration of aliens living in our country lawfully for the long term. There is a public interest in this because no democratic state may accept in the long term that a large section of its inhabitants should be excluded from the rights and duties of a citizen for generations.

332. The Immigration Act (Zuwanderungsgesetz), which will enter into force on 1 January 2003, sets in place for the first time the principle of the promotion of the integration of aliens lawfully resident in Germany in the right of residence, and sets the political requirements to improve the framework for the integration of aliens. In this context, a minimum framework of state integration offerings is governed by law; this includes language courses and courses on the legal order, culture and history of Germany.

333. In the period under report, the Federal Government supported also measures such as programmes of action to improve the training opportunities for immigrants aiming to create a sustained improvement in the training situation of this target group in schools and in vocational basic and further training, as well as the integration of migrants in Germany by promoting civil society initiatives. The measures supported in the framework of project promotion also include those implementing legal provisions encouraging integration, as well as measures on the political co-determination of immigrants living in Germany lawfully and for the long term.

334. In implementing the EU Directive applying the principle of equal treatment regardless of race or ethnic origin, it is provided that German anti-discrimination legislation as substantive core norms should contain a prohibition in particular of discrimination based on racial or ethnic origin in working life, or in access to public goods or services, including housing that is available to the public. Furthermore, it is intended to set sanctions ranging up to compensation, to ease the burden of proof and to establish independent agencies to support the victims of discrimination independently in the complaint procedure. It is currently planned that this will be implemented through a Civil Law Anti-Discrimination Act (Zivilrechtliches Antidiskriminierungsgesetz) and a Labour Law Anti-Discrimination Act (Arbeitsrechtliches Antidiskriminierungsgesetz).

**(c) Measures targeting people acting in a xenophobic manner and their environment**

335. Over and above this, it is important to use preventive and repressive action approaches to decisively influence persons acting in a xenophobic manner and their environment. This includes, for one thing, the consistent use of those means made available to the state by law in order to counter the propagation of right-wing extremist ideologies in an organisational framework. The possibility to prohibit associations and parties and its use have already been described above (cf. at paras. 256 et seqq. and 259 et seqq.). The Federation and the Länder have repeatedly made use of the possibility to prohibit associations in particular, especially in the case of right-wing extremist organisations (cf. on this para. 261 above).

336. Racism and xenophobia must be dealt with actively in all fields of society, including family and work, as well as in the field of training and careers. The Act to Reform the Works Constitution Act (Gesetz zur Reform des Betriebsverfassungsgesetzes), which entered into force on 28 July 2001, uses a combination of measures for its contribution towards in-company integration of foreign workers and towards suppressing xenophobic activity at work. This includes, for instance, the employer's duty to report regarding the integration of the foreign workers employed in the company and the right of the works council to request measures to suppress racism and xenophobia. Furthermore, if there is xenophobic and racist activity the works council may refuse to approve individual personnel measures such as appointment and promotion, and may demand removing a worker from the company who acts in a xenophobic manner.

337. Furthermore, the state is obliged not to desert those who have been drawn in by the right-wing scene. For this reason, the Federal Ministry of the Interior has conceived a "Quitting programme for right-wing extremists" to be managed by the Federal Office for the Protection of the Constitution. The programme was launched in mid-April 2001 and aims to weaken and undermine the right-wing extremist scene by "breaking out" leaders; additionally, members not thoroughly involved in the scene are to be encouraged to give serious thought to leaving. In an active section which is currently being initiated, the Federal Office for the Protection of the Constitution intends to approach leaders and activists in the scene where there are indications that they may be willing to leave. Furthermore, a telephone hotline has been activated at the Federal Office for the Protection of the Constitution (as a so-called passive section of the programme), which can be contacted by right-wing extremists willing to leave or by their family

members. Here, contact can be provided to trained staff of the Federal Office for the Protection of the Constitution who offer assistance in specific individual cases on how to quit the previous social environment (“help to help oneself”). For this - in cooperation with the employment office, youth welfare and social services - assistance can be offered for instance in looking for work and housing.

338. New communication media, in particular the Internet, are being increasingly used by right-wing extremists for the purpose of self-portrayal, for mobilisation and for agitation. Whilst the Federal Office for the Protection of the Constitution counted 330 right-wing extremist homepages in 1999, this number increased to roughly 800 in 2000. Approximately 1,300 homepages with right-wing extremist content were known at the end of 2001. If a homepage indicates content or symbols of unconstitutional organisations constituting public incitement, this is punishable in accordance with sections 86, 86a and 130 of the Criminal Code (cf. in detail paras. 244 et seqq.).

#### **(d) Human rights education**

339. Following the fourth Periodic Report, the Human Rights Committee considered that there was an additional need to develop measures for human rights education, in particular in view of police officers, soldiers (“defence academies”) and young people (CCPR/C/79/Add.73, comment 12). A large number of initiatives have been taken in this field in the period under report.

##### **(1) Human rights education in the police**

340. It is regarded as a main task of police training to prepare police officers to respect basic and human rights in dealing with citizens and to suppress xenophobic criminal offences. Because of the Federal system, one discovers differences when comparing the individual Federal Länder and the Federation, but the training and study curricula in the Federation and in all the Federal Länder have considerable theoretical as well as practical teaching content which encourages police officers to promote the free, democratic basic order, respect for and implementation of human rights, as well as tolerantly dealing with citizens of German and foreign origin. Human rights education is an integral, essential element of many training subjects, in particular the subjects “Constitutional law”, “State and administrative law”, “Ethics”, “Social science”, “Politics”, “Communication and rhetoric” and “Psychology”.

341. For instance, the following study content is an obligatory part of the training plan in Rhineland-Palatinate in the examination subject “State and constitutional law”

- general significance of basic and human rights as they relate to the state’s monopoly of power,
- historical development of basic and human rights,
- position and significance of basic and human rights in national and international law.

342. The abovementioned subjects are on principle among the obligatory subjects, so that it is ensured that all police officers receive appropriate training. The goal is to comprehensively study these topical areas in order to strengthen a corresponding value awareness and to create the foundation for police work that is strictly orientated in line with respect for human rights, especially in the field of intervening action. These include teaching skills such as how to take responsibility for others, cooperation and teamwork, empathy, tolerance of foreign cultural influences and peace education.

343. The training content taught in theory is supplemented by special communication and conduct training. With the support of the psychological services, conduct-orientated training programmes to increase social competence (dealing with citizens) in the field of communication and stress and conflict management are implemented to a greater degree. This also includes tolerance in dealing with citizens of foreign origin from a legal, social policy and psychological point of view.

344. In-service further training has increasingly focused for several years on the problems of ethnic minorities and the need to suppress racism and xenophobia. For instance, special seminars series are offered on the topics of "Police and aliens", "Political extremism", "Xenophobia" and "Anti-Semitism" in which in particular an understanding of the value systems and conduct of other cultures is taught. There are excursions accompanying the lessons and a regular exchange of thoughts and experience with representatives of migrants' organisations and aliens' advisory councils. The Land of Berlin for instance offers a further training seminar entitled "Aliens in Berlin" which more than 4,000 police officers have attended since 1994. In Saxony-Anhalt, 2,800 police officers have already attended training since 2001 on the topics "Police and aliens" and "Police and human rights".

345. Furthermore, there is a large number of further initiatives. The following are indicated by way of example:

- publication of a guideline entitled "Police work in a democratic society - Is your unit a defender of human rights?",
- the organisation of a "Human Rights Week" from 30 October until 3 November 2001 on the occasion of the 50th anniversary of the signing of the European Convention on Human Rights under the heading "Police and human rights",
- visits by study groups of an administrative college (in the special field of police training) to the human rights organisation "Association for the prevention of torture" in Geneva in 2001,
- the implementation of training and meeting seminars with immigrants and the police in the context of the "Police in a multicultural society" project promoted by the European Commission, and
- support for the "Police and human rights - after 2000" programme in the human rights Directorate General of the Council of Europe by appointing an officer of the Land of Hesse, whose work focuses on the development of human rights training for the police.

346. The understanding of German police officers towards other cultures - in particular non-European cultures - is finally also promoted by appointing aliens to the German police service. In Schleswig-Holstein, for instance, they accounted for 4.3 and 3.9 % respectively of appointments to the Land police in 2000 and 2001.

## **(2) Human rights education in the Federal Armed Forces**

347. Human rights education is integrated into the concept of internal management (Innere Führung) in the armed forces of the Federal Republic of Germany as a management philosophy of the Federal Armed Forces. It is documented in the corresponding service regulations. Training in the roughly 70 schools and academies of the Federal Armed Forces takes this challenge seriously and provides extensive tuition concerning human rights in the curricula.

348. The concept of internal management (Innere Führung) has the task of compensating for tensions resulting from the combination, on the one hand, of the individual rights of the free citizen, and of military duties on the other. The concept covers both teaching standards for the conduct of the soldiers, and a structuring principle for the integration of the armed forces into the state and society, and for an internal order based on human dignity and orientated to follow the legal order. It is in particular a goal of training of managerial staff in the armed forces to entrench the understanding of this guideline of the citizen in uniform. This description also includes teaching basic rights and their validity for soldiers, and is linked with teaching on the inalienable human rights and the dignity of basic rights. Especially in the military environment, questions arise as to how to deal with human rights and human dignity in many ways, so that these aspects arise in a wide variety of forms in the courses and further training.

349. In the field of leadership, the ethical principles which can be derived from human rights and human dignity form the basis of all responsible activity on the part of soldiers. This is discussed particularly in training of military management personnel. In the lesson units on internal management - characterised by references to the law - elements of human rights and human dignity are taken up and discussed by law teachers or lecturers. Also in the context of training in humanitarian international law, the concept of protecting human dignity and human rights on the basis of humanitarian international law can be brought closer and can teach that respect for human dignity and human rights must be guaranteed in war as well.

350. The Internal Management Centre supports the entire armed forces through basic work and teaching. The following training courses and seminars are named as examples:

- In the training course entitled "Practice of political training" the protection of human rights and human dignity are stressed as a major motivation factor for service in the armed forces.
- The topics of xenophobia and the problem of refugees are covered in management games.
- Violations of human rights by the Wehrmacht in the Second World War are discussed in the training course entitled "Practice of political and historical training".

- The training courses entitled “Human rights and political education for teaching staff” and “Leadership / young leaders” focus on the question of the basis for responsible activity by soldiers and teach basic human rights values and norms.
- The topic of human rights regularly forms a focal point in the framework of the training course entitled “Security policy and international law”.
- Human dignity is explained using concrete content in other cross-section training courses and measures of the Internal Management Centre. For example, the topics of “Women in the armed forces”, “Protection against mobbing/sexual harassment at work”, “Tolerance education and training” and “Intercultural education” are discussed.

351. Human rights also play a special role at the Management Academy of the Federal Armed Forces, which is the central training facility for training staff officers. This topic is not only entrenched in all career-relevant training courses as integrated or separate training. The training goals of the training courses offered also include strengthening social skills and teaching the ethical dimension of actions by officers. Furthermore, it is considered important for participants in training courses to be able to collect knowledge and understanding of other countries and cultures, including by means of specific meetings. 70 % of all training courses and seminars carried out at the Management Academy of the Federal Armed Forces are open to foreign staff officers, in the training courses for General Staff/ Admiral Staff service, the share of foreign course participants is the highest, at 30 %, in the national course (NATO states) and almost 70 % in the international course (non-NATO states).

### **(3) Human rights education for pupils and young people**

352. In accordance with the constitutional order of the Federal Republic of Germany, the Länder bear responsibility for schools. The Conference of Ministers of Culture and Education - a meeting of the Ministers of Culture and Education of the Länder - has stressed repeatedly and in connection with various recommendations and agreements that human rights education is part of the core area of schools' educational mandate. One should mention here in particular “Europe in teaching” (order of the Conference of Ministers of Culture and Education dated 8 June 1978 in the version dated 7 December 1990), “‘Intercultural training and education in schools’ recommendation” (order of the Conference of Ministers of Culture and Education dated 25 October 1996) and ‘One World/Third World’ in teaching and at school” (order of the Conference of Ministers of Culture and Education in the version dated 20 March 1998). In 2000, the Conference of Ministers of Culture and Education reworded the “Recommendation to promote human rights education in schools” (order of the Conference of Ministers of Culture and Education dated 4 December 1980 in the version dated 14 December 2000). The orders of the Conference of Ministers of Culture and Education, which were passed unanimously, are a political self-obligation of each Land to entrench the concomitant topical area in the curricula of the Länder and to implement them in teaching.

353. In the Recommendation to promote human rights education, the Ministers of Culture and Education express the fact that human rights are brought about not only through state action, but directly by the stance and commitment of each individual. Schools must contribute to this by forming the personality appropriately. Human rights education is stipulated as a supreme goal of



education in all Land Constitutions and Schools Acts. Human rights education is hence a task for education as a whole, and for all teachers. It covers all fields of school activity. Here, the social science subjects make a particularly systematic contribution.

354. The goal of dealing with topics related to human rights in teaching is to provide a knowledge and understanding of

- the historic development of human rights and their current significance;
- the significance of basic and human rights, both for the rights of the individual and for the objective forming principles of the community;
- the relationship between personal rights of freedom and social basic rights in the Basic Law and in international conventions;
- the different perception of and manner of guaranteeing human rights in different political systems and cultures;
- the fundamental significance of human rights for the development of the modern constitutional state;
- the need to take account of individual human rights protection in international law;
- the significance of international cooperation for the implementation of human rights and for securing peace;
- the extent and the social, economic and political reasons for the violations of human rights that can be observed worldwide.

355. Dealing with human rights is to awaken and strengthen the willingness among pupils to strive for their implementation and to resist their neglect and violation. Pupils are to be made ready to strive towards the implementation of human rights in their personal and political environment. They should be prepared to use the question of the implementation of human rights as an important standard to assess the political circumstances in their own and in other countries. This includes a willingness to defend the rights of others. Human rights education is hence not restricted only to teaching knowledge. It must include the emotional and active component. Pupils must experience and practice respect for their fellow human beings in their daily behaviour in school.

356. Thus, projects and activities within and outside lessons take on increasing significance for teaching peaceful co-existence. Here, one should point by way of example to the following projects in which pupils and teachers, together and partly in cooperation with parents and civil society initiatives, as well as with facilities of youth welfare, discover what each individual can do to defend human rights in their personal environment and furthermore for all people. The projects and measures are initiatives of the Länder, and are funded jointly by the Federation and the Länder:

- longer-term programmes of action such as “School without racism”, etc;

- projects such as “Foreigners setting an example”;
- call by the Ministries to organise action days and weeks on the occasion of memorial dates, topical events, etc.;
- project days and weeks on topical themes;
- international exchange programmes for teachers and pupils;
- international school partnerships;
- promotion competitions, awarding school peace prizes;
- strengthening integrative lessons to promote the disadvantaged;
- promotion of pupils with different home languages;
- expanding social work in schools;
- models of settling disputes between pupils;
- handouts for teachers, working material for pupils;
- establishing extra-mural agencies to promote school youth work and other youth work;
- cooperation with various extra-mural institutions and associations.

357. The activities of the Federal Ministry of Education and Research focus on education for democracy, as well as - following a primary prevention approach - on suppressing right-wing extremism, xenophobia and anti-Semitism. They are also conceived against violence in general, and are intended to teach conflict solution strategies. In total, the Ministry is providing approx. Euro 4.2 million for eight programmes and individual projects in this area in 2002. Two projects deserve particular emphasis because of their innovative significance and because of the extent of the Federation’s financial commitment at this juncture:

- BLK “Learning and living democracy” model programme:

The pilot programme of the Federation-Länder Commission for Education Planning and Research Promotion launched in 2002 and set to run for five years aims to systematically link aspects of school development with the promotion of democratic (everyday) culture, including the social and societal environment of schools and their pupils. This pursues a primary prevention approach against right-wing extremism, xenophobia and violence. The model programme also makes the experience already available more transparent and more accessible, creates a network of the various initiatives and measures, facilitates cooperation, builds a regional advice and support system, and contains supporting research on effects. A total of Euro 12.8 million is available for the model programme which is to run for five years, equal halves of which are provided by the Federation and the Länder.

- “Development and testing of a further training programme against violence, xenophobia, political extremism and anti-Semitism”:

This project focuses on intra-school evaluations of social school quality and the development of a modular correspondence course offering (15 modules) for school and extra-mural basic and further training. At a total of 150 to 175 schools from ten Federal Länder, an intra-school evaluation of social school quality (including also xenophobia and political extremism, as well as acceptance of violence and violent acts) are carried out and repeated after two years. A modular further training programme is developed and offered, building on the content areas “social school quality”, consisting of a correspondence course and seminars in combination with intra-school further training for teachers. The development of the correspondence courses offered creates a basis for further training which can be used in the long term to prevent violence and xenophobia.

358. Dedication to the basic democratic and humanist values, respect for human rights, practising solidarity and tolerance, as well as the rejection all forms of extremism and xenophobia, are naturally also some of the fundamental principles of youth work, and are expressed in the various forms of measure - from classical political education to social services and concrete social policy action. Thus, for instance, in the framework of the child and youth plan of the Federation, the youth policy promotion tool of the Federal Government, the “Political education” programme is promoted to the tune of approximately Euro 10.9 million per year. The promotion of intercultural learning and efforts to achieve integration of the foreign juveniles living here are also important - both tasks which have for a long time played a major role in the daily practice of youth work.

359. Experience to date has shown how important and necessary it is that the competent authorities and independent organisations in the Länder and local authorities draft and implement concepts for preventive child and youth work which aim to strengthen both the basic democratic views and the practical democratic and civil commitment among juveniles who reject intolerant and discriminating conduct and extremist and xenophobic positions, as well as dealing thoroughly with the group of problem juveniles who are at risk from xenophobic or extremist conduct, or who have already come to notice.

360. With the programme of action entitled “Youth for Tolerance and Democracy - against right-wing extremism, xenophobia and anti-Semitism”, launched in 2000, the Federal Government placed particular stress on this appeal. The programme aims at a sustained increase in the strength of democratic culture among young people. An increasingly major role is played here by networking different initiatives and projects in situ and cooperation with schools.

361. The programme of action, which is a part of the “Alliance for Democracy and Tolerance - against Extremism and Violence”, is split into the following three parts:  
XENOS - ENTIMON - CIVITAS.

The Federal Government is taking a new path with the programme entitled “XENOS - living and working in a multifarious environment”. This programme combines labour market-related measures with activities against xenophobia and racism. “XENOS - living and working in variety” presupposes that characteristics such as tolerance and respect for

strangers are important qualifications at work. The programme addresses companies and associations, trade unions and enterprises, local authorities and organisations of vocational training, as well as vocational schools and initiatives. Its aim is to link measures targeting exclusion and discrimination on the labour market and in society with approaches to combat xenophobia, racism and intolerance. The programme is active where people work and learn together. Promotion is provided to local projects, mobile advisory teams and pools of experts, initiative groups and roundtables, as well as advising in vocational orientation to strengthen civil society structures and civil commitment. The programme targets in particular juveniles and persons who come into contact with juveniles in schools and training, or at work. Prevention is given a high status in the XENOS programme. The programme supports measures and projects which promote democratic, tolerant conduct, and those which support intercultural dialogue and teach positive experience between young people of varying origins. This also includes promoting mobility, thereby contributing towards improving mutual understanding. Young people are to be encouraged to take up a clear stance in their environment against xenophobic and racist opinions, and to develop their own creative activities for peaceful coexistence between the various cultures. The Federal Government provides a total of roughly Euro 75 million from the European Social Fund for the XENOS programme. Added to this is roughly the same amount in funds from national co-funding.

362. The section of the programme entitled “ENTIMON - Together against violence and right-wing extremism” stresses in particular the great importance among the central educational objectives and educative goals which is attached to strengthening democratic culture among young people, and makes a major contribution towards the suppression of right-wing extremism, xenophobia and anti-Semitism. The following spheres of activity are in the foreground in implementing this section of the programme:

- local networks;
- intercultural learning;
- political educational work;
- research projects.

363. Particular significance is attached here to the development of a new participation culture for young people and to the particular accommodation of the development of offerings for the target group of secondary and vocational school pupils. This includes improving the offerings of children’s and young people’s education directly in situ. The implementation of this section of the programme is effected in close cooperation with the Länder and the local authorities, the Federal Centre for Political Education, central national organisations of youth education, as well as organisations which have experience of working with young migrants. The Federal Government has so far provided Euro 25 million for ENTIMON.

364. As a third focal point of the programme of action, the programme entitled “CIVITAS - Initiative against right-wing extremism in the new Federal Länder” has been launched with funding amounting to Euro 10 million per year. The programme aims to promote model projects on advising, training and supporting initiatives against right-wing extremism, as well as model

projects advising victims and potential victims of right-wing extremist criminal offences and violent acts in order to strengthen a democratic, community-orientated overall culture in the new Federal Länder. This section of the programme is devoted to projects and initiatives which are human rights-orientated and empathise with the victims and potential victims of right-wing extremist violence. It focuses on recognition and protection of, as well as respect for ethnic, cultural and social minorities. CIVITAS supports the effectiveness and strengthening of self-help in civil society, on which both the current and future success of local democratisation depends on. Both the increasing professionalism of advice structures for which CIVITAS aims, and the development of local civil society initiatives, are major elements to strengthen the democratic culture and in the fight against right-wing extremism, xenophobia and anti-Semitism.

**(e) Further measures in the youth area**

365. Crime prevention projects also play an important role in the suppression of right-wing extremist, xenophobic and anti-Semitic motivated criminal offences and violent acts. These already tackle the conditions for the genesis of crime by overseeing the suppression of the causes of criminal activity and by reducing the opportunities to commit offences. In this context, the establishment of the “German Forum for Crime Prevention” (DFK) Foundation in June 2001 for the preventive suppression of right-wing extremism, xenophobia, anti-Semitism and violence is of considerable significance. The Federation, the Länder, the local authorities, religious communities, associations, private donors and other social forces work together in the DFK, which covers all aspects of prevention of criminal offences. That body has the task of developing overall community strategies to deal with the causes of crime, to establish contacts between the players in question and to initiate and promote preventive activities. The DFK will be the central information and service agency of crime prevention in Germany and the point of call for exchanging opinion and experience at international level. The Federal Government has commissioned the DFK to implement a project entitled “Primary prevention of violence against members of groups - young people in particular”. The project targets violent crime against a person or thing solely or largely because of race, religion, ethnic affiliation, gender, political or sexual orientation, age or mental or physical disability or the owner or holder of this thing (so-called “hate crime”). The project is to make proposals for prevention work on the basis of a documentation package.

366. Furthermore, the Federal Government promoted the following plans and projects on observance of human rights, on practising solidarity and tolerance, as well as on the suppression of extremist, racist and xenophobic orientations among young people in the period under report:

- Information, Documentation and Action Centre against Xenophobia (IDA) in the youth associations and youth initiatives of Germany, which offers national youth work against racism and xenophobia
- Creation of intercultural networks of social work with young people in the social environment to support better integration of young migrants
- Projects to support the work of anti-racist initiatives, projects and networks to suppress right-wing extremism, in particular in the Eastern Federal Länder, and promotion of civil society initiatives, such as the Networks Against Right-wing Extremism working party

- Media teaching projects to strengthen the media competence of young people and against right-wing extremist orientations (“Rock von Rechts” [Right-wing Rock], “KAHLSCHLAG” [Demolition], “Verlorene Kinder” [Lost children], Netgeneration, etc.)
- Media Association Training Programme to teach youth leaders, social workers and teachers to deal with right-wing extremist activities and xenophobia among juveniles
- Selected youth education culture projects such as “Rap for Courage”, videos targeting prejudice and violence, “Violence is speechless” - book exhibition and book suitcase
- Targeted measures of international youth work such as the support of solidarity projects in work with aliens, organisation of memorial trips to concentration camps, cycle tours under the heading “Nothing has been forgotten - Stop Racism”, sympathy magazine “Understanding the unknown”, “Understanding Islam”, “Understanding Judaism” and “Understanding Buddhism”
- Extra-mural anti-Fascist and anti-racist youth policy educational work
- Intercultural work aiming to train cosmopolitan attitudes and tolerance with the intention of undermining the development of xenophobia and racism
- Promotion of projects offering conduct-changing measures such as mediation and anti-aggression training
- Sport and experience training in youth work (e.g. street football for tolerance)
- “Fan projects coordination agency”: The fan projects are to counter the occurrence of violence by young people in connection with football
- Targeted research such as supplementing and specifying the youth study running at the German Youth Institute “Attitudes of young people and young adults” through the group of topics entitled “Extremism, xenophobia and violence”
- Establishing a “Right-wing extremism and xenophobia - youth policy and teaching challenges” unit to evaluate conceptual preventive approaches in teaching work.
- Participation in the EU Programme of Action entitled “Youth”: The Programme of Action makes a special contribution towards mutual confidence, towards strengthening democracy, towards tolerance, towards the willingness of young people to co-operate and show solidarity with each other, and is consequently of considerable significance for the cohesion and future development of the Union. The Programme of Action is a combination and extension of the previous EU programmes entitled “Youth for Europe” and “European Voluntary Services”. It formally entered into force when it was published on 18 May 2000. The Programme of Action is focused on the European Youth Exchange and the European Voluntary Service. As

goals for the programme, the EU Commission and the EU Council expressly set themselves the tasks, firstly, of promoting an active contribution by young people towards European integration through their participation in cross-border exchange programmes within the Community, or with third countries, in order to develop an understanding of the cultural diversity of Europe and its common basic values, and following from that, respect for human rights and the suppression of racism, anti-Semitism and xenophobia

- D-a-s-h: Europe-wide campaign to encourage young people and groups of young people to use the Internet to join in forming an action forum against intolerance and discrimination and to fight for tolerance and diversity.

## **2. Civil law Anti-Discrimination Act**

367. The aim is being pursued in the Federal Republic of Germany to adopt a civil law Anti-Discrimination Act in order to prevent discriminating practices, including between private individuals. In accordance with the law as it currently stands in the Federal Republic of Germany, evident cases of discrimination may in the field of civil law be countered by the general civil law clauses. The Federal Government however already intended with No IX.10 of the Coalition Agreement dated 20 October 1998 to intensify protection against discrimination and to include private law to a greater extent.

368. An Act to Prevent Discrimination under Civil Law (Gesetz zur Verhinderung von Diskriminierungen im Zivilrecht) is currently being drafted. Its main concern is to take up an unmistakable stance against discrimination in civil law legal transactions on the basis of race and ethnic origin. In the framework of this draft Bill, for the field of civil law legal transactions, express discrimination prohibitions are established and sets of civil law tools introduced with the assistance of which it is to be made easier in the long term to maintain the prohibitions of discrimination. It is to be ensured that no one is placed at a disadvantage in civil law legal transactions because of his race or ethnic origin, for example in access to goods and services, including housing. This applies in particular to establishing, terminating and planning purchase, tenancy, service and agency contracts, as well as similar obligations available to the public or based on employment, medical care or education.

369. In order to make it easier to assert rights, this prohibition of discrimination is to be linked to a regulation on the burden of guilt and the facilitation of a legal action taken by an associations under civil law with which associations whose tasks include the defence of the interests of groups of persons involved may also demand in court the omission of discriminating conduct. Over and above the requirement of omission, the individual is also to have a right to be treated in a manner that is free of disadvantage or, if the disadvantage cannot be compensated for by other means, should also be able to demand suitable monetary compensation. With the draft Bill to prevent discrimination in civil law, at the same time Council directive 2000/43/EC dated 29 June 2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin is to be implemented.

### 3. Registered partnership for same-sex couples

370. Couples of the same sex have had the possibility since 1 August 2001 to establish a “registered same-sex partnership”. The “Act to End Discrimination against Same-Sex Communities: Same-Sex Partnerships” (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften) dated 16 February 2001 (Federal Law Gazette Part I p. 266) contains the following core points:

- establishment of the same-sex partnership on principle for life;
- possibility to determine a joint name;
- mutual maintenance duties and rights while the same-sex partnership continues;
- “minor custody” of the same-sex partner (co-decision making in matters concerned with the daily life of a child);
- statutory right of inheritance of the surviving same-sex partner;
- rescission of the registered same-sex partnership by a family court;
- arrangement of the consequences of the separation of same-sex partners (e.g. right of maintenance).

The recognised same-sex partnership is also taken into account in other fields, such as in the law on health insurance and in the right to refuse to testify.

### 4. Reservation in the ratification of the Optional Protocol

371. The Federal Republic of Germany has submitted the following reservation on ratification of the Optional Protocol to the International Covenant on Civil and Political Rights, (Federal Law Gazette 1994 Part p. 311):

“The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications

...

(c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant.”

372. In its Concluding Observations dated 8 November 1996 (CCPR/C/79/Add. 73, note 14) the Human Rights Committee regrets that the reservation at (c) was made. The Federal Government acknowledges the suggestion therein and will examine this section of the reservation once ratification of the 12th Optional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, containing a general prohibition of discrimination, is completed.



## Article 27

### Protection of minorities

373. The Government of the Federal Republic of Germany regrets that the impression has been created that the rights under Article 27 of the Covenant in Germany are granted only to specific minorities (Note 13 of the Concluding Observations, CCPR/C/79/ dd. 73). All ethnic, religious and linguistic minorities in Germany are protected by the Basic Law as to the rights named in Article 27 of the Covenant. All minorities within the meaning of Article 27 may use their mother tongues and culture and practice their religion. Germany does not exercise any pressure aimed at enforcing assimilation. Accordingly, there are many associations and groupings organised by ethnic, religious or linguistic minorities. These associations serve to maintain cultural identity, the exercise of religious confessions and care for customs and own language. The activities of these associations and groupings are not hindered in any manner. Many individual projects are supported financially by the state.

374. Germany is making considerable efforts to improve the lives of immigrants in Germany. Many immigrants' cultural projects are promoted in the framework of cultural promotion measures or with funds from integration policy. Mother tongue teaching is increasingly offered in schools in the language of the respective country of origin in order to improve success in school, integration and equal opportunities (cf. also paragraphs 295 et seqq.).

375. The integration of aliens living lawfully in the long-term in Germany continues to form a particular focus of aliens policy. The goal of integration policy is to enable aliens living in Germany to lead a life with equal rights and to enable as full a participation as possible in all social fields. In particular in the fields of language acquisition, of school and vocational training, as well as of access to employment, the Federation, the Länder and the local authorities, as well as charities and youth associations, support measures strengthening participation by aliens, and in particular by foreign young people.

376. In the budget of the Federal Ministry of Labour and Social Affairs (BMA) alone, more than roughly DM 100 million (Euro 51.2 million) were available in 2001 to promote the linguistic, vocational and social integration of foreign employees and their family members. The BMA has spent almost DM 1.9 billion on integration measures since 1968. These measures supplement the vocational and labour market integration measures of the Federal Employment Service, as well as the integration measures of other Federal Ministries, the Länder and local authorities, and those of private organisations. Focal points include the promotion of social advice for aliens, German language courses, vocational integration with the special promotion of young aliens in the transition from school to work, social and vocational integration of foreign women, improving the co-existence of Germans and aliens, information measures and the training of multipliers.

377. A considerable change is currently underway in German policy on aliens (cf. also paras. 332 and 335). The majority of Germans now see immigration as positive, and accepted it as something to be taken for granted. Immigrants' positive contributions towards the social and economic development of our country are at the centre of the discussion. This change in the general social climate will have a further positive influence on the situation of immigrants in Germany. The Immigration Act, which has been reformed in this respect, will enter into force

on 1 January 2003. This Act will form the legal basis for the new understanding of Germany as an immigration country. In addition to procedural simplifications and clearer arrangements for entry and residence, it also creates coordinated, comprehensive integration promotion for immigrants. The Immigration Act can be regarded as the symbol of the change in German policy on aliens and immigration.

378. As the first major step towards a newer, improved policy on aliens and integration, the Act to Reform Nationality Law (Gesetz zur Reform des Staatsangehörigkeitsrechts) was promulgated on 23 July 1999. Its main provisions entered into force on 1 January 2000. Elements of the territorial principle (*ius soli*) were included in German nationality law for the first time. In accordance with the new provision, children of foreign parents born in Germany acquire German nationality at birth if one parent has continuously had his habitual place of residence in Germany for eight years and has a right of unlimited residence or has had an unlimited residence permit for three years. For children aged up to ten who were born prior to the entry into force of the Reform Act, and where the preconditions were met at their birth for *ius soli* acquisition, a transitional arrangement was created that is initially restricted to one year. If the child also acquires a foreign nationality in addition to German, apart from the statutory exceptions permitting multiple nationality to be accepted, he must choose between German and the foreign nationality derived from the other parent on coming of age by the age of 23.

379. Adult aliens now receive a right to naturalisation after a lawful, habitual residence period in Germany of eight (instead of the previous 15) years. The principle of avoiding multiple nationality is maintained. The exceptions to this principle are however being expanded. Thus, the requirement imposed for naturalisation, namely to relinquish the previous nationality, is foregone, for instance, if relinquishment would lead to considerable disadvantages, especially economic or property law in nature. Those who are politically persecuted and have been recognised as refugees will not be required in future to undertake to be released from their previous nationality. Furthermore, in the case of individuals who have the nationality of a Member State of the European Union, naturalisation is permitted whilst retaining multiple nationality if reciprocity exists. This is the case if the EU state of origin accepts multiple nationality when naturalising Germans.

380. Over and above the rights contained in Article 27 of the Covenant for all ethnic, religious or linguistic minorities (which Germany guarantees for all minorities) Germany has additionally accepted special protection obligations for its national minorities. With this specific purpose in mind, Germany ratified the Council of Europe's Framework Convention for the Protection of National Minorities in 1997. The Framework Convention applies to Danes with German nationality, the Sorb people, the Friesians in Germany and the German Sinti and Roma. It entered into force for Germany on 1 February 1998. If Germany only regards such groups of people as national minorities which amongst other things meet the condition that they are traditionally at home in the Federal Republic of Germany and their members have German nationality, it presupposes preconditions in line with the international law standard throughout Europe.

381. The Council of Europe's European Charter for Regional or Minority Languages, which is to protect and promote the traditional regional or minority languages spoken in a contracting state as a threatened part of European cultural heritage, was also ratified by Germany in September 1998. It entered into force for Germany on 1 January 1999. Protected minority

languages include Danish, Upper and Lower Sorb, North Friesian and Saterland Friesian, the Romany of the German Sinti and Roma and Lower German as a regional language.

Article 1 (a) ii) of the Charter expressly stipulates that immigrants' languages do not fall under this type of protection. Hence, the Federal Republic of Germany is among the only 13 - out of a total of 43 - member States of the Council of Europe which have ratified both the Council of Europe's Framework Convention for the Protection of National Minorities, and the European Charter for Regional or Minority Languages.

382. The Federal Republic of Germany presumes that Article 27 of the Covenant does not contain the right of further protected minorities also to be recognised as national minorities. It refers here to the material on the Covenant (Travaux Préparatoires) and the Final Report dated 1 July 1955 (A/2929), stating:

“The provisions concerning the right of minorities, it was understood, should not be applied in such a manner as to encourage the creation of new minorities or to obstruct the process of assimilation. It was felt that such tendencies could be dangerous for the unity of the State. In view of clarification given on those points, it was thought unnecessary to specify in the article that such rights may not be interpreted as entitling any groups settled in the territory of a State, particularly under the terms of immigration laws, to form within that State separate communities which might impair its national unity or security.” (A/2929, p. 63, para 186)

### Notes

<sup>1</sup> This number largely covers smaller, regionally- or locally-active groups.

<sup>2</sup> Of these, in 2001 33,000 were members of the right-wing extremist parties “National Democratic Party of Germany” (NPD), “German People’s Union” (DVU) and “The Republicans” (REP), whilst in the case of the REP, one may not presume that all members pursue or support right-wing extremist goals. Another 4,300 were members of other right-wing extremist organisations. The remaining persons belong to the spectrum of Neo-nazis and subcultural and otherwise right-wing extremists with the propensity to violence. Most of the latter are not organised in groups.

<sup>3</sup> These are the following associations: Kurdistan Workers Party (PKK) including several sub-organisations and ancillary organisations, Kurdistan Information Office (KIB), Revolutionary People’s Liberation Party - Front (DHKP - C), Turkish People’s Liberation Party (THKP/ -C-Devrimci-Sol), Federation of Islamic Associations and Communities in Cologne (“The Caliphe State”), AL AQSA e.V., Viking Youth (WJ), Free German Workers Party (FAP), Blood & Honour - German Division with the White Youth youth organisation.