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The progress of the Assembly's monitoring procedure (September 2015-December 2016) and the periodic review of the honouring of obligations by Austria, the Czech Republic, Denmark, Finland, France and Germany

Periodic review: Germany

Report[1]
Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)
Rapporteur: Mr Cezar Florin PREDA, Romania, Group of the European People's Party

Summary

All member States of the Council of Europe that are not under a monitoring procedure *sensu stricto*, or engaged in a post-monitoring dialogue, are the subject of a regular periodic review by the Monitoring Committee of the honouring of their membership obligations to the Council of Europe. In this report, the committee presents the periodic review on Germany. The committee concluded that Germany is globally fulfilling its membership obligations to the Council of Europe and, overall, its democratic institutions function in line with the standards of the Council of Europe. However, a number of concerns were raised, and recommendations made in that respect, that deserve the prompt attention of the authorities.

1. See also Doc. 14213 Part 1, Part 2, Part 3, Part 4, Part 5 and Part 6.

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Explanatory memorandum by Mr Cezar Florin Preda, rapporteur

1. Introduction

1. Germany (officially the Federal Republic of Germany, *Bundesrepublik Deutschland*) is a federal republican State and a parliamentary democracy. With around 81 770 900 inhabitants,[2] Germany has the largest population in the European Union and the second largest among the Council of Europe member States.

2. The current Constitution – the Basic Law (*Grundgesetz*) of the Federal Republic of Germany – was adopted by the Parliamentary Council on 8 May 1949 and entered into force on 26 May 1949 on the territory of Western Germany (formerly zones controlled by the United States, the United Kingdom and France). In October 1949, the establishment of the German Democratic Republic (Eastern Germany) was announced. The separation into two German States – considered as temporary – lasted until the reunification of the country in 1990.[3] Following the reunification, both the territory and the population of Germany expanded substantially. The capital of the Federal Republic of Germany was transferred from Bonn to Berlin.

3. The Federal Republic of Germany joined the Council of Europe on 13 July 1950, becoming the 14th member State of this Organisation. One of the founding members of the European Coal and Steel Community (since 1951), in 1957[4] it was among the States that established the European Economic Community which was later transformed into the European Union. On 1 January 1999, Germany became a member of the Eurozone. In 1955, the Federal Republic of Germany joined the North Atlantic Treaty Association (NATO). Germany is also a founding member of the Organisation for Economic Co-operation and Development (OECD) and of the Organization for Security and Co-Operation in Europe (OSCE) which it chairs in 2016.

4. Germany is composed of 16 *Länder* (States). Legislative power in the country is held by the Federal Parliament (*Bundestag*) and the *Landtage* (State parliaments). The *Länder* also participate in the policy making and legislation at the federal level through the Federal Council (*Bundesrat*), composed of members of governments of the *Länder* (69 full members). As a general rule, the *Länder* have the legislative power unless the Basic Law confers the competence at the federal level. The *Länder* are in charge of the implementation of both *Land*-level and federal legislation.

5. Members of the *Bundestag* are elected in general and direct elections for a four-year term. The current 18th German *Bundestag* has 630 members (the number of members is subject to variations resulting from the electoral system). Five political parties are represented: the Christian Democratic Union (*Christlich Demokratische Union Deutschlands*, CDU), the Social Democratic Party (*Sozialdemokratische Partei Deutschlands*, SPD), the Left (*Die Linke*), Alliance 90/The Greens (*Bündnis 90/Die Grünen*) and the *Christian Social Union of Bavaria* (*Christlich-Soziale Union in Bayern*, CSU). The largest parliamentary group is the one formed by the members of the long-standing alliance between the CDU and the CSU with 310 seats.[5]

6. Among other powers, including federal law-making, the *Bundestag* conducts parliamentary scrutiny of the work of the Federal Government and elects[6] the Federal Chancellor (*Bundeskanzler/Bundeskanzlerin*), head of government and chief of the executive power who chairs the Federal Cabinet (*Bundeskabinett*) and proposes candidates for ministerial office to the Federal President.

7. The current Federal Government, led by Chancellor Angela Merkel of the CDU, was formed in 2013 by the "grand coalition" between the CDU/CSU and the SPD.[7] Coalition governments are an established political practice in the Federal Republic of Germany – every government since 1949 has been the result of party coalitions. This system based on the coalition culture has proven to be very stable; there has been only one early election, in 2005, called by the government itself.

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2. Both German and foreign citizens, estimations of the Federal Statistics Office for 30 September 2015 based on the 2011 census:
https://www.destatis.de/EN/FactsFigures/SocietyState/Population/CurrentPopulation/Tables/Census_SexAndCitizenship.html;jsessionid=039BCB1054700C8E2E3E7095FC8274C1.cae1.

3. In formal terms, on 3 October 1990, eastern Germany dissolved into five federated States (*Länder*) who joined the Federal Republic of Germany.

4. The year of the signature of the Treaty of Rome, which entered into force in 1958.

5. The SPD group holds 193 seats, the Left – 64 seats and Alliance 90/The Greens – 63 seats. See www.bundestag.de/en/parliament/plenary/distributionofseats .

6. Formally, it is the Federal President who proposes the Federal Chancellor to the *Bundestag* and appoints him/her following the vote.

8. The latest elections took place on 13 March 2016 to the *Landtage* of Baden-Württemberg, Rhineland-Palatinate and Saxony-Anhalt and received extensive international media coverage, mostly due to the results achieved by the far-right Alternative for Germany party (*Alternative für Deutschland*, AfD). Fifteen of the 16 German *Länder* are currently governed by coalitions. Bavaria, where the local CSU holds the absolute majority in the *Landtag,* is the only exception.

9. The head of State of Germany is the Federal President (*Bundespräsident*) elected for five years by the Federal Convention (the Members of the *Bundestag* and an equal number of members elected by the *Landtage*); re-election for a consecutive term is allowed only once. The role of the Federal President is mostly ceremonial; he/she represents the Federal Republic of Germany both at home and abroad. Currently, the post of Federal President is held by Joachim Gauck.

10. The German political system was designed after the Second World War to avoid the monopolisation and abuse of power by one political force and to make impossible the establishment of a dictatorship. Strong parliamentarianism and federalism are its contemporary distinctive features. The Federal Constitutional Court, established in 1951 in the city of Karlsruhe, plays an important role in safeguarding and improving this system, including in the field of protection of human rights.

11. More than 25 years after the reunification, the economic and social gap between the former eastern and western *Länder* still constitutes a subject for debate. Berlin and the "new" *Länder* are economically supported by the rest of the country through the "Solidarity pact".[8] In 2012, a report of the Congress of Local and Regional Authorities of the Council of Europe spoke about a "huge regional discrepancy between the new *Länder* of former East Germany and those of the previous *Bundesrepublik*. … it has been an important goal for each federal government to reduce the differences in the level of income and living standards between East and West. The integration costs of the Eastern *Länder* have been almost inestimable in the last two decades. Nonetheless, even if it has not yet ended, this long process has not proved to be unsuccessful".[9] This economic discrepancy is related to socio-political specificities. It has been noted that far-right movements had greater support in the East: for example, in its 2013 report, the European Commission against Racism and Intolerance (ECRI) considered that "extreme right-wing organisations have a strong foothold" in the eastern *Länder* (and it is also there that the "civic commitment against racism is particularly important").[10] The rise of the so-called PEGIDA movement in Dresden in 2014-2015 partly confirmed these observations.

12. Since 2014, the political debate in the country has been galvanised by two main subjects. First, the massive arrival of migrants, refugees and asylum seekers in Europe. In 2015 alone, 1 091 894 asylum-seeker arrivals were recorded in the online system for the initial distribution of asylum seekers to Germany's *Länder* (EASY system). This provoked heated debates about realistic and humanistic policy to adopt, about European solidarity and integration of migrants, refugees and asylum seekers. Second, the rise of xenophobic political movements and extremist statements and attacks revealed that the *Willkommenskultur* advocated by Chancellor Merkel and President Gauck was not shared by all the Germans, and that the country's history was not an antidote to hatred. These subjects are both addressed in this report.

13. In the international arena, including in European affairs, Germany continues to play an active and respected role, promoting dialogue and co-operation whilst remaining faithful to the values of human rights and the rule of law. Germany has been particularly active in the efforts to achieve peace in Ukraine and in Syria, find solutions to the Greek debt crisis and come up with a common European approach to the massive arrival of migrants.

14. The active role that Germany has played in the international institutions for the protection and promotion of human rights has been widely praised. In 2015, Germany chaired the United Nations Human Rights Council for the first time and was re-elected to sit on the Council for a new term (2016-2018). On 1 January 2016, the country assumed the Chairmanship of the OSCE under the motto "Renewing dialogue,

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7. The previous governing coalition, in 2009-2013, was formed by the CDU/CSU and the Free Democratic Party (Freie Demokratische Partei, FDP).

8. €156 billion were allocated for 2005-2019 in the framework of the *Solidarpakt II*. See "Solidarpakt II von 2005 bis 2019", the website of the Commissioner of the Federal Government for the new Federal States: www.beauftragte-neue-laender.de/BNL/Navigation/DE/Themen/Bundesstaatliche_Solidaritaet/Bund_Laender_Finanzausgleich_und_Aufbau_Ost/Solidarpakt_II/solidarpakt_II.html.

9. CG(22)7, Local and regional democracy in Germany, 14 March 2012, Report of the Congress of Local and Regional authorities of the Council of Europe (rapporteur: Britt-Marie Lövgren, Sweden, L, ILDG): https://wcd.coe.int/ViewDoc.jsp?p=&id=1918543&Site=COE&direct=true.

10. ECRI Report on Germany (fifth monitoring cycle), CRI(2014)2, adopted on 5 December 2013 and published on 25 February 2014: https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Germany/DEU-CbC-V-2014-002-ENG.pdf.

rebuilding trust, restoring security". While the top priorities are rebuilding trust among participating States and maintaining efforts to achieve a political solution to the conflict in Ukraine, Federal Minister for Foreign Affairs Frank-Walter Steinmeier announced that Germany would also "pay particular attention to safeguarding commitments [in the field of human rights] within the OSCE area and to improving their implementation".[11]

15. This active international involvement is also made possible by the sound economic results of Germany with real gross domestic product (GDP) growth of 1.7% in 2015, general government debt of 74.9% of GDP in 2014 and a 4.6% unemployment rate in the first quarter of 2016.[12] In 2015, the official development assistance from Germany totalled USD 17.78 billion, 0.52% of the gross national income (GNI) (which still falls short of the United Nations target of 0.7%), representing an increase of 25.9% compared to 2014, mostly due to in-donor refugee costs.[13] While generally particularly prudent as to the participation in military operations abroad, on 26 November 2015, immediately after the terrorist attacks in Paris, the German Federal Government decided to provide cover and logistic support to French air strikes in Syria (with six reconnaissance planes, a satellite radar and a frigate). On 5 December 2015, the *Bundestag* authorised this operation with a renewable one-year-mandate. It involves about 1 200 members of the German armed forces, in addition to 650 soldiers deployed to Mali to support the United Nations peacekeeping mission.

2. Background

16. This periodic report was drafted in line with Resolution 2018 (2014) and the explanatory memorandum approved by the committee on 17 March 2015. This report is based, *inter alia,* on the most recent findings of the Council of Europe monitoring mechanisms, the reports of the Parliamentary Assembly and the Commissioner for Human Rights, and, when relevant, reports prepared by other international organisations and civil society. The rapporteur would also like to thank the German delegation to the Parliamentary Assembly and the German authorities for their comments[14] on the preliminary draft report, which have been taken into consideration in the preparation of this report.

17. In order to allow for a clear and systematic presentation, this report is organised in three parts making reference to the three pillars of the Council of Europe's work: democracy, human rights and the rule of law. The rapporteur believes, however, that these three dimensions of common European values and standards are necessarily interconnected and indivisible. For example, while clearly representing a threat to democracy, extremism, racism and intolerance also pose a challenge to the rule of law and endanger the respect of human rights; the situation of media freedom is crucial for the realisation of the right to freedom of expression, but is also an important factor for the functioning of democracy; oversight of intelligence and security services is related to the three pillars of the Council of Europe's work, etc.

18. While stressing again the overall commitment of the German people to democracy and human rights, a large part of this report addresses the issues of xenophobia, racism and intolerance which represent a particularly dangerous threat to our common values. Drawing on the conclusions of many international monitoring bodies, the rapporteur believes that this area constitutes one of the most important and urgent challenges Germany, as well as many other European States, has to face. However, this and other issues touched upon in the report should not be taken out of the context of the very positive record in terms of democracy, human rights and the rule of law for which Germany can be rightfully congratulated.

11. "Strengthening dialogue, trust and security in the OSCE region at the heart of German Chairmanship in 2016", OSCE, 1 January 2016: www.osce.org/cio/213666.
12. Data of the Federal Statistical Office: https://www.destatis.de/EN/FactsFigures/NationalEconomyEnvironment/NationalEconomyEnvironment.html.
13. OECD, Development aid in 2015 continues to grow despite costs for in-donor refugees, Detailed summary, 13 April 2016, www.oecd.org/dac/stats/ODA-2015-detailed-summary.pdf.
14. See comments by members of the delegation of Germany to the Parliamentary Assembly and by the government on the preliminary draft periodic report on Germany, AS/Mon (2016) 33.

3. Democracy

3.1. German federalism and local democracy

19. The sixteen *Länder* that compose the Federal Republic of Germany are legally equal, enjoy the same constitutional status and possess their own Constitution and internal political structure – with a government, a unicameral parliament (*Landtag*), judicial system, etc. The city-States of Berlin, Bremen and Hamburg have a double status as *Länder* and municipalities, and their deliberative body is the legislative organ of the *Land* and of the municipal authority.

20. The Basic Law defines the relations between the Federal Government and the *Länder*, and the Federal Constitutional Court is responsible for the arbitration of conflicts between them, playing a leading role in interpreting the concrete implementation of the German federalism. Article 79 section 3 of the Basic Law protects the federal structure of Germany from constitutional amendments. As mentioned above, the *Länder* have the legislative power unless the Basic Law states otherwise; they are also responsible for the implementation of federal legislation. The governments of the *Länder* have an institutionalised representation and legislative power on the federal level through the *Bundesrat*, which holds the right of veto on certain federal bills[15] and is consulted on the others.

21. Recently, two constitutional amendments reformed the federal structure of Germany. In 2006, the *Föderalismusreform I* clarified and modified the power-sharing and reduced the number of federal laws requiring the consent of the *Bundesrat* while providing more legislative autonomy to the *Länder* (e.g. exclusive legislative competence in the field of education, including universities). In 2009, following a 2006 decision by the Federal Constitutional Court, the *Föderalismusreform II* focused on the financial relationship between the *Länder* and the Federation and on the public debt management at federal and State level.

22. As far as the local authorities are concerned, the Basic Law guarantees the right of municipalities and associations of municipalities (*Gemeindeverbände*) to self-government (Article 28). Matters of local government fall within the competence of the *Länder*. The constitutional amendment of 2006 withdrew the right of the Federal Government to directly confer mandatory functions on local authorities. In principle, the local authorities are responsible for the matters not conferred expressly on federal or *Land* authorities, but the *Länder* can transfer additional responsibilities to them. The local councils are elected by general direct elections and, except in the city-States, the mayors are usually elected directly.

23. Germany signed the European Charter of Local Self-Government (ETS No. 122) in 1985 and ratified it in 1988.[16] In 2012, following a monitoring visit by a delegation focusing on the situation of the local authorities and their relations with the *Land* governments, the Congress of Local and Regional Authorities produced a detailed report and adopted a recommendation on "Local democracy in Germany".[17] In the recommendation, the Congress expressed satisfaction, *inter alia,* that the right to self-government of municipalities was recognised in the Federal and *Länder* Constitutions, that the German authorities had made progress in the area of local government finances and that the mode of consultation with local government associations was formally recognised in the procedural rules of the Federal Government.

24. While recognising that Germany complied with the requirements of the European Charter of Local Self-Government, the Congress made several recommendations concerning the guarantees for local finances and institutionalisation of the participatory rights of associations of local authorities. It is to be noted that the rules of procedure of the federal ministries and of the German *Bundestag* provide for the participation of the local authorities. Similar participatory arrangements are also enshrined in the *Länder*.[18] It also recommended that

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15. The draft legislation "affecting the division of political tasks between the Federation and the federal States i.e. provisions pertaining to legislative, administrative and jurisdictional competence nationally and vis-à-vis the European Union; the apportionment of tax revenue between the Federation and the federal States; stipulation of the administrative procedure to be applied by State authorities in enforcing federal laws". Website of the *Bundesrat*: www.bundesrat.de/EN/funktionen-en/funktion-en/funktion-en-node.html.

16. Germany declared that the scope of Article 9.3 ("Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate") would not apply to municipal associations (*Gemeindeverbände*) in the *Land* of Rhineland-Palatinate and to the counties (*Kreise*) in all the *Länder*.

17. CG(22)7, Local and regional democracy in Germany, op. cit., and Recommendation 320 (2012), adopted on 21 March 2012.

18. AS/Mon (2016) 33, p. 5.

Germany sign the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207) – recommendation that remains unimplemented due to the fact that not all *Länder* have given their consent to the signature of the Additional Protocol.

3.2. General elections

25. According to Articles 38 and 39 of the Basic Law, the members of the *Bundestag* are elected in general, direct, free, equal and secret elections for a four-year term. The electoral system combines the principle of proportional representation with the elements of the single member system.[19] The *Bundestag* is composed of 598 seats, a number which is subject to variations due to the electoral system: 299 members are elected in single-seat electoral districts (under the first-past-the-post system), the rest of the members are elected on the closed party lists in each of the 16 *Länder* ("Land lists"). The voters therefore cast two votes: the first goes to a candidate in the single-seat electoral district, and the second to a *Land* list. The electoral threshold for the parties to participate in the distribution of proportional seats is 5% of the second votes at the federal level, but a party can still participate in the allocation of such seats if it wins in at least three single-seat electoral districts. Following the proportional seat allocation, the number of the single-seat electoral districts won in each *Land* is deducted from the number of seats that the parties received on the proportional basis in that *Land*; the remaining mandates are fulfilled according to the order of candidates on the lists. Until the 2013 parliamentary elections, if a party had received more single-seat mandates than its proportion of the second votes, it retained these excess "overhang" mandates (*Überhangmandate*), which resulted in an increase of the overall number of seats in the *Bundestag*. Following the amendment of the Federal Electoral Act (*22. Gesetz zur Änderung des Bundeswahlgesetzes*) of 3 May 2013, seats are not allocated to the parties on the basis of *Land* allotments, but rather for the electoral area as a whole. The parties then internally sub-allocate them to their *Land* lists: the number of seats is increased until no party has more direct mandates than the number of seats to which it is entitled based on its proportion of the second vote.[20]

26. The last general elections took place on 22 September 2013. Thirty parties participated in these elections. No new parties entered the *Bundestag*, and the liberal-democrat FDP (which had been a member of coalition governments during 52 of the 64 years between 1949 and 2013) was voted out for the first time in the German post-war history. With a turnout of 71.5%, the following parties passed the electoral threshold: CDU (34.1% of second votes), SPD (25.7%), *Die Linke* (8.6%), *Bündnis 90/Die Grünen* (8.4%) and CSU (7.4%).[21] These elections resulted in the allocation of 33 "extra mandates" due to the additional stage of seat distribution, bringing the total number of seats in the *Bundestag* to 630. 230 members (36.5%) of the current *Bundestag* are women.

27. Following an invitation from the German authorities to observe the 2013 federal vote, the OSCE/ODIHR deployed an Election Expert Team to assess the electoral legal framework, as well as the legislation and practice concerning political party and campaign finance. The mission concluded[22] that "the legal framework provided a solid basis to conduct genuine elections". The mission also assessed the amendments to the electoral legislation introduced prior to the elections – some of them addressed previous OSCE/ODIHR recommendations. The most significant amendment, adopted in May 2013, concerned the seat allocation method following the 2008 and 2012 judgments by the Federal Constitutional Court on the unconstitutionality of the electoral system;[23] an additional stage of seat distribution was introduced to improve the proportionality. Whilst these amendments enjoyed political consensus, the OSCE/ODIHR mission noted that they "were adopted less than a year before the elections, which is contrary to good electoral practice", referring to the recommendations of the European Commission for Democracy through Law (Venice Commission).[24] The OSCE/ODIHR also noted that a few previous recommendations remained unaddressed, in particular concerning "legal provisions allowing significant difference in the number of registered voters in each electoral

19. For a detailed description of the German electoral system see: Elections to the Federal Parliament (Bundestag), 22 September 2013, OSCE/ODIHR Election Expert Team Final Report, 16 December 2013: www.osce.org/odihr/elections/109518?download=true.
20. AS/Mon (2016) 33, p. 6.
21. "Final result of the Election to the German Bundestag 2013. Federal Result", Website of the Federal Returning Officer: https://www.bundeswahlleiter.de/en/bundestagswahlen/2013/ergebnisse.html.
22. Elections to the Federal Parliament (*Bundestag*), 22 September 2013, OSCE/ODIHR, op. cit.
23. Both judgements concerned the disproportionality caused by "overhang" mandates and "negative voting weight", i.e. additional votes for a party list that could lead to the loss of a seat.
24. Paragraph 65 of the Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev-e, Venice Commission, 2002: www.venice.coe.int/webforms/documents/CDL-AD%282002%29023rev-e.aspx.

district and the absence of explicit legal provisions on election observation". The mission also proposed several recommendations as to party and campaign financing legislation (including three priority recommendations[25]) and the mechanism of submitting complaints prior to election day.

28. The German authorities provided detailed comments on the recommendations made by the OSCE/ODIHR in relation to the late amendment of the election legislation (prompted, as mentioned earlier, by the 2012 decision of the Constitutional Court).[26] They argued that the difference in the number of registered voters in each electoral district has no influence on the political outcome of the election in the German electoral system, as the *Bundestag*'s political composition depends on the relative proportions of second votes received nationwide, not the number of constituencies won. As regards election observation, in the view of the authorities, observation of the election process is open to everyone, which renders additional provisions unnecessary.[27]

29. As far as party funding is concerned, the authorities stated that non-submission of statements of accounts are penalised by a loss of entitlement to funds from public funding for political parties and, since the 2015 amendment of the Act on Political Parties, the loss of legal status as a political party after six years and the imposition of penalty payments. The law also requires disclosing operating expenditure on election campaigns, in particular timely publication of donations when their total exceeds €10 000, and of single donations exceeding €50 000. The upgraded legal framework also allows decisions taken by County or *Land* Electoral Committees to be challenged at the *Land* or the Federal Electoral Committees, and, since 2012, at the Federal Constitutional Court regarding decisions by the Federal Electoral Committee on the non-admission of lists to the *Bundestag* election.[28]

3.3. Migration in the political debate

30. The massive arrival of migrants and asylum seekers to Germany and to Europe and the welcoming, humanitarian stance of the Federal Government towards refugees – notably represented by Chancellor Merkel's "open arms" approach persistently refusing to set a limit for the influx of refugees – provoked heated debates and political conflicts. Three observations may illustrate the political unease that polarises German society, placing migration at the centre of the public debate.

31. First, the Chancellor's position was on numerous occasions contested by some CDU and CSU members. As it became increasingly hard for the local authorities to cope with the arrival of refugees in Germany, since autumn 2015, the debate on how to handle the situation has intensified.[29] The head of the CSU and Minister-President of Bavaria Horst Seehofer became a particularly outspoken critic of the federal refugee policy. In October 2015, he declared that should the situation not improve, he was considering sending refugees back to Austria, *de facto* violating the federal law. In February 2016, he accused the Federal Chancellor of pursuing the "rule of injustice" (*Herrschaft des Unrechts*).[30]

32. In spite of these criticisms, at the CDU Congress in Karlsruhe on 14 December 2015, Chancellor Merkel succeeded in persuading the overwhelming majority of the delegates to support her refugee policy: the declaration adopted by the Congress called for a reduction of the flow of migrants and refugees but did not propose a limit to the number of asylum seekers.

33. On 13 April 2016, in an interview with *Die Welt* newspaper, the CSU Secretary General Andreas Scheuer called for a stronger and more critical approach to political Islam and proposed to adopt an Islam Law (which seems to be similar to the Austrian 2015 law). According to him, certain political currents of Islam "prevent people from integrating". Two measures were suggested: prohibition of foreign funding of mosques

25. The priority recommendations concerned parties' annual financial statements, donations and detailed information on campaign expenditure.
26. The decision of the Federal Constitutional Court of 25 July 2012, which declared invalid the previous procedure for allocating seats, made it necessary to replace it for the 2013 *Bundestag* election. A bill was tabled in the *Bundestag* by the CDU/CSU, SPD, FDP and Alliance 90/The Greens parliamentary groups on 14 December 2012 (*Bundestag* printed paper 17/11819); the Act entered into force on 9 May 2013. The *Bundestag* election was held on 22 September 2013. In AS/Mon (2016) 33, p. 6.
27. AS/Mon (2016) 33, p. 6/7.
28. *Ibid*.
29. CDU/CSU members have addressed several open letters to Chancellor Merkel – asking her to provide information on how many more migrants and refugees were expected to come to Germany and how the government intended to handle the situation, or requesting a change in the policy.
30. This phrase was interpreted as an implicit reference to *Unrechtsstaat*, term used to describe dictatorships, such as the GDR.

and Muslim institutions and compulsory training in Germany and in the German language for all Imams who intend to work in the country.[31] This proposal is clearly related to the debate on the integration and acceptance of immigrants and refugees.

34. Second, the elections to *Landtage* of Baden-Württemberg, Rhineland-Palatinate and Saxony-Anhalt held on 13 March 2016 – the first major poll since the massive arrival of migrants and asylum seekers – was expected to become a test of the popular support for Chancellor Markel's policy. The electoral performance of the populist AfD party, founded in 2013, was particularly discussed in the media. In July 2015, the AfD elected a proponent of anti-immigration policy, Frauke Petry, as its new leader, replacing the more moderate Eurosceptic Bernd Lucke. This leadership change was seen as a far-right turn for the party. Together with a group of other members, Bernd Lucke left the AfD, accusing the party of growing islamophobic and xenophobic views (he subsequently established a new Eurosceptic party, the Alliance for Progress and Renewal (*Allianz für Fortschritt und Aufbruch,* ALFA). A month after the March *Landtag* elections, the AfD leadership called for a ban on minarets, burqas and muezzin prayer calls and stated that Islam was incompatible with the German Constitution.[32] Secretary General of the Council of Europe Thorbjørn Jagland strongly protested against these statements as going against the European values.[33] On 1 May 2016, the AfD congress in Stuttgart adopted a party manifesto containing the same Islamophobic points. The major political parties immediately condemned this move.[34]

35. As a result of the 13 March 2016 elections, the AfD entered into the three *Landtage* with 15.1% of votes in Baden-Württemberg, 12.6% in Rhineland-Palatinate and 24.2% in Saxony-Anhalt.[35] Nevertheless, the overwhelming majority of the voters backed the parties and candidates taking a "pro-asylum" stance: the Greens came first in Baden-Württemberg, the SPD in Rhineland-Palatinate and the CDU in Saxony-Anhalt. Moreover, the CDU suffered the biggest losses in the *Länder* where the heads of lists distanced themselves from Chancellor Merkel's refugee policy the most (Julia Klöckner in Rhineland-Palatinate and Guido Wolf in Baden-Württemberg). In the aftermath of the elections, Chancellor Merkel refused to change her refugee policies.

36. It is worth noting that the major parties declared they would not imitate the AfD populist stance following the elections.[36] In Saxony-Anhalt, where the AfD received the biggest number of votes, the CDU, Greens and SPD decided to join forces to keep the populist party out of the government.[37]

37. The third indicator of the intensity of the debates over migration policies in Germany is the emergence of Islamophobic and anti-refugee protest movements, most notably the so-called "Patriotic Europeans against the Islamisation of the West", or PEGIDA. Having emerged in October 2014 in Dresden, this movement found support in other German big cities, including Leipzig, Munich and Hanover.

38. PEGIDA – called LEGIDA in Leipzig – mostly acts through protest rallies which often become a stage for xenophobic statements and hate speech and sometimes for violence, as on 11 January 2016 in Leipzig, when far-right hooligans attacked shops and bystanders (211 people were arrested) on the margins of a LEGIDA rally. In October 2015, the founder of PEGIDA, Lutz Bachmann, was charged with inciting hatred against migrants in his comments posted on Facebook in September 2014, while he was still on probation following convictions for burglary, drug dealing and assault.[38] On 3 May 2016, a district court in Dresden found him guilty and sentenced him to a fine of €9 600.[39] Senior German politicians, including Chancellor

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31. "German conservatives call for Islam Law", *Deutsche Welle,* 13 April 2016: www.dw.com/en/german-conservatives-call-for-islam-law/a-19184632.
32. "Germany's AfD takes overt anti-Islam stance", *Deutche Welle,* 17 April 2016: www.dw.com/en/germanys-afd-takes-overt-anti-islam-stance/a-19194641.
33. "Secretary General Jagland concerned by Islamophobic statements of 'AfD' party in Germany", Council of Europe, 18 April 2016: https://go.coe.int/jLF2l.
34. "AfD manifesto criticized as 'unconstitutional' for statements on Islam", *Deutsche Welle*, 2 May 2015: www.dw.com/en/afd-manifesto-criticized-as-unconstitutional-for-statements-on-islam/a-19228574.
35. The AfD had already been represented in the *Landtage* of Brandenburg and Saxony, as well as in the city-States of Bremen and Hamburg, but with few seats (14 seats in Saxony was the maximum).
36. "Germany assesses shake-up following election gains for AfD", *Deutsche Welle*, 14 March 2016: www.dw.com/en/germany-assesses-shake-up-following-election-gains-for-afd/a-19115149.
37. "Coalition government in Saxony-Anhalt to exclude AfD", *Deutsche Welle*, 19 April 2016: www.dw.com/en/coalition-government-in-saxony-anhalt-to-exclude-afd/a-19199791.
38. "PEGIDA leader Lutz Bachmann denies xenophobic remarks", *Deutsche Welle*, 19 April 2016: www.dw.com/en/pegida-leader-lutz-bachmann-denies-xenophobic-remarks/a-19199027.
39. "PEGIDA founder Lutz Bachmann found guilty of inciting hatred", *Deutsche Welle*, 3 May 2016: www.dw.com/en/pegida-founder-lutz-bachmann-found-guilty-of-inciting-hatred/a-19232497.

Merkel, have condemned PEGIDA. In many cities, with the exception of Dresden, thousands of counter-demonstrators, who had taken to the streets peacefully in support of a more outward-looking Germany, confronted PEGIDA demonstrators.[40]

39. The rapporteur believes that critical debate on policies chosen by the government is an indispensible element of democracy, that such debates make democracy work. There should be no forbidden topics for rational and respectful discussion. Nevertheless, political debates should not become a generator of hatred, xenophobia and disdain for others. As Secretary General Jagland pointed out, "It is right and necessary to have a debate about important issues like integration and education, but to depict Islam as a threat to our society is wrong and hurtful to millions of European Muslims. We need to strengthen the respect for common values in Europe, not to create new divisions".[41] At the end of her visit to Germany on 11 and 12 January 2016, then Parliamentary Assembly President Anne Brasseur rightly stated: "We must stop the populists who surf on fear of migrants. … We must put party politics aside and unite in order to create a democratic alliance that can stand firm against those who spread hate."[42] In this respect, the rapporteur welcomes the tolerant position of the Federal Government and major political parties who continue to resist the temptation of populism.

40. At the same time, and in this context, it is important to acknowledge the efforts by the German authorities and civil society organisations to host, accommodate and assist the refugees, such as "The People Support People" programme, which enables members of the public to "adopt" young refugees or a refugee family. In another example, the "Federal Voluntary Service" now provides the possibility for up to 10 000 volunteers a year living in Germany to support refugees in the framework of this programme. The "Living Democracy!" federal programme provides support to many initiatives, associations and individuals working for a diverse, peaceful and democratic community, in particular to prevent extremism, with a total budget amounting to €50.5 million in 2016, which is expected to rise to €104.5 million in 2017.[43]

3.4. Racism and intolerance

41. Several international bodies noticed that racism and intolerance had been on the rise in Germany for several years: e.g., the Advisory Committee on the Framework Convention for the Protection of National Minorities (Framework Convention) observed in 2015 "worrying developments as regards public manifestations of racism and xenophobia";[44] the United Nations Committee on the Elimination of Racial Discrimination (CERD) expressed concerns over "the proliferation and dissemination of racist ideas by certain political parties and movements and about the lack of efficient measures taken to strongly sanction and deter such discourses and behaviours".[45] The authorities have refuted the view that no effective measures have been taken in this respect. They have provided the rapporteur with detailed information about measures taken (including criminal sanctions and intensified efforts to step up and consolidate further training in the judicial sphere on this subject).[46] At the federal level, the Ministry of the Interior and the Federal Ministry of Family, Senior Citizens, Women and Youth presented their common Strategy on prevention of extremism and promotion of democracy.[47] At State and local levels, several programmes, strategies and initiatives have been in force for decades in addition to the democratic forces in society, which are constantly active against racism and extremism.[48]

42. At the same time, the international monitoring bodies note the strong popular demonstrations and statements by the authorities in support of diversity and mutual respect. *Inter alia*, CERD welcomed the intention of the authorities to revise the National Plan of Action against Racism "to reflect the adoption of a

40. Comments by SPD MP Gabriela Heinrich, AS/Mon (2016) 33, p. 3.
41. "Secretary General Jagland concerned by Islamophobic statements of 'AfD' party in Germany", op. cit.
42. "President, ending Germany visit: we must stop the populists who surf on fear of migrants", 13 January 2016: www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5972&lang=2&cat=15.
43. AS/Mon (2016) 33, p. 5.
44. Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Germany, ACFC/OP/IV(2015)003, adopted on 19 March 2015: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805946c6.
45. Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth to twenty-second periodic reports of Germany, CERD/C/DEU/CO/19-22, 30 June 2015: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/139/15/PDF/G1513915.pdf?OpenElement.
46. AS/Mon (2016) 33, p. 7.
47. www.bmi.bund.de/SharedDocs/Kurzmeldungen/DE/2016/07/praeventionsstrategie-gegen-extremismus-mit-bmfsfj.html.
48. Comment from CDU/CSU MP Dr Thomas Feist.

more strategic approach".[49] In its 2016 Resolution on the implementation of the Framework Convention by Germany, the Committee of Ministers of the Council of Europe recommended that the German authorities pursue efforts "to combat racism and intolerance and prevent right-wing extremism"[50].

3.4.1. Legal framework

43. Several concerns have been voiced regarding the legal framework prohibiting hate speech and hate crime. In particular, Section 130 of the German Criminal Code prohibits public incitement to violence, hatred or any arbitrary measure, and public insults and defamation, but such acts must be "liable to disturb public order" (or public peace). CERD and ECRI recommended that this proviso relating to disturbance of public order be removed from Section 130. According to ECRI, this causal link may be difficult to prove and this restriction could constitute an impunity gap.[51] In the reply to the report of the Council of Europe Commissioner for Human Rights, the German authorities explained that this proviso represented a "corrective element in order to eliminate cases which are not severe enough to merit criminal sanctions" to achieve a balance between combating racism and guaranteeing free speech in a democratic society.[52] The authorities further explained that Section 130.2 of the Criminal Code, which criminalises the dissemination of written material with such content and the act of making such content accessible to the public via radio, media services or telecommunication services, *does not* contain this disputed requirement.[53]

44. In 2011, Germany ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189).

45. With regard to hate crimes, on 8 May 2015, an amendment to Section 46 of the Criminal Code defining the racist motivation of an ordinary offence as an aggravating circumstance fulfilled (after two failed attempts) a long-standing recommendation of many monitoring bodies, including ECRI. The Commissioner for Human Rights[54] and CERD[55] have already welcomed this amendment. At the same time, the Commissioner noted that reservations were expressed by several organisations about the fact that Section 46 did not expressly refer to motivations other than racist ones, for example homophobic and transphobic motives. In their comments, the authorities disagreed with this point of view, and considered that "other motivations showing contempt for human dignity" encompasses all recognised aspects of discrimination, in particular motives directed against the victim's sexual orientation, and thus includes homophobic and transphobic motives.[56]

46. Another area recurrently described as presenting important shortcomings is the data collection on hate crimes. Hate crimes are recorded under the category of "politically motivated crimes" (*Politisch motivierte Kriminalität*), including four categories: right-wing politically motivated crimes, left-wing politically motivated crimes, politically motivated crimes committed by foreigners, and other politically motivated crimes. Many international human rights organisations and non-governmental organisations (NGOs), including the Commissioner for Human Rights, ECRI and Amnesty International,[57] suggested a reform to take into account all hate crimes, and not only those committed by extremist groups with political motivation (since many racist and homophobic offences are not based on any political motivation). ECRI noted in 2013 that the title "politically motivated crimes" could itself be misleading for police officers recording offences. The German authorities explained that all criminal acts "motivated by intolerance are automatically and simultaneously

49. Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth to twenty-second periodic reports of Germany, op. cit.
50. Committee of Ministers Resolution CM/ResCMN(2016)4 "On the implementation of the Framework Convention for the Protection of National Minorities by Germany" adopted on 3 February 2016 at the 1246th meeting of the Ministers' Deputies: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1e3d.
51. ECRI Report on Germany (fifth monitoring cycle), op. cit
52. CommDH/GovRep(2015)7, Comments by the German Federal Government on the Report by Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe, following his official visit to Germany on 24 April and from 4 to 8 May 2015, 1 October 2015 (translation): https://wcd.coe.int/ViewDoc.jsp?p=&id=2363203&Site=CM&direct=true.
53. AS/Mon (2016) 33, p. 7.
54. Report by Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe, following his official visit to Germany on 24 April and from 4 to 8 May 2015, CommDH(2015)20, 1 October 2015: https://wcd.coe.int/ViewDoc.jsp?p=&id=2356893&Site=COE&direct=true.
55. Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth to twenty-second periodic reports of Germany, op cit.
56. AS/Mon (2016) 33, p. 7
57. Amnesty International report 2014/2015. The state of the world's human rights, Amnesty international, 2015, p. 162: https://www.amnesty.org/download/Documents/POL1000012015ENGLISH.PDF.

classified as 'politically motivated'" and that new police instructions required that "the possibility of a racist, xenophobic, inhuman or otherwise political motivation be considered as a matter of principle in cases of violent crime".[58]

47. In addition, according to the international monitors, the lack of data on the ethnic origin of victims of offences (the authorities seem quite reluctant to gather such data) limits the ability to act against racism and discrimination. The use of the generic term "persons with a migrant background" to identify victims of racial hate crimes and discrimination was criticised by CERD. The Commissioner for Human Rights, ECRI and CERD recommended collecting comprehensive data broken down by grounds such as ethnic origin in a manner that is voluntary and based on self-identification and anonymity. In their comments, the authorities reiterated their position that collecting official statistics about the migrant background of persons only results in limited conclusions (i.e. about the size of ethnic groups) and is not relevant in cases of xenophobic/racist hate crimes: for such crimes, the authorities would inquire about the motivation of the perpetrators, while the victims of hate crimes – also for historical reasons – are not required to disclose their ethnic origin (only their nationality). Collecting such data would raise legal and practical problems.[59]

3.4.2. Organised right-wing extremism

48. The German authorities continue to combat organised right-wing extremism. The number of extreme right-wing sympathisers was estimated to be around 21 000 in 2014 (21 700 in 2013), including 5 600 neo-Nazis.[60] Twenty such extremist organisations were prohibited between March 2005 and September 2012.[61] Anti-democratic associations can be simply banned by the Ministry of the Interior, as opposed to political parties that can only be outlawed by the Federal Constitutional Court. The last parties to be banned were the far-right Socialist Reich Party in 1952 and the Communist Party of Germany in 1956. Hence, according to the Federal Ministry of the Interior, the neo-Nazi circles increasingly use "the political party as a model of organisation to make it more difficult to ban. Possible entitlement to State funding provides further incentive".[62] The 2014 report on the Protection of the Constitution quotes two relatively new parties that are used by neo-Nazis as platforms for activities: *DIE RECHTE* (The Right) and *Der III. Weg* (The Third Way).

49. In this context, it is worth noting that on 1 March 2016, the Federal Constitutional Court started the hearings on the possible ban of the far-right ultranationalist National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands*, NPD), following the 2012 decision of the *Bundesrat* to file an application claiming the party espouses racist views and is a threat to the democratic order. The NPD is represented in the *Landtag* of the north-eastern *Land* of Mecklenburg-Western Pomerania[63] and since 2014 in the European Parliament (where one seat is held by Ugo Voigt, former leader of the party); around 300 municipal councillors are also NPD members. The membership of the NPD is falling (5 200 in 2014; 5 500 in 2013), but it remains the most influential right-wing extremist party.[64] Politicians and security officials believe it plays a role in anti-immigrant protests and contributes to the spread of violence through hate speech.

50. While the Federal Government supported the suit without joining it formally, some think that it could be counterproductive. Our former colleague and former Federal Minister of Justice, Sabine Leutheusser-Schnarrenberger, warned that the case "could backfire legally and politically, with a ban far from certain and the NPD unnecessarily gaining publicity in the process". It must be proven that the NPD is actively working to overthrow the constitutional order, and a two-thirds majority of judges is required to ban the party. The Federal Constitutional Court had attempted to ban the NPD in 2003, but found that too many NPD members, including its leaders, were undercover agents of the security forces.

51. In 2013, ECRI recommended that the German authorities introduce into the law an obligation to discontinue public financing of organisations, including political parties, which promoted racism (presently public funding ceases only if the party is banned).[65] At the same time, ECRI welcomed the preventive work conducted by the authorities to make children and young people more aware of the dangers of right-wing

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58. Comments by the German Federal Government on the Report by Nils Muižnieks, op. cit.
59. AS/Mon (2016) 33, p. 8.
60. Federal Ministry of the Interior, 2014 Annual Report on the Protection of the Constitution. Facts and Trends, 2015, p. 9: https://www.verfassungsschutz.de/download/annual-report-2014-summary.pdf.
61. Report by Nils Muižnieks, op. cit.
62. Federal Ministry of the Interior, 2014 Annual Report on the Protection of the Constitution, op. cit., p. 12.
63. With five seats; the party was voted out of the Saxony *Landtag* in 2014, where its representatives had held eight seats.
64. Federal Ministry of the Interior, 2014 Annual Report on the Protection of the Constitution, op. cit., pp. 9 and 11.
65. ECRI Report on Germany (fifth monitoring cycle), CRI(2014)2, op. cit.

extremism and to encourage them to take part in combating this evil. In recent years, many civil society initiatives emerged to stand up against intolerance, like the "Exit project" providing assistance to members of neo-Nazi organisations wishing to leave those circles, or *Rechts gegen Rechts*, an organisation launching original campaigns based on the principle of "unwilling donations" by right-wing extremists to anti-racist initiatives.[66] The rapporteur welcomes this commitment of the civil society and the authorities' support; German experience may serve as example for anti-extremist mobilisation in other European countries.

3.4.3. Extremist violence, hate crime and hate speech

52. Sadly, extremist violence is on the rise in Germany. According to the Federal Ministry of the Interior, in 2014, there were 990 violent crimes motivated by right-wing extremism, 23.6% more than in 2013 (801); the largest number since 2008.[67] The number of xenophobically motivated violent crimes increased from 494 in 2013 to 554 in 2014.[68] The latest Report on the Protection of the Constitution published in June 2016 signals a dramatic rise in the number of violent right-wing extremist crimes with a xenophobic background[69]; Right-wing extremist acts of violence increased by 42.2% compared to 2014 (from 990 to 1408). At the same time, while not of the same category, there was a considerable increase in the number of violent left-wing extremist crimes, with an increase of 61.6% compared to 2014 (i.e. from 995 to 1 608).[70]

53. On 17 October 2015, candidate for the mayorship of Cologne Henriette Reker was stabbed by a former extreme-right wing activist. On 15 April 2016, the trial against the alleged perpetrator opened; according to the prosecutors, the attack was motivated by Ms Reker's welcoming stance towards refugees.[71] On 21 August 2015, the Headquarters of the SPD in Berlin had to be evacuated after a bomb threat apparently linked to Federal Vice-Chancellor Sigmar Gabriel's visit to a refugee shelter in Heidenau, Saxony.

54. In 2014-2015, there was also an upsurge in the number of attacks against facilities for asylum seekers and refugees. 1 031 such attacks were registered by the police in 2015,[72] 199 in 2014 and 69 in 2013. In the first quarter of 2016, 347 crimes linked to refugee accommodation were registered by the Federal Criminal Police Office (BKA), including three attempted homicides, 37 arson attacks and 23 injuries.[73] On 6 May 2015, the police arrested a group planning to detonate a nail bomb in a home for asylum seekers (four persons went on trial on 27 April 2016); on 22 October 2015, the police prevented an attack by an extreme right-wing group that had apparently planned to blow up a refugee shelter in Bavaria. According to *Die Zeit*, between January and December 2015, 222 dangerous attacks (mostly arsons) were carried out against refugee shelters in Germany. Only 12 cases have been resolved, and only four incidents resulted in the conviction of a perpetrator.[74] On 14 May 2016, the head of the BKA Holger Münch reported that 45 arson attacks against refugee shelters had been carried out since the beginning of the year. While German media are openly speaking about established right-wing terrorism, the head of the BKA also recognised a possible risk of the emergence of "criminal or even terrorist structures" and assured that German police took this danger very seriously.[75]

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66. See, for example, "Hitler birthday meal deal becomes unwitting donor to anti-neo-Nazi drive", *Deutche Welle*, 20 April 2016: www.dw.com/en/hitler-birthday-meal-deal-becomes-unwitting-donor-to-anti-neo-nazi-drive/a-19201288.
67. Federal Ministry of the Interior, 2014 Annual Report on the Protection of the Constitution, op. cit., p. 12.
68. Comments by the German Federal Government on the Report by Nils Muižnieks, op. cit.
69. The percentage of violent criminal offences against accommodation centres for asylum applicants more than quintupled from 2014 to 2015. See. https://www.verfassungsschutz.de/en/public-relations/publications/annual-reports/annual-report-2015-summary, p. 6.
70. 2015 Report on the protection of the Constitution published by the Federal Ministry of the Interior in June 2016, https://www.verfassungsschutz.de/en/public-relations/publications/annual-reports/annual-report-2015-summary. More details about violence-oriented leftwing extremists to be found at pp.13-18.
71. "Man accused of stabbing Cologne mayor goes on trial", *Deutche Welle,* 15 April 2016: www.dw.com/en/man-accused-of-stabbing-cologne-mayor-goes-on-trial/a-19192002.
72. "Attacks on refugee homes as high as ever, German Criminal Police Office says", *Deutsche Welle,* 28 April 2016: www.dw.com/en/attacks-on-refugee-homes-as-high-as-ever-german-criminal-police-office-says/a-19221702. The authorities raised some questions about the stated number of suspects identified/convictions indicated by *Die Zeit*, as "flow" statistics are not compiled by the police or judicial system. They also noted that the number of cases recorded in the official criminal police statistics (1 031 crimes in 2015, of which 177 were violent offences) differs from civil society statistics and lists compiled by the press, as police assessments take into consideration the results of the relevant investigations; the attacks are categorised on the basis of criminal relevance, using police and judicial definitions. As investigations and court proceedings usually take a long time in cases of arson or aggravated arson (the average length of proceedings before the regional courts being in general 17.2 months), any analysis of the investigating authorities/courts based on the convictions secured at that point in time is premature. AS/Mon (2016) 33, p. 8/9.
73. "Attacks on refugee homes as high as ever, German Criminal Police Office says", op. cit.
74. "Germany in flames", *Die Zeit online,* 4 December 2015: www.zeit.de/politik/deutschland/2015-11/anti-immigrant-violence-germany.

55. With regard to the hate speech and hate crime, the Commissioner for Human Rights reports that "in 2014, according to civil society data, there were 292 protests against refugees, and notably against the establishment of reception facilities for asylum seekers. Eighty-one attacks against asylum seekers were reported".[76] In March 2016, reporters from the project "*Correctiv*" and *Der Spiegel* magazine issued an investigative report on the prosecution of crimes against refugees in 2014 (199 crimes were reported, including incitement to racial hatred, assault, bodily injury and property damage): in 157 such cases examined by the journalists, there were only 15 convictions. There was also one conviction for attempted murder.[77]

56. Among other issues of concern, the Commissioner for Human Rights particularly noted a rise in the number of attacks against mosques and Muslim people, negative attitudes to Roma and Sinti among the general population and antisemitic attitudes.[78] As recalled in the Assembly report on "Renewed commitment in the fight against antisemitism in Europe",[79] 1 596 antisemitic crimes were recorded by the police in 2014 in Germany, compared to 1 275 in 2013. According to the data on hate crimes collected by the OSCE/ODIHR, 129 hate crimes motivated by bias against towards lesbian, gay, bisexual and transgender (LGBT) people were recorded by the police in 2014; including 35 cases of physical assault (the real number may be higher than the official data: civil society reported 118 violent attacks).[80] ECRI recommended that the Federal Government and the *Länder* which have not yet adopted an action plan or a comprehensive programme to promote tolerance towards LGBT people take inspiration from existing plans and draw up their own measures. The attention of the rapporteur was also drawn to the threats posed by the potential rise of religiously motivated anti-Semitism, Islamic fundamentalism and some movements within political Islam in Germany, which are openly or latently anti-Semitic or anti-Christian.[81] The authorities informed the rapporteur that the Federal Government is currently drawing up a new "National Action Plan against Racism", which will cover the subjects of homophobia and transphobia. It is expected to be completed – in consultation with civil society – in early 2017. Other measures were taken to address this issue, such as the setting up of a Same-Sex Lifestyles and Gender Identity Division and of an interministerial working group to deal with the special situation of transsexual and intersex people in 2014.[82]

57. Islamist violence, while less widespread than right-wing extremism, also represents a potential threat, as in most European countries. As of early 2015, security forces were aware of more than 600 German or German-based Islamists who had departed for Syria or Iraq,[83] more than twice as many as in early 2014. In 2016, their number reached 800.[84] In April 2016, around 1 100 Islamists residing in Germany were considered to be highly dangerous.[85] A bomb blast that injured three people in a Sikh temple in Essen on 16 April 2016 was qualified by the authorities as a terrorist act, and the detained suspects have links with Islamist circles.[86] On 3 May 2016, the trial of a jihadist accused of war crimes in Syria started in Frankfurt.[87] Other recent Islamist-motivated acts of violence include, *inter alia*, the stabbing of a Federal Police officer in Hanover on 26 February 2016 by a 15-year-old girl – reportedly influenced by propaganda of the so-called "Islamic State" – and the attacks with an axe and knife on several people on a regional train near the city of

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75. "German police chief concerned at growing anti-refugee violence", *Deutsche Welle,* 14 May 2016: www.dw.com/en/german-police-chief-concerned-at-growing-anti-refugee-violence/a-19257795.
76. Report by Nils Muižnieks, op. cit.
77. "Report: Majority of crimes against refugees unsolved", *Deutche Welle,* 31 March 2016: www.dw.com/en/report-majority-of-crimes-against-refugees-unsolved/a-19156653.
78. Report by Nils Muižnieks, op. cit.
79. Report of the Committee on Equality and Non-Discrimination (rapporteur: Mr Boriss Cilevičs, Latvia, SOC), Doc. 14008. Dr Thomas Feist (CDU/CSU) also stressed in comments that the number of attacks against Jewish institutions is far higher than for all other religions and refers to Al-Quds demonstrations and their anti-Semitic, racist underlying motive of Islamic fundamentalism and political Islam in Germany. AS/Mon (2016) 33, p.4.
80. OSCE/ODIHR Hate Crime Reporting: Germany, 2014: http://hatecrime.osce.org/germany.
81. www.sueddeutsche.de/politik/antisemitismus-unter-muslimen-der-hass-ist-voellig-ausser-kontrolle-geraten-1.2059322. See also the 2015 Report on the protection of the Constitution, op. cit., pp. 19-23.
82. AS/Mon (2016) 33, p. 9.
83. Federal Ministry of the Interior, 2014 Annual Report on the Protection of the Constitution, op. cit.
84. "More than 800 Islamists leave Germany to join IS in Syria and Iraq", *Deutsche Welle,* 23 February 2016: www.dw.com/en/more-than-800-islamists-leave-germany-to-join-is-in-syria-and-iraq/a-19066880.
85. "Police swoop on Salafist properties in Bremen", *Deutsche Welle*, 26 April 2016: www.dw.com/en/police-swoop-on-salafist-properties-in-bremen/a-19214555.
86. See "Third person detained over Sikh temple blast in Essen", *Deutsche Welle*, 21 April 2016: www.dw.com/en/third-person-detained-over-sikh-temple-blast-in-essen/a-19206583.
87. "Trial opens in Frankfurt for German jihadist accused of war crimes in Syria", *Deutsche Welle,* 3 May 2016: www.dw.com/en/trial-opens-in-frankfurt-for-german-jihadist-accused-of-war-crimes-in-syria/a-19231715.

Würzburg on 18 July 2016 by a 17-year-old Afghan refugee. On 24 July, a 27-year-old Syrian blew himself up outside a wine cellar in the town of Ansbach, injuring 15 people. The so-called "Islamic State" later claimed responsibility for the crime.[88]

58. The German authorities take these threats to the peaceful and democratic cohesion of German society seriously. In the reply to the country report by the Commissioner for Human Rights, they provide detailed information on the measures taken to combat hate crime and hate speech.[89] The rapporteur underlines that everything possible needs to be done to avoid the situation of impunity for the crimes against refugees, and for hate crimes in general. Political leaders also need to continue to unequivocally condemn hate crimes and hate speech, supporting the part of civil society that represents, quoting President Gauck, "a Germany of light" opposed to "a Germany of darkness".[90]

59. Online hate speech has also become a growing matter of concern for the Federal Government, given the significant rise of xenophobic and racist posts on social networks and online platforms since the increase in refugees coming to Germany. The Federal Government considers that operators of these services should shoulder a degree of responsibility. A task force established by the Federal Government in 2015 and comprised of internet companies and civil society organisations led to an outcome paper "Together Against Hate Speech", in which the internet companies undertook: to establish user-friendly mechanisms, to report hate speech and to review and, if necessary, delete content considered as hate speech within 24 hours.[91] Germany is also participating in the Council of Europe's "No Hate Speech" initiative with a national campaign, supported by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (www.no-hate-speech.de).[92]

3.4.4. Racism in law enforcement

60. Monitoring bodies, including the Commissioner for Human Rights, the Advisory Committee on the Framework Convention, CERD, ECRI and the German Institute for Human Rights expressed concerns as to the racial profiling practices among German police and called for their prohibition. The Council of Europe Committee of Ministers joined this call.[93] There are reports of routine searches of individuals belonging to ethnic minorities without objective and reasonable justification "which, in accordance with the case law of the Strasbourg Court, constitutes discrimination".[94] In its submission to the United Nations Universal Periodic Review of Germany in 2013, the German Institute for Human Rights stated that the practice of ethnic profiling was approved by a court of first instance, and called for a legal ban on ethnic profiling.[95] This judgment was however annulled by a higher court, which made it clear that stop-and-search based exclusively on skin colour violates the principle of equal treatment in the German Basic Law.

61. More generally, there are worrying reports of racially motivated conduct by German law-enforcement bodies. Allegations of violence and insults have been reported,[96] but also less visible forms of racism, resulting from structures and procedures in law enforcement. In particular, it seems that "some police officers are reluctant to register complaints of offences with a racist or homo/transphobic motive". The fear of formalities involved in registering such complaints may be one explanation; "other information suggests that racist ideas and sympathy towards extreme right-wing organisations are widespread in the police".[97]

62. The authorities argued that there are not a large number of complaints of racial profiling or court proceedings concerning it, and that racial profiling is certainly not a general practice in the German police. Search methods based solely on an individual's appearance – without other suspicious facts or situational

88. Information provided by the authorities, AS/Mon (2016) 33, p. 9.
89. Comments by the German Federal Government on the Report by Nils Muižnieks, op. cit., pp. 8-10.
90. "Bundespräsident Gauck bei Flüchtlingen: 'Es gibt ein helles Deutschland'", *Spiegel Online*, 26 August 2015: www.spiegel.de/politik/deutschland/joachim-gauck-bei-fluechtlingen-es-gibt-ein-helles-deutschland-a-1049850.html.
91. AS/Mon (2016) 33, p. 8.
92. Comments by SPD MP Gabriela Heinrich, AS/Mon (2016) 33, p. 3.
93. Committee of Ministers Resolution CM/ResCMN(2016)4 "On the implementation of the Framework Convention for the Protection of National Minorities by Germany", op. cit.
94. Report by Nils Muižnieks, op. cit.
95. UN General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, Sixteenth session, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21. Germany, A/HRC/WG.6/16/DEU/3, 8 April 2013: http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/WG.6/16/DEU/3&Lang=E.
96. See, for example, Report by Nils Muižnieks, op. cit.
97. ECRI Report on Germany (fifth monitoring cycle), CRI(2014)2, op. cit. This finding from ECRI is firmly contested by Dr Feist in his comments (see AS/Mon (2016) 33, p. 4), as it "relates to – unacceptable – isolated cases or to allegations".

knowledge playing a part – are already unlawful as the law stands, and are neither taught nor generally practised within the federal police. Consideration of both criteria is essential in policing practice, especially in connection with entry controls. German courts, too, have confirmed this legal situation under international law and the compatibility of the German authorising provisions for searches by the federal police. Against this background, the Federal Government sees no need for legislative action; instead, it trusts that indications of potentially racist or discriminatory conduct by federal police officers are taken very seriously in the framework of operational and administrative supervision and are fully investigated in every single case.[98]

63. The possible existence of structural forms of racism was mentioned in the 2014 Assembly report on "Tackling racism in Police"[99] and brought to public attention with the National Socialist Underground (NSU) case, which is now on trial. This case showed that the police were unable to identify racist motivation and a right-wing terror group behind a string of at least 10 murders and two bombings. A special committee was established in the *Bundestag* to inquire into the failures in the investigation. This committee produced a report in 2013, and the second inquiry committee was established in November 2015, following new information made available during the trials. According to the Commissioner for Human Rights, but also to ECRI and CERD, the NSU case is exemplary in the way that it shows "systemic shortcomings in identifying and addressing the racial motivation behind [crimes], which may mask institutional racism".[100] Regardless of numerous reports pointing in this direction, the German authorities recently stated that they did not share such "descriptions of institutional racism ('structural forms of racism')"[101], which they reiterated in their latest comments.[102]

64. In any case, the German authorities would only benefit from taking "active steps to build trust between persons belonging to minorities and the police".[103] There are many concrete recommendations in the reports by ECRI, CERD and the Commissioner for Human Rights on how it can be done. A paradigm shift from a narrow view of racism that seems to be prevalent in Germany (often reduced to right-wing ideology) towards "a broader understanding of racism that [includes] indirect, structural and institutional discrimination"[104] seems highly advisable. The authorities, however, rely on the concept of "racial discrimination" as defined in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination,[105] which has the status of a federal law in Germany.[106]

3.5. Discrimination

3.5.1. Legal framework

65. Germany has not ratified Protocol No. 12 to the European Convention on Human Rights (ETS No. 177) prohibiting discrimination (signed in 2000).

66. Discrimination on the grounds of race or ethnic background, sex, religion or belief, age, disability and sexual orientation is prohibited by the General Equal Treatment Act that came into force in 2006. This law combats discrimination in the field of employment and in civil law transactions, but it does not cover discrimination by public authorities. In its submission to the United Nations Universal Periodic Review, the German Institute for Human Rights called for the General Equal Treatment Act to provide for class actions. In 2015, the Advisory Committee on the Framework Convention considered the anti-discrimination legislation weak;[107] the Committee of Ministers also recommended strengthening this legislation.[108]

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98. AS/Mon (2016) 33, p. 8/9.
99. Tackling racism in the police, report of the Committee on Equality and Non-Discrimination (rapporteur: Mr David Davies, United Kingdom, EDG), Doc. 13384.
100. ECRI Report on Germany (fifth monitoring cycle), CRI(2014)2, op. cit.
101. Comments by the German Federal Government on the Report by Nils Muižnieks, op. cit., pp. 8-10.
102. AS/Mon (2016) 33, p. 9.
103. Committee of Ministers Resolution CM/ResCMN(2016)4, op. cit.
104. According to the GIHR. UN General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, op. cit.
105. "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".
106. AS/Mon (2016) 33, p. 10.
107. Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Germany, ACFC/OP/IV(2015)003, op. cit.
108. Committee of Ministers Resolution CM/ResCMN(2016)4, op. cit.

67. In 2006, a Federal Anti-Discrimination Agency was established within the Ministry of Family Affairs. This agency assists people seeking protection from discrimination; it can also seek a friendly settlement through conciliation. According to international monitoring bodies, including the Commissioner for Human Rights, CERD, ECRI, the Advisory Committee on the Framework Convention and the Committee of Ministers, its mandate needs to be extended (for example to give the agency wider powers to carry out investigations and provide legal assistance to victims), its budget strengthened, and its staff increased. The authorities indicated that the Federal Government has already increased the budget and staff of the Federal Anti-Discrimination Agency in recent years and will continue to do so. Four of the 16 *Länder* have also set up their own specialised agencies to combat discrimination at *Land* level, which is further step towards comprehensive and effective protection from discrimination at local level.

3.5.2. Sinti, Roma and other national minorities

68. "Persons with a migrant background", as well as Sinti and Roma, have, according to ECRI, lower than average access to employment and education.[109] The authorities acknowledged that people with a migrant background, as well as Sinti and Roma, are disproportionately represented among those with lower levels of school performance and have therefore lower chances of access to higher education. They can however have access to all programmes offering pre-school and school-based language support and other individual support in the various types of school.[110] According to the Advisory Committee on the Framework Convention, Sinti and Roma children are reportedly still over-represented in special schools. However, in general, representatives of national minorities consider that the level of protection of their rights is relatively high. The Federal Ministry of the Interior holds an annual conference on the implementation of the Framework Convention and the European Charter on Regional or Minority Languages (ETS No. 148), bringing together representatives of the Federal Government, governments of the *Länder* and national minorities. A Consultative Committee on Issues concerning German Sinti and Roma has been established. The authorities provide substantial support to the preservation and development of national minority languages and cultures.[111] Regarding the minority languages, in 2014 the Committee of Ministers recommended that the German authorities strengthen the efforts to promote, including through an adequate educational offer and the media, the Lower Sorbian, North Frisian, Sater Frisian, Low German, Danish and Romani languages.[112]

3.5.3. LGBTI people

69. As far as the discrimination against LGBTI people is concerned, several major improvements in the legal situation of homosexual and bisexual people are to be welcomed. The Life Partnership Law adopted in 2001 created a separate institution of family law for same-sex couples. In 2004, additional rights were granted to same-sex civil partnerships. The Federal Constitutional Court further strengthened these rights, on several occasions declaring unconstitutional different treatment of marriage and same-sex civil partnerships. According to the European Union Fundamental Rights Agency (FRA) report, same-sex civil partnerships are legally equal to marriage in all aspects other than adoption.[113]

70. At the same time, homophobia still exists in German society. In a 2012 survey quoted by the FRA report, 30.7% of the respondents stated having experienced harassment at work or during training due to their lesbian/bisexual orientation and 20% reported disrespectful treatment by medical staff. These numbers are higher when looking at trans-persons; one third experienced sexualised violence, half have experienced discrimination at work and 44% in relation to medical treatment.

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109. ECRI Report on Germany (fifth monitoring cycle), CRI(2014)2, op. cit.; Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth to twenty-second periodic reports of Germany, op. cit.

110. See the Information sent in 2015 by Germany to the European Commission on progress in implementing the report "EU Framework for National Roma Integration Strategies up to 2020 – Integrated packages of measures to promote the integration and participation of the Sinti and Roma in Germany").

111. Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Germany, op. cit.

112. Recommendation CM/RecChL(2014)5 of the Committee of Ministers "on the application of the European Charter for Regional or Minority Languages by Germany", adopted by the Committee of Ministers on 28 May 2014: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c5aa3.

113. Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity. Germany. January 2014 Update, EU FRA, GIHR, 2014: http://fra.europa.eu/sites/default/files/fra_uploads/country-study-lgbt-legal-update-2014-de.pdf.

3.6. Media freedom

71. In most international ratings and monitoring reports, Germany is considered to have a very positive record in the area of media freedom. It enjoys the status of a "free" country in the Freedom House reports on "Freedom of the Press"[114] and "Freedom on the net".[115] In the "World Press Freedom Index" published by Reporters without Borders, Germany fell in 2016 (data for 2015) from 12th to 16th place in the world – which is still a very high rank. This relative decline was linked first to the "harassment, threats and violence against journalists covering radical right-wing groups, especially the Islamophobic and xenophobic group PEGIDA" (around 30 attacks according to Freedom House) and second to the "*Netzpolitik.org*" affair.[116] In the latter case, for the first time in 30 years and for the fourth time in the history of the Federal Republic of Germany, the Federal Prosecutor General launched investigations for treason on journalists – editors of the online-magazine *netzpolitik.org* who published confidential secret service reports on internet surveillance. The investigation was launched on 13 May 2015 and sparked off popular protests in Berlin. On 4 August, Federal Minister of Justice Heiko Maas dismissed Federal Prosecutor General Harald Range who had opened the investigation. On 10 August, the acting Federal Prosecutor General announced that the investigation had been halted.[117] Going beyond the debate on media freedom, this direct intervention into the investigation by the Federal Minister via dismissal of the Federal Prosecutor General may raise questions as to the independence of the prosecution. The authorities drew attention to the fact that under existing German law, public prosecutors – including the Federal Public Prosecutor General – are not, in fact, independent, but rather subject to the administrative supervision of the Federal Minister of Justice and Consumer Protection and the justice ministries of the *Länder* (Section 147 of the Judiciary Act (*Gerichtsverfassungsgesetz*)). They are thus bound by instructions. Instructions which are clearly unlawful are, however, punishable for the person issuing the instruction and are not binding on the person to whom the instruction is issued. Obeying such an instruction would expose the latter, too, to the risk of consequences under criminal law. Providing an extensive description of the prosecution system, the authorities concluded that there is no danger of politically motivated influence being exerted on criminal proceedings in individual cases, and thus also no need for the creation of a general rule requiring instructions to be issued in writing.[118] In the light of the "*Netzpolitik.org*" affair, which belies this position, the rapporteur considers, however, that due consideration should be given to such a move in order to strengthen the independence of the public prosecutors.

72. Another factor quoted as having an incidence on the situation in the area of media freedom is the anti-terrorism law of 2009, known as the BKA Act, granting the Federal Criminal Police Office (BKA) the power to act preventatively against crimes related to international terrorism – previously held exclusively by the intelligence services. One of the powers vested by this law to the BKA is to conduct surveillance of telecommunications of "bearers of professional secrecy" (journalists, lawyers and doctors).[119] The 2009 BKA Act was ruled partly unconstitutional by the Federal Constitutional Court on 20 April 2016[120] – these provisions are expected to be revised in a new BKA Act.[121]

73. Finally, the decision by the Federal Government to allow the prosecution of satirist Jan Böhmermann under Section 103 of the Criminal Code (Defamation of organs and representatives of foreign States) for having insulted Turkish President Recep Tayyip Erdoğan relaunched the debate about the freedom of speech in Germany. While some criticised the satirist for obscene and provocative insults, others supported him, saying he was exercising his right to freedom of speech. While on 15 April 2016 Chancellor Merkel gave the approval needed to prosecute the comedian (following an examination by the Federal Government, in which the Federal Foreign Office, the Federal Ministry of Justice, the Federal Ministry of the Interior and the Vice-Chancellor Gabriel were involved), she also announced that the Federal Government (i.e. the Minister of

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114. See 2015 and 2016 editions of *Freedom of the Press,* Freedom House: https://freedomhouse.org/report/freedom-press/2015/germany; https://freedomhouse.org/report/freedom-press/freedom-press-2016.
115. "Germany" in Freedom on the net 2015, Freedom House https://freedomhouse.org/report/freedom-net/2015/germany.
116. "Germany" in World Press Freedom index, 2016, Reporters without Borders: http://rsf.org/en/germany.
117. On the *Netzpolitik* affair see, e.g.: www.dw.com/search/en/netzpolitik.org/category/9097/.
118. AS/Mon (2016) 33, p. 11.
119. Regarding the law and the debates around its adoption, see: "What is the Federal Criminal Police Office allowed to do when surveilling terrorists?", *Deutsche Welle,* 19 April 2016: www.dw.com/en/what-is-the-federal-criminal-police-office-allowed-to-do-when-surveilling-terrorists/a-19199733.
120. According to the Court, although the surveillance powers granted to the BKA are in line with the Basic Law, the current legal framework granting them does not satisfy the principle of proportionality (provisions are in part too unspecific and too broad); the unconstitutional elements of the law do not pertain to its essence and the law will remain in force until 2018, subject to restrictions. See "German court: anti-terror laws partially unconstitutional", *Deutsche Welle,* 20 April 2016: www.dw.com/en/german-court-anti-terror-laws-partially-unconstitutional/a-19200199.
121. AS/Mon (2016) 33, p. 11.

Justice) would propose to scrap Section 103 of the Criminal Code. This rarely used legal norm, also known as "*Lese majesté*", foresees a punishment of up to five years of imprisonment. It has been criticised as outdated, unfair (since it specifically protects foreign States' representatives) and encouraging abuse by foreign authorities.

4. The rule of law

4.1. Judiciary and prosecution

74. The independence of the judiciary is guaranteed by the Basic Law. The court system is structured federally: jurisdiction is exercised by federal courts (including the Federal Constitutional Court) and by the courts of the 16 *Länder;* the main workload lies with the *Länder.*[122]

75. In her 2015 report on "Threats to the rule of law in the Council of Europe member States: asserting the Parliamentary Assembly's authority", our colleague Marieluise Beck (Germany, ALDE) underlined three concerns with regard to the rule of law in her own country.[123] First, Germany has still not established a High Judicial Council to introduce a dose of self-administration into the judiciary. In fact, prosecutors and judges are formally recruited and promoted by the Ministers of Justice – something which *per se* is not seen as problematic for the independence of the judiciary in Germany due to its federal system (different political forces are in power in different *Länder*), strict recruitment procedures and a strong *esprit de corps*. In addition, some *Länder* introduced elements of self-administration of justice. At the same time, "a dose of judicial self-administration, not excluding a reasonable representation of political representatives, as advocated by the Venice Commission, would be desirable, also as a matter of setting the right example". Second, the report criticised the right of the ministers of justice to give instructions to prosecutors on individual cases. In practice, ministers made very cautious use of this right which also represents a safeguard for parliamentary control over the prosecution service; instructions opposing the "principle of legality" (obliging prosecutors to prosecute and investigate) constitute an obstruction of justice and are therefore illegal. However, the dismissal and appointment of the prosecutors by the ministers of justice could also be a tool to unduly influence the prosecution, as has been alleged in relation to the *Netzpolitik.org* affair mentioned above. Ms Beck suggested that "democratic accountability of the prosecution could be preserved whilst minimising the danger of politically motivated abuses by laying down the simple rule that any individual instructions should be given in writing, and made public. If a minister can explain to parliament and ultimately to the voters why he or she gave a specific instruction to a prosecutor, the chances are that the instruction was legitimate". Finally, the salaries of judges and prosecutors in relation to the national average are the second-lowest in Europe.

76. In 2009, the Assembly had already called on Germany to consider setting up a system of judicial self-administration, gradually increase the salaries of judges and prosecutors and abolish the possibility for ministers of justice to give the prosecution instructions concerning individual cases.[124] In 2015, it repeated these calls.[125] Stating that the justice system needs to be free from, but also to be seen as being free from political influence, in its 2014 report the Council of Europe's Group of States against Corruption (GRECO) also made similar recommendations to the German authorities.[126]

77. In their comments, the authorities stressed that independence of the judiciary is ensured by the fact that judges can take their decisions individually and independently without influence by third parties – and in particular without influence by another branch of the State – and that they are subject only to the law in taking their decisions. The German system provides for self-administrative elements (such as councils for judicial appointments, councils of judges representing judges, bureaux responsible for the allocation of court business and the composition of the formations of the court, or committees for the election of judges). The authorities also stressed that the vast majority of judges (19 923 of the 20 382 judges in Germany) and public prosecutors (5 132 of the 5 231 public prosecutors in Germany) are employed at the level of the *Länder*. As part of the "federalism reform", the Federation's concurrent legislative power over the remuneration and

122. For an overview of the judiciary in Germany, see "Judicial systems in Member States – Germany", European e-justice portal: https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-de-en.do?member=1.
123. Report of the Committee on Legal Affairs and Human Rights, Doc. 13713.
124. Resolution 1685 (2009) on allegations of politically motivated abuses of the criminal justice system in Council of Europe member States.
125. Resolution 2040 (2015) "Threats to the rule of law in Council of Europe member States: asserting the Parliamentary Assembly's authority".
126. GRECO, Fourth Evaluation Round. Corruption prevention in respect of members of parliament, judges and prosecutors. Evaluation Report. Germany, adopted on 10 October 2014 and published on 28 January 2015: https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4%282014%291_Germany_EN.pdf .

pensions of civil servants and judges was repealed and, with effect from 1 September 2006, the *Länder* were given exclusive legislative power over the remuneration and pensions of judges and public prosecutors (Article 74 (1) No. 27 of the Basic Law).[127] While the rapporteur takes due note of these elements, he nevertheless invites the German authorities to address the issues raised by the Assembly and GRECO.

4.2. Fight against corruption

78. According to the Transparency International Corruption Perception Index, in 2015 Germany had the 10th lowest level of corruption in the world – the 7th best record among the Council of Europe member States and the 5th best in the European Union.[128] According to GRECO, "Germany is generally considered to be in the top ranks internationally for fighting corruption and to have provided a good framework for repressing and preventing it".[129]

79. The 2014 European Union Anti-corruption report also recognised that "[w]hen it comes to fighting corruption, Germany is amongst the best countries of the EU". However, the European Commission proposed several recommendations to further improve the situation: introduce strict penalties for corruption of elected officials; develop a policy against the "revolving door" phenomenon, where officials leave office to work for companies they may have recently helped; increase awareness of the risks of foreign bribery amongst small and medium-sized enterprises; and address more efficiently the concerns over the financing of electoral campaigns.[130] In the meantime, an offence of bribing delegates entered into force on 1 September 2014. Following an amendment of the Federal Ministers Act and the Act governing the Legal Status of Parliamentary State Secretaries, the rule requiring a "cooling-off" period for members of the Federal Government and Parliamentary State Secretaries before taking up employment after leaving office came into force on 25 July 2015.[131]

80. Germany has signed, but not ratified the Civil Law Convention on Corruption (ETS No. 174, signed in 1999), the Criminal Law Convention on Corruption (ETS No. 173, signed in 1999) and the Additional Protocol thereto (ETS No. 191, signed in 2003). In 2016, Germany signed the revised Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), but has not ratified it yet. Germany is not a member of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL).

81. The authorities expect to ratify the Criminal Law Convention on Corruption and the Additional Protocol thereto in the near future. Germany has already transposed all the provisions of the Criminal Law Convention on Corruption and the Additional Protocol into national law after the entry into force of the Anti-Corruption Act (*Gesetz zur Bekämpfung der Korruption*) on 26 November 2015. In accordance with the Basic Law, a draft ratification law was adopted by the Federal Government on 25 May 2016 and was passed by the *Bundesrat* in July 2016. The *Bundestag* was expected to consider it in September 2016. With regard to the Council of Europe Civil Law Convention on Corruption, the question of whether there is a need for action to create a specific provision in German law to protect whistle-blowers is still being examined. Germany also intends to ratify the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, which was signed on 28 January 2016. A law for the ratification of the Criminal Law Convention on Corruption, its Additional Protocol and the Convention on the Financing of Terrorism was adopted by the *Bundestag*[132] on 20 October 2016.

82. While the two first evaluation rounds by GRECO[133] clearly confirmed Germany's reputation as a country complying with Council of Europe anti-corruption standards, the third evaluation round on incriminations[134] and transparency of party funding raised concerns. GRECO had to prepare three interim

127. AS/Mon (2016) 33, p. 12.
128. See Transparency International Corruption Perception Index: www.transparency.org/cpi2015#results-table.
129. GRECO, Fourth Evaluation Round, Germany, op. cit.
130. European Commission, COM(2014)38 final, Annex: Germany to the EU Anti-Corruption Report, 3 February 2014: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_germany_chapter_en.pdf.
131. The procedure was described in detail by the authorities in their comments, see AS/Mon (2016) 33, p. 12.
132. The adoption of a ratification law by the *Bundestag* is not however the end of the ratification process.
133. The first evaluation round's themes included independence, specialisation and means available to national bodies engaged in the prevention and fight against corruption and extent and scope of immunities. The second evaluation round concerned identification, seizure and confiscation of corruption proceeds; public administration and corruption (auditing systems and conflicts of interest); prevention of legal persons being used as shields for corruption; tax and financial legislation to counter corruption; links between corruption, organised crime and money laundering. See: www.coe.int/t/dghl/monitoring/greco/evaluations/index_EN.asp?.

reports before it concluded that the level of compliance with the recommendations was no longer "globally unsatisfactory". Most problems concerned the second theme: party funding. In the third interim report, GRECO still expressed "strong misgivings about the very limited attention paid to several recommendations on issues of prime importance", including the "introduction of a system for the timely publication of election campaign accounts, enhancing the transparency of direct donations to parliamentarians and election candidates who are members of political parties, and further increasing the resources available to the president of the *Bundestag* for supervising party funding".[135] In this regard, it should be noted that the foundations close to political parties (*Stiftung*) traditionally play a very important role in German party politics. The authorities recalled the new rules governing donations to parliamentarians exceeding in total €10 000 a year, or single donations exceeding €50 000, which must be reported respectively to the party's executive committee member in charge of finances, and to the President of the German *Bundestag*.[136]

83. In its second compliance report under the third evaluation round, which was published in June 2016,[137] GRECO concluded that Germany had implemented satisfactorily or dealt with in a satisfactory manner eight of the 20 recommendations contained in the third round evaluation report. Ten recommendations have been partly implemented and two have not been implemented to date. It would appear that "the recent amendments to the Political Parties Act adopted on 22 December 2015 (and which entered into force on 1 January 2016) have the potential to increase the transparency and effective enforcement of the rules and can thus be considered as steps in the right direction. That said, GRECO regrets that this reform process has not been used to implement the outstanding recommendations. It wishes to stress again that several recommendations are pending on issues of prime importance – such as the introduction of a system for the timely publication of election campaign accounts, enhancing the transparency of direct donations to parliamentarians and election candidates. GRECO thus once again urged the German authorities to address the outstanding recommendations as soon as possible.[138]

84. In the evaluation report under the fourth evaluation round on prevention of corruption in respect of members of parliament, judges and prosecutors, GRECO addressed to the German authorities eight recommendations.[139] Regarding members of parliament, it recommended: 1) further improving transparency of the parliamentary process (e.g. by introducing rules on how to interact with lobbyists); 2) introducing a requirement of ad hoc disclosure when there is a possibility of a conflict of interest of parliamentarians and providing MPs with guidance on this requirement; 3) reviewing the existing regime of declarations of interest to extend the categories of the disclosed information and extending their scope to include information on spouses and dependent family members; 4) ensuring effective supervision and enforcement of the declaration requirements, rules on conflicts of interest and other rules of conduct for members of parliament. On the recommendations regarding judges and prosecutors, see the respective paragraph of this report. No compliance reports have been published in relation to Germany under the fourth evaluation round at the time of the preparation of this report.

85. As regards foreign bribery, Germany was one of the first States to ratify the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) in 1998; in 2014, it ratified the United Nations Convention against Corruption. According to Transparency International, Germany is actively enforcing the OSCE Anti-Bribery Convention; the NGO addressed several recommendations to the German authorities.[140]

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134. Incriminations provided for in the Criminal Law Convention on Corruption, its Additional Protocol and Guiding Principle 2 (GPC 2).

135. GRECO, Third Evaluation Round. Third Interim Compliance Report on Germany, adopted on 6-10 October 2014: www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3%282014%2919_3rd_Interim_Germany_EN.pdf.

The authorities stated that, at present, statements of accounts need to be published annually by the political parties, disclosing operating expenditure on election campaigns. AS/Mon (2016) 33, p. 13.

136. AS/Mon (2016) 33, p. 13.

137. GRECO, Third evaluation round: second compliance report on Germany: "Incriminations (ETS 173 and 191, GPC 2)", "Transparency of party funding", adopted on 14-18 March 2016 and published in June 2016, GrecoRC3(2016)5.

138. Ibid., p. 10.

139. GRECO, Fourth Evaluation Round, Germany, op. cit.

140. See Transparency International, Exporting Corruption. Assessing Enforcement of the OECD Convention on Combating Foreign Bribery, 11th report, 2014, section on Germany: www.transparency.org/exporting_corruption/Germany.

4.3. Intelligence and security services

86. Surveillance and interception of the communications by German citizens and foreign nationals in Germany is regulated by the "G-10 Act" (restricting the right to privacy enshrined in Article 10 of the Basic Law). Measures of intrusive information collection are overseen *ex post* by the Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*) composed of nine elected members of the *Bundestag*. Any measures falling within the scope of the G-10 Act need to be authorised by the "G-10 Commission" appointed by the Parliamentary Control Panel. Other actors of oversight of surveillance by intelligence services include the Federal Commissioner for Data Protection and Freedom of Information and the *Bundestag*'s Confidential Committee responsible for the budget of intelligence and security services. Similar bodies exist at the *Land* level.[141] The activities of the three German intelligence services as a whole are also subject to oversight by the Parliamentary Oversight Panel. Only the Federal Intelligence Service (*Bundesnachrichtendienst*) is empowered to carry out strategic communications surveillance under Article 5 of the G10 Act.[142]

87. In his 2015 report on Germany, the Commissioner for Human Rights welcomed the existence of a general framework for the democratic oversight of the intelligence and security services, but encouraged the authorities to strengthen the existing legal framework and improve legal remedies to ensure full protection of human rights against any abuse. He proposed to improve the capacity of the oversight bodies (including resource-wise), guarantee their full access to all information and clarify the question of surveillance by the German intelligence services over non-German citizens outside Germany. According to the Commissioner, these measures could provide a remedy to the shortcomings in the oversight of the surveillance exposed by the "Snowden revelations".[143] These leaks revealed, *inter alia*, close co-operation between the German Federal Intelligence Service (*Bundesnachrichtendienst*, BND) and the US National Security Agency (NSA) that eluded democratic control. This co-operation included, for instance, "open sky" surveillance and transmission of massive amounts of metadata by the BND to the NSA. In 2015, it was also revealed that the BND conducted surveillance on other European countries, including on high-level politicians, for the benefit of the NSA. As a consequence of the Snowden revelations, on 20 March 2014 the *Bundestag* set up a committee of inquiry into the NSA affair. The revealed shortcomings, according to the Commissioner, concern the oversight bodies' lack of resources and expertise, problems of co-ordination (competition between different bodies, fragmentation), the scope of the oversight of telecommunications (it is the Federal Government which decides whether a measure falls within the scope of the G-10 Act) and the absence of effective remedies for persons affected by surveillance.

88. In response to the Commissioner's recommendations, the authorities informed the rapporteur that two bills were currently in the parliamentary pipeline: one relates to the oversight activities of the Parliamentary Oversight Panel, and the other clarifies the legal framework for communications surveillance of foreign nationals abroad carried out by the Federal Intelligence Service from within Germany. Beyond this, the Snowden revelations are the subject of an ongoing investigation by a parliamentary committee of inquiry, the Federal Government refraining from commenting on its results before it completes its work.[144]

89. Another issue related to the intelligence and security services concerns the CIA renditions. In December 2014, the US Senate Select Committee on Intelligence published a 499-page summary of its investigative report on the CIA secret rendition, detention and interrogation programme. This report, *inter alia*, addressed the case of Khaled el-Masri, a German national detained in the "former Yugoslav Republic of Macedonia" by the CIA agents who illegally transferred him to a secret site in Afghanistan, where he was tortured in the course of his five months in CIA custody.[145] After the publication of these findings, Amnesty International called on the German Government "to re-open its own investigation into its role in the CIA counter-terrorism operations, including in the rendition of Khaled el-Masri, and to ensure that the German Government complies with its constitutional duty to co-operate fully with any such investigation", as well as to seek "full and effective redress for Khaled el-Masri as a victim of torture".[146] According to the human rights NGO, in 2007, the Munich District Court issued 13 arrest warrants against CIA officials and agents on charges of causing grievous bodily harm and deprivation of liberty, but the German Federal Office of Justice declined to request the extradition of the CIA employees, probably in order to maintain good relations with the United

141. For a description of the system of oversight of intelligence, see pp. 14-15 of the Report by Nils Muižnieks, op. cit.
142. AS/Mon (2016) 33, p. 13.
143. For the Assembly's position on mass surveillance and its democratic control in the light of the Snowden revelations, see Resolution 2045 (2015) and Recommendation 2067 (2015) on mass surveillance.
144. AS/Mon (2016) 33, p.13.
145. For a description of this case, see Amnesty International's report Breaking the conspiracy of silence: USA's European "partners in crime" must act after Senate torture report, Amnesty International, 2015: https://www.amnesty.org/download/Documents/212000/eur010022015en.pdf.
146. Ibid.

States. Immediately after the publication of the US Senate report, the European Center for Constitutional and Human Rights (ECCHR) lodged a criminal complaint against former CIA head George Tenet, former Defence Secretary Donald Rumsfeld and other members of the George W. Bush administration, accusing them of the war crime of torture (paragraph 8.1(3) of the German Code of Crimes against International Law).[147] In the same vein, Human Rights Watch proposed that the German Federal Prosecutor General consider opening a "structural investigation" under "universal jurisdiction" into abuses committed by US officials after 2001, since German law allows prosecution of grave international crimes, even those committed abroad by foreigners, under the jurisdiction of German courts.[148] The rapporteur was informed by the authorities that, on 16 December 2014, following the publication of the CIA torture report on 9 December 2014, the Federal Public Prosecutor General launched an examination of whether the report provides grounds for an initial suspicion that offences have been committed under the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*). It is not yet known when this examination will be completed.[149]

90. With respect to the el-Masri case, the authorities replied that the competent investigating authorities have taken all necessary steps since Mr el-Masri's return to Germany to clarify the facts of the matter and identify those responsible for what happened to him. The Federal Government has repeatedly made it unequivocally clear to the United States that such a case must not be repeated in future and that the principles of the rule of law and international law must be upheld everywhere and at all times. In its decision of 7 December 2010, the Cologne Administrative Court found that Mr el-Masri's rights were not infringed by the Federal Government's decision not to submit an extradition request to the United States.[150]

91. Finally, in its 2014 report, the United Nations Committee on Enforced disappearances praised the co-operation of the German authorities with civil society and the Committee, as well as the ratification of major human rights instruments, but it also suggested numerous measures to bring the legal framework and the way it is implemented fully into line with the International Convention for the Protection of All Persons from Enforced Disappearance (ratified by Germany in 2009). It namely recommended measures in the field of criminalisation of enforced disappearance, investigation, judicial co-operation, prevention, reparation and protection of minors against enforced disappearances.[151] Following the United Nations recommendations, the German authorities considered again whether a separate offence of enforced disappearance should be created. They concluded however that adding a new offence to the Criminal Code is not necessary at this time. While it is accepted that, in theory, certain prosecution gaps are conceivable, the view is nonetheless taken that the existing German criminal offences and other laws are sufficient in principle to ensure comprehensive investigation, prosecution and sanctioning.[152]

5. Human rights

5.1. National human rights institution

92. In 2001, in conformity with the 1993 United Nations Paris Principles and respective 1997 Recommendation of the Committee of Ministers of the Council of Europe,[153] Germany established the German Institute for Human Rights (GIHR), an independent national human rights institution. The GIHR has a legal status of association (NGO), and in 2015 it was given the legal basis of a national human rights institution. The GIHR's mandate includes the following activities: research, information and documentation on human rights topics, policy advice, human rights education, international co-operation with human rights institutions and promotion of public debate on human rights.[154] Other bodies for the protection of human rights exist in the different *Länder*.

147. "Criminal complaint against Bush era architects of torture", ECCHR: www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/germany.html.
148. Géraldine Mattioli-Zeltner, "Why Germany Can and Should Open an Investigation into US Torture" (published in *Frankfurter Rundschau*), Human Rights Watch, 18 December 2015: https://www.hrw.org/print/284703.
149. AS/Mon (2016) 33, p. 14.
150. Ibid.
151. UN Committee on Enforced Disappearances, Concluding observations on the report submitted by Germany under article 29, paragraph 1, of the Convention, CED/C/DEU/CO/1, 10 April 2014: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/DEU/CO/1&Lang=Fr.
152. AS/Mon (2016) 33, p. 14.
153. Recommendation R(97)14 of the Committee of Ministers of the Council of Europe on the establishment of independent national human rights institutions for the promotion and protection of human rights adopted on 30 September 1997: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804fecf5.
154. "Mandate", GIHR website: www.institut-fuer-menschenrechte.de/en/about-us/mandate/.

93. In his 2015 report on Germany, the Commissioner for Human Rights welcomed "the essential role that the GIHR plays for the protection and promotion of human rights in Germany and its recent strengthening through the adoption of a law giving it a solid legal basis".[155] At the same time, he called on the German authorities to empower the GIHR in order to increase its efficiency: strengthen its investigation powers, give it the right to bring complaints before the Federal Constitutional Court, increase its budget and decrease the role of the *Bundestag* in participation into and nomination of members of the GIHR's Board of Trustees.[156] In 2011, the United Nations Committee on Economic, Social and Cultural Rights expressed concern that the competence of the GIHR was not extended to consider complaints.[157] The authorities added that the United Nations sub-committee responsible for the accreditation of national human rights institutions had examined the statutory basis, considering the United Nations Paris Principles, and concluded that, in consideration of the 2015 law, a (re)classification of the German Institute for Human Rights in the highest possible category ("A status") was appropriate. Against this background, the Federal Government sees no need for action at present.[158]

5.2. International framework

94. According to Article 25 of the Basic Law, the general rules of international law are an integral part of federal law, take precedence over domestic laws and "directly create rights and duties for the inhabitants of the federal territory". Germany has ratified most of the Council of Europe and other international treaties on human rights. On 18 November 2015, it ratified the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201). On 22 October 2015, it signed the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217) and, on 28 January 2016, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The latter is in the parliamentary process of being ratified (see above).

95. Nevertheless, several important treaties still await ratification. In particular, in its Resolution 1953 (2013) on the progress of the Assembly's monitoring procedure (June 2012-September 2013), the Assembly called on Germany to sign and ratify the following Council of Europe treaties: Protocol No. 12 to the European Convention on Human Rights concerning the fight against discrimination[159] (also recommended by the Commissioner for Human Rights, ECRI and the GIHR[160]); the European Social Charter (revised) (ETS No. 163) and the Additional Protocol thereto Providing for a System of Collective Complaints (ETS No. 158) (also recommended by the Commissioner for Human Rights); the Civil Law Convention on Corruption; the Criminal Law Convention on Corruption; and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. None of these documents have yet been ratified by Germany. The rapporteur notes with satisfaction, however, that the ratification of the three conventions on corruption and the financing of terrorism is currently under consideration, according to the latest official information received.[161]

96. Concerning the ratification of Protocol No. 12 to the European Convention on Human Rights (which was signed on 4 November 2000), the German authorities explained that they were observing the further progress of ratification by other countries and the development of the case law of the European Court of Human Rights ("the Court") after the Protocol's entry into force, to see how ratification of the Protocol would affect Germany's internal legal order. As Protocol No. 12 includes the prohibition of discrimination on grounds of origin and a broad interpretation of this prohibition could lead to problems for German legislation relating to civil servants, social matters, foreign nationals and asylum, the Federal Government intends to continue to wait for the time being, as the current German legal order already enshrines a comprehensive prohibition of

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155. Report by Nils Muižnieks, op. cit.
156. The *Bundestag* has two representatives on the Board of Trustees of GIHR and appoints six additional members with voting rights – the total number of members with voting rights is 18.
157. UN Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Working Group on the Universal Periodic Review, Sixteenth session, A/HRC/WG.6/16/DEU/2, 11 February 2013: http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/WG.6/16/DEU/2&Lang=E.
158. AS/Mon (2016) 33, p. 14.
159. According to the Commissioner for Human Rights, "the German authorities have explained their non-ratification of Protocol No. 12 with concerns that it would interfere with German legislation differentiating between German citizens and non-nationals. They have also indicated that before any step is taken to ratify the Protocol they prefer to see more clearly how the [Court] applies it". Report by Nils Muižnieks, op. cit.
160. In its submission to the UN Universal Periodic Review: UN General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, op. cit.
161. AS/Mon (2016) 33, p. 12/13.

discrimination, in particular through Article 3 of the Basic Law, and the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) which entered into force on 18 August 2006 and ensures far-reaching protection from discrimination in labour and civil law.[162]

97. On 11 May 2011, Germany signed the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210, "Istanbul Convention"). On 7 July 2016, the *Bundestag* adopted a bill to enhance the protection of individual consent in sexual relations (so-called "No means No" law), which implements the provisions of Article 36 of the Istanbul Convention. The *Bundesrat* considered the bill in September 2016, allowing the law to enter into force in October 2016. The Federal Government plans to draw up a draft law expressing parliamentary approval of the Istanbul Convention, so that the Convention can be ratified before the end of the current electoral term.

98. As already mentioned above, the German Code of Crimes against International Law (CCAIL) adopted in 2002 integrates the Rome Statute of the International Criminal Court (ICC) into German law and allows German courts to prosecute war crimes and crimes against humanity even if they are committed abroad by non-German citizens. In 2009, the German Federal Police and Prosecution Office created a "Central Unit for the Fight against War Crimes and Further Offenses Pursuant to the CCAIL". Several war criminals from the Democratic Republic of Congo and Rwanda have already been tried and sentenced under this provision in Germany.

5.3. European Court of Human Rights

99. In 2015, the European Court of Human Rights dealt with 913 applications concerning Germany, 901 of which were declared inadmissible or struck out. It delivered 11 judgments concerning 12 applications, six of which found at least one violation of the European Convention on Human Rights. 576 applications were pending before the Court on 1 January 2016.[163]

100. Recent noteworthy Court judgments concern unjustified extension or ordering of preventive detention, including retroactive extension,[164] parental authority,[165] freedom of expression[166] and excessive length of proceedings before the domestic courts, a recurring problem underlying the most frequent violations.[167] The 2016 Information report on the "Impact of the European Convention on Human Rights in States Parties: selected examples"[168] highlights numerous cases of the positive impact of Court jurisprudence on German legislation and legal practice. Such improvements include, among others, redress for excessively long domestic proceedings, prohibition of retrospective order or extension of preventive detention, strengthening of the rights of fathers, protection of whistle-blowers, rejection of evidence obtained as a result of incitement by agent provocateurs or the fact that police must not threaten suspects with physical harm during interrogation.

101. In its 2011 Resolution 1823 (2011) "National parliaments: guarantors of human rights in Europe", the Assembly mentioned Germany as a positive example alongside other countries which have set up parliamentary structures to monitor the implementation of the Court's judgments.[169] The background memorandum on "The role of parliaments in implementing ECHR standards: overview of existing structures and mechanisms"[170] prepared by the Assembly secretariat, describes the system of parliamentary follow-up to the Strasbourg Court judgements in Germany. Two committees of the *Bundestag* deal primarily with human rights issues: the Committee on Human Rights and Humanitarian Aid and the Committee on Legal Affairs. Neither committee has an explicit mandate to consider the implementation of judgments of the Court; their

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162. Ibid., p. 14.
163. European Court of Human Rights, "Germany" country profile, updated in April 2016: www.echr.coe.int/Documents/CP_Germany_eng.pdf.
164. For example *Bergmann v. Germany*, 7 January 2016; *H.W. v. Germany*, 19 September 2013; *Haidn v. Germany*, 13 January 2011.
165. For example *Kuppinger (No. 2) v. Germany*, 15 January 2015; *Zaunegger v. Germany*, 3 December 2009.
166. For example *Axel Springer AG (No. 2) v. Germany,* 10 July 2014; *Brosa v. Germany*, 17 April 2014; *Peta Deutschland v. Germany*, 8 November 2012.
167. The pilot judgement *Rumpf v. Germany*, 2 September 2010.
168. AS/Jur/Inf (2016) 04, Impact of the European Convention on Human Rights in States Parties: selected examples, information report prepared by the Parliamentary Assembly's Legal Affairs and Human Rights Department upon the request of Mr Pierre-Yves Le Borgn' (France, SOC), rapporteur on the implementation of judgments of the Court, 8 January 2016.
169. Resolution 1823 (2011) "National parliaments: guarantors of human rights in Europe".
170. Parliamentary Project Support Division, PPSD (2014) 22 rev., The role of parliaments in implementing ECHR standards: overview of existing structures and mechanisms, Background memorandum prepared by the Secretariat, 8 September 2015: https://pace.coe.int/documents/10643/695436/20142110-PPSDNotefondstandardsCEDH-EN.pdf.

involvement depends on the particular matter raised by a judgment. However, in practice, "the German Ministry of Justice has reported on [the Court] judgments annually since 2004 to both [Committees]. Initially, the report covered judgments and decisions against Germany. Since 2007, it has covered the implementation of judgments. Since 2010, a separate annual report has also been produced covering judgments against other States which have potential implications for Germany".

5.4. Detention facilities, prevention of torture and inhuman or degrading treatment or punishment

102. According to the Council of Europe "Annual Penal Statistics SPACE I – Prison Populations Survey 2014" published on 23 December 2015, Germany has a relatively low prison population – 81.4 prisoners per 100 000 population (below the Council of Europe average of 135.8), with a 15.7% decrease in prison population rates between 2004 and 2014. Prisons are not overcrowded: the density in German penal institutions is 86.3 inmates per 100 places (below the Council of Europe average of 91.7). The average length of imprisonment in Germany is 8.5 months. The suicide rate in 2013 was 7.4 per 100 000 inmates – slightly below the Council of Europe average (7.6).[171]

103. In 2010, Germany established the National Agency for the Prevention of Torture, a preventive mechanism under the Optional Protocol to the United Nations Convention against Torture (OPCAT). However, its lack of human and financial resources has disappointed human rights defenders,[172] including the Commissioner for Human Rights who qualified the Agency as "rather a low-profile mechanism"[173] and the United Nations Special Rapporteur on Torture who stated that "such an approach to the implementation of OPCAT is counter-productive since it does not take the problem of torture and ill-treatment in detention seriously and sets a bad example for other States".[174] The German authorities took due note of criticism related to the National Agency's financial and human resources and subsequently appointed four members to the Commission of the *Länder* in January 2015; the *Länder* and the Federal State have increased the resources of the Agency.[175] They thus deny that the issue of torture and degrading treatment is not taken seriously in Germany.[176]

104. The Commissioner for Human Rights also regretted the absence of an independent police complaints mechanism in Germany, regardless of repeated calls by monitoring bodies, including the CPT. Even though some progress has been made at the *Land* level, in 2015 the Commissioner considered that investigation of ill-treatment by police officers at the Federal level remained an outstanding issue and called on the German authorities "to establish a fully independent and well-functioning complaints mechanism covering all law-enforcement officials". In its 2015/2016 annual report, Amnesty International stated that "[t]he authorities continued to fail to effectively investigate allegations of ill-treatment by police and did not establish any independent complaints mechanism to investigate those allegations". In their reply to the Commissioner, the German authorities agreed that the "establishment of an independent police complaints mechanism could offer an additional point of contact for those making complaints", but disagreed as to the substantial difference of such a mechanism compared to those already existing in the Federal Police.[177] The authorities however stick to the view that such an independent complaints mechanism is not necessary or appropriate at the federal level, given the existence of internal and external complaints mechanisms (including, in some *Länder*, independent special commissions to investigate crime committed by police officers) and the principle of mandatory prosecution which compels the public prosecution office to open an investigation if there is a suspicion that an offence may have been committed.[178] The rapporteur, however, continues to believe that the setting up of such independent mechanisms would reinforce the trust of citizens in their police.

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171. Council of Europe Annual Penal Statistics SPACE I – Prison Populations Survey 2014, PC-CP(2015) 7, 23 December 2015: http://wp.unil.ch/space/files/2016/05/SPACE-I-2014-Report_final.1.pdf.
172. For example Amnesty International in its submission to the UN Universal Periodic Review: UN General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, op. cit.
173. Report by Nils Muižnieks, op. cit.
174. UN General Assembly, Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum, A/HRC/13/39/Add.5, 5 February 2010: www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5_en.pdf.
175. Respectively increasing the allocation from the *Länder* and from the State from €200 000 to €360 000, and from €100 000 to €180 000.
176. AS/Mon (2016) 33, p. 15.
177. Comments by the German Federal Government on the Report by Nils Muižnieks, op. cit.
178. More details were provided by the authorities in their comments, see AS/Mon (2016) 33, p. 15.

105. The latest, sixth periodic visit of the CPT to Germany took place from 25 November to 7 December 2015. The delegation visited 15 police establishments, prisons and psychiatric hospitals in different *Länder*. Particular attention was paid to the situation of persons held in solitary confinement for prolonged periods and to the use of special security measures (including mechanical restraint – *Fixierung*).[179] The report following this visit had not been published at the time of the preparation of the present document.

106. The previous CPT visit to Germany took place from 25 November to 2 December 2013. The delegation visited five prisons[180] and two prison hospitals.[181] The report following the visit[182] focused on three subjects: treatment and conditions of detention of persons held in preventive detention, imposition of special security measures in prisons, particularly *Fixierung,* and surgical castration of sex offenders. The CPT welcomed the excellent co-operation of the German authorities and was pleased that its delegation received no allegations and found no evidence of physical ill-treatment or verbal abuse in the detention facilities visited. Regarding preventive detention, the CPT addressed to the authorities several recommendations and requests for information concerning the conditions and treatment in detention, disciplinary sanctions[183] and complaint procedures. The CPT also encouraged the authorities of all *Länder* to abandon the resort to *Fixierung* in prisons and called on all relevant federal and *Länder* authorities to put a definitive end to surgical castration. On this last point, it should be noted that castration is only permissible under very strict preconditions, including the consent of the person concerned, confirmed by an expert.[184] In addition, surgical castration is applied only in rare exceptional cases: since 2000, 29 applications had been submitted, of which only eleven were accepted.

5.5. Violence against women

107. According to a 2004 survey conducted by the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 37% of women interviewees have experienced some form of physical attack or threat of violence since the age of 16.[185] A survey by European Union Fundamental Rights Agency, published in 2014, found that 35% of women in Germany had experienced physical violence or threats since the age of 15.[186] At the same time, according to the same survey, only 23% of women had recently seen or heard any campaigns addressing violence against women.

108. The issue of violence against women recently appeared on the front pages of the press all around Europe and beyond, following the attacks in Cologne and other German cities (but also in Austria, Finland and Switzerland) on New Year's Eve 2016, when hundreds of men harassed, insulted and grabbed women – in the context of widely published allegations that the offenders were persons of migrant background or refugees. The rapporteur does not want to give a detailed description of the events, considering that in January 2016 our colleague Jonas Gunnarsson (Sweden, SOC) prepared an excellent report on "Recent attacks against women in European cities – the need for a comprehensive response"[187] resulting in a resolution[188] adopted by the Assembly on the occasion of a debate under urgent debate procedure. Furthermore, a follow-up report on "Women in public space: putting an end to sexual violence and street

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179. "Council of Europe anti-torture Committee visits Germany", CPT website, 11 December 2015: www.cpt.coe.int/documents/deu/2015-12-11-eng.htm.
180. Diez Prison (Rhineland-Palatinate), Frankfurt Prison III for Women (Hessen), Freiburg Prison (Baden-Württemberg), Hohenasperg Socio-therapeutic Institution (Baden-Württemberg), Berlin-Tegel Prison.
181. Berlin-Plötzensee and Hohenasperg Prison Hospitals.
182. Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 2 December 2013, CPT/Inf (2014) 23, 24 July 2014: www.cpt.coe.int/documents/deu/2014-23-inf-eng.pdf.
183. Shorter term of disciplinary isolation; appeal procedure for persons in preventive detention facing disciplinary charges; review of the role of prison doctors in relation to disciplinary matters in all German *Länder*.
184. Response of the German Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany from 25 November to 2 December 2013, CPT/Inf(2014)24, 24 July 2014: www.cpt.coe.int/documents/deu/2014-24-inf-eng.pdf.
185. Health, well-being and personal safety of women in Germany: A representative survey of violence against women in Germany – summary of the central research results, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2004: www.bmfsfj.de/RedaktionBMFSFJ/Broschuerenstelle/Pdf-Anlagen/Frauenstudie-englisch-Gewalt-gegen-Frauen,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf.
186. Violence against women: an EU-wide survey. Main results, European Union Fundamental Rights Agency, 2014: http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf.
187. Recent attacks against women in European cities – the need for a comprehensive response, report of the Committee on Equality and Non-Discrimination (rapporteur: Mr Jonas Gunnarsson, Sweden, SOC), Doc. 13961.
188. Resolution 2093 (2016) "Recent attacks against women: the need for honest reporting and a comprehensive response".

harassment" is under preparation in the Committee on Equality and Non-Discrimination. The rapporteur would nevertheless like to underline three ideas already expressed in the report and the resolution that he finds of particular relevance.

109. First, there should be no impunity for violence against women – in Germany or elsewhere. Up to the end of March, in Cologne alone police received 1 527 criminal complaints, with more than 500 victims alleging sexual crimes. The first person on sexual offence-related charges was arrested on 18 January 2016, and the first sexual assault case related to the attacks went to trial on 11 April (this case was related to the attacks in Düsseldorf). Furthermore, German police reported 66 complaints of sexual insults or aggression (up from 18 in 2015) during the Cologne carnival from 4 to 10 February 2016. According to the police, this increase could partly be attributed to "a change in the attitude of victims and witnesses", since local authorities urged the victims to come forward. Eight women also reported to the police that they were sexually assaulted during the 13-16 May 2016 Festival of Cultures in Berlin; 12 suspects were identified, and arrest warrants issued against seven.[189] The Conference of Interior Ministers also established a Federation-*Länder* Project Group on the New Year's Eve events, headed by the Federal Criminal Police Office, to establish the full facts, carry out a "qualified analysis of the phenomenon" and develop suitable countermeasures, which are currently being examined by the Conference of Interior Ministers.[190] The rapporteur recalls that the Assembly called on the relevant authorities to conduct an investigation into the New Year's Eve events and to publish its results.

110. Second, as the Assembly stressed in its resolution, violence against women should not be instrumentalised for other purposes. Shamefully, certain political movements (including PEGIDA) and media used the attacks as a tool for stigmatisation of refugees and migrants, affecting public opinion. This sad episode should be a wake-up call to reconsider and reinforce the policies of combating violence against women (which is not a new phenomenon in Germany) and not a pretext for blaming a group of the population. As the Assembly report stated, "[w]hile the Cologne attacks were allegedly mostly perpetrated by men from an immigrant background, we should not pay more attention to the country of origin of perpetrators than to the gravity of the acts committed".

111. Finally, this episode should lead to concrete and long-term policies to combat violence against women. The ratification of the Istanbul Convention would be a logical step, and the rapporteur was pleased to learn that the German authorities were preparing it. One positive step was made with the amendment of the much criticised sex crime legislation and the adoption of the "No means No" law in July 2016 (the current definition of rape did not, so far, include the notion of consent,[191] and the rape was not prosecuted if the victim did not fight back).[192] But utmost attention should also be paid to awareness-raising activities and education policies, support to organisations providing assistance and involvement of the media. The Federal Minister of Justice has recently proposed to ban sexist advertisements, which could be interpreted as a signal that the government takes the issue of violence against women seriously and is looking for new approaches to combat it.[193]

5.6. Trafficking in human beings

112. Germany ratified the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) in 2012. In 2006, it ratified the United Nations Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. It is also Party to numerous other treaties contributing to the fight against trafficking in human beings (THB) (including those specifically protecting children and women). Three Sections of the German Criminal Code, introduced in 2005, contain provisions criminalising THB: 232 (Human trafficking for the purpose of sexual exploitation), 233 (Human trafficking for the purpose of work exploitation) and 233a (Assisting in human trafficking).[194]

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189. "Berlin police seek carnival sexual assault suspects", *Deutsche Welle*, 17 May 2016: www.dw.com/en/berlin-police-seek-carnival-sexual-assault-suspects/a-19263469.
190. AS/Mon (2016) 33, p. 16.
191. Section 177 of the Criminal Code lists three forms of coercion as the definition of rape: force, "threat of imminent danger to life or limb" or "exploiting a situation in which the victim is unprotected and at the mercy of the offender", German Criminal Code, official English translation: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.
192. "Germany begins reforming sex crime law after Cologne", *Deutsche Welle,* 28 April 2016: www.dw.com/en/germany-begins-reforming-sex-crime-law-after-cologne/a-19223262.
193. "German justice minister: sex shouldn't sell", *Deutsche Welle,* 12 April 2016: www.dw.com/en/german-justice-minister-sex-shouldnt-sell/a-19181901.
194. German Criminal Code, official English translation https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

113. In June 2015, the Group of Experts on Action against Trafficking in Human Beings (GRETA) published its report on Germany under the first evaluation round.[195] According to the report, Germany is primarily a country of destination for victims of THB. 651 victims of human trafficking were identified by the BKA as part of police investigations in 2010 (515 women, 35 men, 95 children), 672 in 2011 (555 women, 24 men, 90 children), 626 in 2012 (510 women, 11 men, 100 children) and 603 in 2013 (478 women, 54 men, 70 children). Most of them were victims of sexual exploitation (93% of the victims from 2010 to 2013). The main countries of origin of the victims in 2010-2013 were Romania (571), Bulgaria (516), Hungary (190), Poland (112) and Nigeria (102). The number of German citizens identified as victims of trafficking amounted to 92 in 2013 (122 in 2010, 138 in 2011, 129 in 2012).

114. GRETA welcomed important steps taken by Germany in the fight against THB, including the action of the Federal Working Group on THB and co-ordinating structures at the *Land* level as well as the establishment of specialised counselling centres assisting victims of THB for the purpose of sexual exploitation (even though they often lack adequate long-term funding, and such facilities for victims of THB for labour exploitation and for trafficked children are lacking). It also noted several areas for improvement, including the elaboration of a comprehensive nation-wide action plan or strategy specifically addressing THB and awareness-raising activities, consistent data collection and a proactive approach to identification of victims, increased attention to forms of THB other than for sexual exploitation, to the vulnerability of children and to the victims of THB among asylum seekers and irregular migrants in detention facilities, compensation for the victims and training of judges and prosecutors.

115. GRETA also urged the German authorities to ensure that victims of THB are not penalised for offences committed in the course of or as a consequence of being trafficked. The Committee of the Parties to the Council of Europe Convention on Action against Trafficking in Human Beings subsequently put forward a number of recommendations in these areas.[196] In this respect the rapporteur welcomes the draft Act to Improve Action Against Human Trafficking and to Amend the Federal Central Criminal Register Act and Book VIII of the Social Code (*Gesetz zur Verbesserung der Bekämpfung des Menschenhandels und zur Änderung des Bundeszentralregistergesetzes sowie des Achten Buches Sozialgesetzbuch*) adopted by the German *Bundestag* on 7 July 2016. The bill contains a provision on the criminal liability of clients of sexual services, which criminalises the exploitation – including the knowing acceptance – of a victim's predicament to induce them to engage in sexual acts. In addition, the bill includes new offences of "labour exploitation" and "exploitation involving unlawful deprivation of liberty". The Law to improve action against trafficking was adopted on 11 October 2016, and entered into force on 15 October 2016.[197]

116. Special reference should be made to the efforts undertaken by the German authorities to address the issue of the vulnerability of children and the victims of THB among asylum seekers and irregular migrants, in co-operation with the *Länder*, through the drafting of a comprehensive protection strategy including several programmes addressing in particular the needs of women and children in refugee accommodation centres. The Federal Government is also examining, together with the *Länder*, to what extent the protection of women, children and other especially vulnerable groups in refugee accommodation centres can be improved through provisions in federal law.[198]

117. The rapporteur also welcomes the preparation of a nationwide co-operation strategy to improve the protection of victims in the case of the trafficking of minors to ensure adequate protection measures and comprehensive support measures for potential and actual victims of human trafficking who are minors.[199]

118. The rapporteur would like to recall the conclusions of the Assembly's 2014 report on "Prostitution, trafficking and modern slavery in Europe"[200] prepared by our former colleague José Mendes Bota (Portugal, EPP/CD). Prostitution is legal in Germany since 2002, and whilst official sources claimed that it had led to a decrease in THB (according to the BKA, a third less trafficking cases were prosecuted in 2011 than 10 years

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195. Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Germany. First evaluation round, GRETA(2015)10, adopted on 30 March 2015, published on 3 June 2015: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680631c38.
196. "Recommendation CP(2015)2 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Germany", Committee of the Parties to the Council of Europe Convention on Action against Trafficking in Human Beings, adopted at the 16th meeting of the Committee of the Parties on 15 June 2015: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680631c38.
197. AS/Mon (2016) 33, p. 16.
198. Ibid.
199. Ibid.
200. Prostitution, trafficking and modern slavery in Europe, report of the Committee on Equality and Non-Discrimination (rapporteur: Mr José Mendes Bota, Portugal, EPP/CD), Doc. 13446.

earlier), other actors thought that lower figures only reflected fewer investigations and more difficult prosecution, and that in reality THB had increased. The report also quotes academic research, including into the German case, concluding that legalising prostitution seems to lead to an increase in THB and that criminalisation of prostitution reduces it – which is not confirmed by the Federal Criminal Police Office's annual Trafficking in Human Beings Situation Report, even in a comparison over several years.[201] In the resolution following the report, the Assembly called on the member States, in order to reinforce the fight against THB, to consider criminalising the purchase of sexual services, to ban their advertising and to criminalise pimping.[202]

119. The rapporteur was informed that on 7 July 2016 the parliament adopted the draft Act on Regulating the Business of Prostitution and Protecting Persons Working in Prostitution (*Prostituiertenschutzgesetz*), which will enter into force on 1 July 2017. The bill provides for the regulation of the business of prostitution under commercial law and for binding minimum requirements and obligations, notably to protect the health and safety of the prostitutes. The bill also introduces a ban on any form of advertising of prostitution which is detrimental to legally protected public interests, especially the protection of minors, as well as a ban on the advertising of unprotected sex.[203] The rapporteur notes that the Act Protecting Persons Working in Prostitution will introduce federal statistics, which are intended to help ensure that more reliable statistical information becomes available about the situation of legal prostitution in Germany. The rapporteur welcomed the announcement made by the authorities to carry out an evaluation of the Act Protecting Persons Working in Prostitution on the basis of these statistics to gain a better understanding of the effects of this legalisation.

5.7. Migrants and asylum seekers

120. On 21 March 2016, the Federal Statistics Office announced that in 2015 it recorded the highest net immigration of foreign nationals in the history of the Federal Republic of Germany: 1.14 million people, almost twice as many as in 2014 (577 000 people).[204] The number of registered arrivals dropped in March 2016 to about 20 000 from 61 000 in February, 92 000 in January and a peak of 206 000 in November 2015. This decrease may be linked to the introduction, in February 2016, of daily quotas for the number of migrants by Austria and the sealing off of their borders by several south-eastern European States. Of this massive arrival, only 477 000 requests for asylum were officially registered in Germany in 2015.[205] In December 2015, 364 664 cases were still pending. Most of the asylum requests came from people who originated from Syria (162 510), Albania (54 762), Kosovo*[206] (37 095), Afghanistan (31 902) and Iraq (31 379). On 9 May 2016, the head of the Federal Refugees Agency (BAMF) said the agency expected to process more than a million applications in 2016, including the 430 000 that remained pending.[207]

121. As already noted, the Federal Government has continually refused to cap the number of refugees arriving in Germany; Chancellor Merkel reiterated on several occasions that the government considered the reception of refugees a moral and political obligation regardless of their number. Germany has also persistently defended an approach according to which European solidarity, primarily at EU level, was indispensable to finding a sustainable and humane solution to the arrival of asylum seekers in Europe. Often facing opposition from some European colleagues,[208] German leaders played a key role in promoting EU schemes for resettlement and relocation and advocated for a common EU asylum/refugee policy. Germany

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201. AS/Mon (2016) 33, p. 16.
202. Resolution 1983 (2014) on prostitution, trafficking and modern slavery in Europe.
203. AS/Mon (2016) 33, p. 17.
204. See "Nettozuwanderung von Ausländerinnen und Ausländern im Jahr 2015 bei 1,1 Millionen", website of the Federal Statistics Office, 21 March 2016 https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2016/03/PD16_105_12421.html.
205. Anne Bonewit and Rosamund Shreeves, Reception of female refugees and asylum seekers in the EU. Case study Germany, Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, PE 536.497, 2016:
www.europarl.europa.eu/RegData/etudes/STUD/2016/536497/IPOL_STU%282016%29536497_EN.pdf.
206. * Throughout this text, all reference to Kosovo, whether to the territory, institutions or population shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.
207. "Germany to process over one million asylum claims in 2016", *Deutsche Welle,* 9 May 2016: http://amp.dw.com/en/germany-to-process-over-one-million-asylum-claims-in-2016/a-19245582.
208. As our colleague Tineke Strik noted: "Some have blamed this summer's unprecedented arrival of refugees through Turkey on 'overgenerous' policies in Germany and Sweden. … Blaming some countries' more humane policies in fact reflects the profound lack of harmonisation across the European Union of reception conditions, asylum procedures and welfare and integration policies. It also ignores some countries' 'race to the bottom'". Doc. 13867 Add., Countries of transit: meeting new migration and asylum challenges, addendum to the report of the Committee on Migration, Refugees and Displaced Persons (rapporteur: Ms Tineke Strik, Netherlands, SOC), 28 September 2015.

also greatly contributed to securing the EU–Turkey Agreement of 18 March 2016, aimed at putting an end to illegal immigrant smuggling in the Aegean, to significantly reduce the number of deaths in the Aegean and the number of illegal border crossings in the Greek islands, and to allow for returning irregular migrants to Turkey from the Greek Islands in exchange for resettlement of Syrian refugees from Turkey in the European Union. This agreement was criticised by human rights defence NGOs and by our Assembly who considered that it raised "several serious human rights issues relating to both its substance and its implementation now and in the future".[209]

122. On 25 August 2015, Germany *de facto* suspended the application of the Dublin procedure to Syrian nationals, accepting asylum applications from all Syrian refugees, regardless of which EU country they first entered. This decision was welcomed[210] as a first step towards reforming the Dublin system, increasingly considered as unfair to asylum seekers and to the countries that find themselves on the frontline of arrival of refugees to the European Union.[211] However, on 10 November 2015, the Federal Ministry of the Interior announced that it had reinstated the application of the Dublin agreements to Syrian refugees since 21 October (with the exception of the returns to Greece already prohibited previously).[212] On 13 September 2015, Germany reintroduced temporary sporadic checks at its border with Austria in order to re-establish control over the flow of migrants and refugees. Several other countries of the Schengen Area did likewise.

123. The massive arrival of asylum seekers and migrants puts pressure on the German system of administration of asylum procedure and on the political leaders who have the responsibility of finding sustainable, practical and humane solutions. The situation is complex and constantly evolving; numerous reforms have been recently launched in order to cope with this responsibility. It would therefore be futile to try to extensively cover the situation in this report. Perhaps our Committee on Migration, Refugees and Displaced Persons could consider looking more closely into the situation of refugees and asylum seekers in Germany, especially considering the scale and political importance of this subject. The rapporteur will only briefly mention several areas where concerns have recently been raised.

124. In his 2015 report, the Commissioner for Human Rights welcomed the progress made by the German authorities in ensuring respect of the rights of asylum seekers.[213] At the same time, he made several recommendations. Concerning reception conditions, he recommended developing nationwide obligatory minimum standards for the operation of reception facilities and insisted on the need to increase the staffing of these facilities. Welcoming the Government's intention to increase the number of staff at BAMF, he underlined the need for appropriate training. The Commissioner urged the authorities to ensure prompt and effective investigation into all allegations of ill-treatment of asylum seekers. He called on the Federal Government to better support, including financially, the *Länder* and municipalities in the implementation of reception. Germany could also improve asylum seekers' access to health care and should ensure that refugees and other beneficiaries of international protection fully enjoy their right to family reunification (including reducing waiting time for obtaining a visa). The Commissioner also insisted on the need to reinforce integration policies, including by strengthening language classes. He called on the German authorities to continue playing a leading role in helping Syrian refugees to face the humanitarian crisis, including by increasing the country's resettlement quota.[214] In this respect, the German authorities pointed out that the legal ways for Syrian refugees to seek asylum are continuously open in the framework of EU agreements – and for family reunification: it is estimated that between 200 000 and 300 000 family members from Syria and Iraq could act on an entitlement to join their families in Germany in the coming months.[215] A 2016 report on the situation of the refugee women commissioned by the European Parliament stated that overcrowding had led to an increase in violence and sexual assaults in reception centres.[216] In May 2016, the media brought into the spotlight the issue of violence in asylum centres, notably following the reports on attacks against Christians by other refugees[217] and a fight in a refugee shelter in the district of Verden in Lower Saxony leaving a 14-year-old Afghan boy critically injured.[218]

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209. Resolution 2109 (2016) on the situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016.
210. For example, report by Nils Muižnieks, op. cit.
211. See, for example, Resolution 2072 (2015) "After Dublin – the urgent need for a real European asylum system".
212. "Germany reinstates Dublin rules for Syrian refugees", *Deutsche Welle,* 10 November 2015: www.dw.com/en/germany-reinstates-dublin-rules-for-syrian-refugees/a-18842101.
213. Report by Nils Muižnieks, op. cit.
214. Currently Germany's pledges since 2013 amount to 20 067 people under humanitarian admission programmes and 21 832 under private sponsorship. See the UNCHR factsheet on "Resettlement and Other Forms of Legal Admission for Syrian Refugees", 18 March 2016: www.unhcr.org/52b2febafc5.pdf.
215. AS/Mon (2016) 33, p. 17.
216. Anne Bonewit and Rosamund Shreeves, op. cit.
217. "German activists decry attacks on Christian refugees in asylum centers", *Deutsche Welle*, 9 May 2016: www.dw.com/en/german-activists-decry-attacks-on-christian-refugees-in-asylum-centers/a-19244927.

125. The German authorities are taking action in these areas of concern. For instance, in October 2015, the *Bundestag* and *Bundesrat* adopted a legislative package[219] accelerating asylum procedures, easing the burden on *Länder*, improving integration measures, replacing support in cash with benefits in kind as far as possible, speeding up construction of new accommodation and improving the assistance to minors among refugees (it should be recalled that almost 6 000 refugee children and minors were reported missing in Germany in 2015).[220] On 14 April 2016, the governing coalition presented the new draft integration law which puts emphasis on refugees' participation in the workforce, proposes to provide easier financial support for new arrivals and to enact penalties for those who don't participate in integration courses and do not learn German.[221] This Law entered into force on 6 August 2016. In May 2016, the head of BAMF announced the plans to further speed up processing of asylum applications.[222] *Der Spiegel* magazine reported that the Federal Finance Ministry expected federal and *Land* authorities to spend €93.6 billion to support refugees in 2015-2020.[223]

126. In 2014 and 2015, Germany twice extended its list of "safe countries of origin". Serbia, "the former Yugoslav Republic of Macedonia" and Bosnia and Herzegovina were deemed safe countries in November 2014 and Albania, Kosovo and Montenegro in October 2015. In January 2016, Federal Vice-Chancellor Sigmar Gabriel announced that Germany would place Algeria, Morocco and Tunisia on the list of "safe countries of origin", and on 13 May 2016 the *Bundestag* approved this proposal. The *Bundesrat* has yet to take a decision on that proposal. The Commissioner for Human Rights and Human Rights Watch,[224] among others, expressed concerns about the quality of individual examinations following the extensions of the lists, the Commissioner recalling that he had already criticised the drawing up of lists of "safe countries of origin" *per se*, because "even countries regarded as safe overall might not be safe for some persons or groups". The Commissioner also called on the authorities to refrain from any forced return, particularly of the Roma people, to Kosovo. The German authorities assured the Commissioner that even when they come from the "safe countries", "vulnerable people … are not left unprotected, as the legal presumption of freedom from persecution can be rebutted. Every asylum applicant has the chance to demonstrate that he faces persecution that deviates from the general situation in the country of origin.[225]

6. Conclusions and recommendations

127. The Federal Republic of Germany is characterised by a federal system, with a well-anchored democracy, including at local level where the right to self-government of municipalities is recognised in the Federal and *Länder* Constitutions. Overall, the functioning of democratic institutions in Germany complies with Council of Europe standards. Germany, which globally honours its membership obligations to the Council of Europe, can be rightfully congratulated on its very positive record in terms of democracy, human rights and the rule of law, and its active and respected role in the international arena, including in European affairs, for promoting dialogue and co-operation whilst remaining faithful to the values of human rights and the rule of law.

128. Germany was, in recent months, confronted with a massive arrival of refugees – more than one million arrived in Germany in 2015 – which has created major challenges at all levels of the State and for the people of Germany. The efforts of the vast majority of the German population, who are willing to accommodate and assist refugees, have to be commended. In this respect, the Monitoring Committee welcomes the tolerant position of the Federal Government and major political parties, despite the recent rise of the far-right Alternative for Germany party, the upsurge in the number of attacks against facilities for asylum seekers and

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218. "Brawl at German migrant shelter leaves 14 injured", *Deutsche Welle*, 15 May 2016: www.dw.com/en/brawl-at-german-migrant-shelter-leaves-14-injured/a-19259711.
219. "Effective procedures, early integration", website of the Federal Government, 15 October 2015: https://www.bundesregierung.de/Content/EN/Artikel/2015/10_en/2015-10-15-asyl-fluechtlingspolitik.html;jsessionid=1865D29CB596C55D55EEDB7502450949.s4t1?nn=447370#Start.
220. Almost 6 000 refugee children went missing last year, says Germany, *The Guardian,* 12 April 2016: http://gu.com/p/4taxb/sbl.
221. "German officials laud new integration law as 'historic step'", *Deutsche Welle*, 14 April 2016: www.dw.com/en/german-officials-laud-new-integration-law-as-historic-step/a-19186665.
222. "Germany to process over one million asylum claims in 2016", *Deutsche Welle,* 9 May 2016: http://amp.dw.com/en/germany-to-process-over-one-million-asylum-claims-in-2016/a-19245582
223. "Report: Germany to spend 94 billion euros on refugees in next five years", *Deutsche Welle*, 14 May 2016: www.dw.com/en/report-germany-to-spend-94-billion-euros-on-refugees-in-next-five-years/a-19258420.
224. Human Rights Watch, "European Union. Events of 2016", World Report 2016: https://www.hrw.org/world-report/2016/country-chapters/european-union-0.
225. Comments by the German Federal Government on the report by Nils Muižnieks, op. cit.

refugees in 2014-2015, the rise in the number of attacks against mosques and Muslim people, negative attitudes to Roma and Sinti among the general population and anti-Semitic attitudes. Drawing on the conclusions of many international monitoring bodies, the committee believes that combating xenophobia, racism and intolerance constitutes one of the most important and urgent challenges that Germany – as well as many other European States – has to face.

129. The committee welcomes, together with ECRI, the preventive work conducted by the authorities to make children and young people more aware of the dangers of right-wing extremism, including the drawing up of a new "National Action Plan against Racism", which should also cover homophobia and transphobia. It notes with satisfaction the increased budget and staff of the Federal Anti-Discrimination Agency in recent years, and encourages Germany to pursue these efforts.

130. While Germany has an overall positive record, the Monitoring Committee would like to make some recommendations to address some remaining issues. The Monitoring Committee in particular:

– welcomes the progress made by the German authorities in the area of local government finances. It encourages the federal authorities to pursue their consultations of all *Länder* to achieve the signature and ratification of the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority, in line with Recommendation 320 (2012) of the Congress of Local and Regional Authorities of the Council of Europe;

– encourages the authorities to scrap Section 103 of the Criminal Code (Defamation of organs and representatives of foreign States) and amend accordingly the 2009 anti-terrorism law (i.e. the BKA Act) following the decision of the Constitutional Court of 20 April 2016, with a view to strengthening media freedom;

– welcomes the recent initiatives undertaken by the authorities, together with the internet operator services and civil society, to tackle the issue of online hate speech, and applauds the various projects undertaken, notably through a national campaign launched in the framework of the Council of Europe's "No Hate Speech Movement";

– encourages the German authorities to pursue efforts to combat racism, hatred and right-wing extremism; welcomes the amendment to the Criminal Code adopted on 8 May 2015 defining the racist motivation of an ordinary offence as an aggravating circumstance to hate crimes, in line with ECRI recommendations, and takes note of the assurances given by the authorities that "other motivations showing contempt for human dignity" encompasses all recognised aspects of discrimination, including and in particular motives directed against the victim's sexual orientation, and thus that this includes homophobic and transphobic motives;

– encourages the authorities to apply a zero-tolerance policy towards racism and ethnic profiling in the police, and combat, through training and awareness-raising activities, less visible forms of racism which may result from structures and procedures in law enforcement; encourages the establishment of an independent complaints mechanism, which could be a useful contribution towards tackling this issue and building trust between police forces and the public;

– praises the substantial support provided by the authorities to preserve and develop the national minority languages and cultures and encourages the German authorities to strengthen their efforts to promote, including through an adequate educational offer and the media, the Lower Sorbian, Upper Sorbian, North Frisian, Sater Frisian, Low German, Danish and Romani languages;

– with a view to strengthening the independence of the judiciary, reiterates the call made by the Parliamentary Assembly in 2009 and 2015 to the authorities, including at the level of the *Länder*, to consider setting up a system of judicial self-administration, gradually increase the salaries of judges and prosecutors and abolish the possibility for Ministers of Justice to give the prosecution [lawful] instructions concerning individual cases, thus strengthening the independence of the public prosecutors;

– with a view to fighting corruption:

  - welcomes the adoption of the Anti-Corruption Act on 26 November 2015 and the 2015 amendments to the legislation about cooling-off periods for members of the Federal Government and Parliamentary State Secretaries; considers that the amendments to the Political Parties Act, adopted on 22 December 2015 (and which entered into force on 1 January 2016), are a step in the right direction towards increasing the transparency and effective enforcement of the rules,

but fail however to address outstanding recommendations issued by GRECO, such as the introduction of a system for the timely publication of election campaign accounts, enhancing the transparency of direct donations to parliamentarians and election candidates;

- welcomes the move to ratify, in the near future, the Criminal Law Convention on Corruption, the Additional Protocol thereto and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005;
- encourages Germany to speed up the consideration of the ratification of the Council of Europe Civil Law Convention on Corruption;

– echoing the recommendations made by the CPT and the Commissioner for Human Rights, encourages the authorities to establish a fully independent and well-functioning complaints mechanism covering all law-enforcement officials;

– welcomes the ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse on 18 November 2015;

– congratulates the German Parliament for adopting, on 7 July 2016, the “No means No” law which enhances the protection of individual consent in sexual relations and paves the way for the ratification of the Istanbul Convention to prevent and combat violence against women and domestic violence, which Germany is encourage to ratify soon;

– welcomes the draft Act to Improve Action Against Human Trafficking, adopted by the German *Bundestag* on 7 July 2016, which includes new offences of “labour exploitation” and “exploitation involving unlawful deprivation of liberty”;

– welcomes the drafting of a comprehensive protection strategy to address the issue of the vulnerability of children and the victims of trafficking in human beings among asylum seekers and irregular migrants, in co-operation with the *Länder*, as well as a nationwide co-operation strategy to improve the protection of victims in the case of the trafficking of minors;

– calls on the authorities to promptly ratify the European Social Charter (revised) and its Protocols.

Appendix

Council of Europe conventions signed and/or ratified between 1 October 2013 and 10 November 2016 by Germany

ETS or CETS No.	Title		
127	Convention on Mutual Administrative Assistance in Tax Matters		
	Signature: 17/04/2008	Ratification: 28/08/2015	Entry into force: 01/12/2015
182	Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters		
	Signature: 08/11/2001	Ratification: 20/02/2015	Entry into force: 01/06/2015
183	European Convention for the Protection of the Audiovisual Heritage		
	Signature: 15/09/2008	Ratification: 05/12/2013	Entry into force: 01/04/2014
184	Protocol to the European Convention for the Protection of the Audiovisual Heritage, on the Protection of Television Productions		
	Signature: 15/09/2008	Ratification: 05/12/2013	Entry into force: 01/04/2014
198	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism		
	Signature: 28/01/2016		
201	Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse		
	Signature: 25/10/2007	Ratification: 18/11/2015	Entry into force: 01/03/2016
202	European Convention on the Adoption of Children (Revised)		
	Signature: 23/05/2014	Ratification: 02/03/2015	Entry into force: 01/07/2015
208	Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters		
	Signature: 03/11/2011	Ratification: 28/08/2015	Entry into force: 01/12/2015
209	Third Additional Protocol to the European Convention on Extradition		
	Signature: 31/01/2011	Ratification: 25/05/2016	Entry into force: 01/09/2016
213	Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms		
	Signature: 24/06/2013	Ratification: 15/04/2015	
215	Council of Europe Convention on the Manipulation of Sports Competitions		
	Signature: 18/09/2014		
217	Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism		
	Signature: 22/10/2015		

Recent findings of Council of Europe monitoring mechanisms and other bodies as of 10 November 2016

European Court of Human Rights	European Convention on Human Rights (ETS No. 5) ratified in 1952 Protocol No. 1 (ETS No. 009) ratified in 1957 Protocol No. 2 (ETS No. 044) ratified in 1969 Protocol No. 6 (ETS No. 114) ratified in 1989 Protocol No. 12 (ETS No. 177) **signed in 2000** Protocol No. 13 (ETS No. 187) ratified in 2004 Protocol No. 14 (CETS No. 194) ratified in 2006 Out of a total of 64,850 applications pending before a judicial formation on 31 December 2015, 212 concerned Germany. Resolutions adopted by the Committee of Ministers: 6 in 2013, 5 in 2014, 4 in 2015 and 2 in 2016. See Press country profile Germany
Congress of Local and Regional Authorities	European Charter on Local Self-Government (ETS No. 122) ratified in 1988 Last report and Recommendation on local democracy in Germany adopted in March 2012: CG(22)7 and Recommendation 320 (2012)

Group of States against Corruption (GRECO)	Civil Law Convention on Corruption (ETS No. 174) signed in 1999 but **not ratified** Criminal Law Convention on Corruption (ETS No. 173) signed in 1999 but **not ratified**, Additional Protocol (ETS No. 191) signed in 2003 but **not ratified** *Third evaluation round: second interim compliance report on Germany: "Incriminations (ETS 173 and 191, GPC 2)", "Transparency of party funding",* adopted by GRECO at its 61st plenary meeting, Strasbourg, 14-18 October 2013, published in December 2013, Greco RC-III(2013)15E second interim report *Third evaluation round: third interim compliance report on Germany: "Incriminations (ETS 173 and 191, GPC 2)", "Transparency of party funding",* adopted by GRECO at its 65th plenary meeting, Strasbourg, 6-10 October 2014, published in January 2015, Greco RC-III(2014)19E third interim report *Third evaluation round: second compliance report on Germany: "Incriminations (ETS 173 and 191, GPC 2)", "Transparency of party funding"*, adopted by GRECO at its 71st plenary meeting, Strasbourg, 14-18 March 2016, published in June 2016, GrecoRC3(2016)5 *Fourth evaluation round: Corruption prevention in respect of members of parliament, judges and prosecutors: evaluation report: Germany*, adopted by GRECO at its 65th plenary meeting, Strasbourg, 6-10 October 2014, published in January 2015, Greco Eval IV Rep(2014)1E
Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL)	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 (ETS No. 141) ratified in 1998 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (revised) (CETS No. 198) signed in 2016 but **not ratified** Germany is not a member of MONEYVAL.
Commissioner for Human Rights	*Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Germany, on 24 April and from 4 to 8 May 2015*, CommDH(2015)20 / 01 October 2015
European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)	Convention (ETS No. 126) ratified in 1990, Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152) ratified in 1996 Publication of the last report: July 2014, C PT/Inf(2014)23 Last country visit: November-December 2015
Group of Experts on Action against Trafficking in Human Beings (GRETA) and Committee of the Parties	Convention (CETS No. 197) ratified in 2012 1st Evaluation Round: ~~G~~RETA's Report and Government's Comments published in June 2015, G RETA(2015)10 ~~R~~ ecommendation CP(2015)2 of the Committee of the Parties adopted in June 2015
Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) and Committee of the Parties	Convention on preventing and combating violence against women and domestic violence (CETS No. 210) signed in 2011 but **not ratified**
European Commission against Racism and Intolerance (ECRI)	The 5th report on Germany was adopted in December 2013 and made public in February 2014, C RI(2014)2
Venice Commission	No opinion concerning Germany

Other treaties:

Framework Convention for the Protection of National Minorities	Convention (ETS No. 157) ratified in 1997 ~~L~~ast State Report (4th cycle) received in March 2014, A CFC/SR/IV(2014)004 ~~L~~ast Advisory Committee Opinion (4th cycle) adopted in March 2015, A CFC/OP/IV(2015)003 ~~L~~ast CM Resolution (4th cycle) on the implementation of the Framework Convention adopted in February 2016, C M/ResCMN(2016)4
European Charter for Regional or Minority Languages	Convention (ETS No. 148) ratified in 1998 ~~L~~ast State Periodical Report (5th cycle) submitted in April 2013, M IN-LANG(2013)PR02 ~~L~~ast Committee of Experts' evaluation report (5th cycle) adopted in November 2013, E CRML(2014)6 ~~L~~ast Committee of Ministers' Recommendation (5th cycle) adopted in May 2014, C M/RecChL(2014)5
European Social Charter	European Social Charter of 1961 (ETS No. 35) ratified in 1965 European Social Charter (revised) (ETS No. 163) signed in 2007 but **not ratified** Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158) **neither signed nor ratified** See Country factsheet Germany