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REPORT
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COMMISSIONER FOR HUMAN RIGHTS OF THE
COUNCIL OF EUROPE

FOLLOWING HIS VISIT TO GERMANY
ON 24TH APRIL AND
FROM 4 TO 8 MAY 2015

The report does not take into account any developments since 31 July 2015

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SUMMARY

Commissioner Nils Muižnieks and his delegation visited Germany on 24 April and from 4 to 8 May 2015. In the course of the visit the Commissioner held discussions with state authorities and non-governmental, national and international organisations. The present report focuses on the following human rights issues:

The institutional and legal framework for the protection and promotion of human rights

Germany has ratified most of the Council of Europe and other international treaties on human rights and set up an independent national human rights institution, the German Institute for Human Rights (GIHR). The Commissioner welcomes 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. At the same time, and based on the GIHR's successful experience so far, he calls on the German authorities to increase the powers of the GIHR so that it can fulfill its mandate more effectively.

The Commissioner also notes that other institutions for the protection and promotion of human rights in Germany currently have inadequate means and powers available to them and are not sufficiently independent. The mandate of the Federal Anti-Discrimination Agency (ADS) should in particular be extended, to allow it to investigate complaints brought to its attention and go to court if necessary. This should be accompanied by an increase of the Agency's budget so as to allow for more effective public awareness campaigns and more substantial research on discrimination, as well as an increase of its legal and research staff. As for the National Agency for the Prevention of Torture, the Commissioner considers that Germany did not live up to the expectations deriving from the ratification of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by setting up a rather low-profile mechanism. He urges the authorities to ensure that this mechanism is adequately resourced and to increase the number of its members and support staff.

Furthermore, the Commissioner notes that there is no independent police complaints mechanism in Germany, a gap repeatedly highlighted by the Commissioner's predecessors. He therefore calls on the German authorities to establish a fully independent and well-functioning complaints mechanism covering all law enforcement officials.

While he welcomes the existence of a general framework for the democratic oversight of the intelligence and security services in Germany, the Commissioner encourages the authorities to draw the necessary lessons from the recent revelations of mass surveillance and acknowledge that the existing legal framework should be strengthened, and legal remedies improved, in order to ensure that human rights are fully protected against any abuse by these services. In the Commissioner's view, the parliamentary oversight currently operated by the Parliamentary Control Panel must be bolstered by considerably strengthening its support staff and the latter's technical expertise. Further consideration should also be given to the resource needs of the G-10 Commission so that it has sufficient technical expertise to carry out its activities and capacity to effectively scrutinize intrusive information-collection measures by the intelligence services. The authorities should also guarantee that all oversight bodies have access to all information, regardless of its level of classification, which they deem to be relevant to the fulfillment of their mandates. The question of surveillance operated by the German intelligence services over non-German citizens outside of Germany should be clarified. The Commissioner urges the authorities to ensure adherence to Article 8 of the European Convention on Human Rights, guaranteeing the right to private life, which should apply to all activities of the states that are party to this Convention, including all its national security and intelligence activities.

The human rights of asylum seekers, refugees and immigrants

The Commissioner acknowledges the very considerable efforts made by Germany in the field of asylum in recent years. He is also heartened by the attitude of the local population, whose vast majority supported their reception. However, with an estimate of 400,000 asylum applications for 2015, a number of important challenges lie ahead, in particular regarding reception conditions and the need to guarantee an expedient but fair asylum procedure. With the number of asylum applications steadily increasing, having a sufficient number of staff responsible for making asylum decision is critical to both keeping pace with the new applications and reducing the backlog in decision.

While recognising the challenges arising from the reception of a high number of asylum seekers, the Commissioner underlines the importance of always securing reception conditions in line with human rights standards. In particular, he invites the authorities to develop nationwide obligatory minimum standards for the operation of reception facilities to ensure that reception conditions and services available to asylum seekers are in line with human rights standards throughout the country. Regarding allegations of ill-treatment of asylum seekers at reception facilities, the Commissioner urges the German authorities to ensure that all these allegations are promptly, adequately and effectively investigated.

The Commissioner also calls on the Federal Government to better support the Länder and municipalities in shouldering the costs and implementation of reception. Further steps should be taken to improve asylum seekers' access to health care, for instance on the basis of the models already in place in the Hamburg and Bremen Länder. With regard to the integration of recognised refugees and other beneficiaries of international protection, the Commissioner calls on the German authorities to strengthen their efforts in this area and further promote a welcoming culture for refugees. One important aspect is the strengthening of language courses, which should start as early as possible. The Commissioner also urges the German authorities to ensure that refugees and other beneficiaries of international protection fully enjoy their right to family reunification, in particular by reducing waiting times for obtaining a visa.

As regards the operation of the Dublin system in Germany, the Commissioner considers that the figures available, and notably the minimal differential between transfers of asylum seekers from and to the country, provide a powerful illustration of the fact that Europe is maintaining a system which is unfair to asylum seekers without even obtaining the results for which it is purportedly kept alive. Dublin cases are also further aggravating the considerable backlog of cases pending before German courts. The Commissioner strongly believes that there is a pressing need to overhaul the Dublin Regulation and calls on Germany to take the lead in promoting the necessary steps to replace it with a more human-rights oriented system.

Finally, the Commissioner welcomes the measures the German authorities have taken since 2013 to help Syrian refugees to face the humanitarian crisis. He encourages the authorities to continue to play a leading role in this regard, increase the resettlement quota over the next years, and fully align the status of resettled refugees to that of persons granted status after an asylum procedure in the country.

The fight against racism and intolerance

The Commissioner is concerned at clear signs that racism and intolerance are on the rise in Germany. The rise of racism and intolerance is particularly reflected in an upsurge of attacks against facilities for asylum seekers. Against this background, the Commissioner considers that the German authorities should significantly broaden their approach to combating racism, from one which focuses almost exclusively on the activities of extremist, and notably far-right, organised groups to one which reflects the reality that racism, including racially motivated offences, often come from individuals not at all associated with these groups.

The NSU affair provides opportunities for progress to be made on this front and the Commissioner calls on the German authorities to ensure that all the necessary lessons are learnt from this case. While the NSU affair clearly illustrates the seriousness of hate crimes committed by extreme-right wing movements, the Commissioner strongly believes that the reform efforts it is prompting should have a much broader reach. In this respect, the Commissioner welcomes the amendments to the Criminal Code introducing the racist motivation as an aggravating circumstance of ordinary offences. However, this should be accompanied by both formal guidance for the police and prosecutors and by training of all the actors of the criminal justice system, including judges, on how to deal professionally with racist offences. On the recording of hate crime data specifically, the Commissioner calls on the German authorities to improve their system for recording and following up on such cases in order to ensure that all incidents involving a bias motivation are recorded and invites the German authorities to revisit their current system of recording “politically motivated crimes” accordingly.

Moreover, the Commissioner urges the German authorities and political leaders to condemn firmly and unequivocally all instances of hate speech and hate crime, and to abstain from using rhetoric that stigmatises particular groups of the population.

In the Commissioner’s view, the NSU affair also clearly indicates that the German authorities should look more deeply into the extent to which structural forms of racism may be preventing law enforcement authorities from providing a professional service to Germany’s minority groups. The Commissioner is concerned at reports of racially motivated conduct by German law enforcement bodies and in particular, racial profiling practices among the German police, whereby members of minority groups are reported to be routinely subject to police checks without objective and reasonable justification. The German authorities should consider introducing a reasonable-suspicion standard, whereby powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria and strengthening the training of law enforcement officers on the subject of identity checks. The Commissioner also stresses that allegations of racist or racially discriminatory conduct by law enforcement officials should be effectively investigated and that the possible racist motivation of such acts should always be closely examined.

Lastly, the Commissioner calls on the German authorities to keep their legislation against racial discrimination and racist hate speech under review to ensure that it provides the necessary tools to deal effectively with these phenomena. In particular, he stresses the need to ensure effective legal protection for victims of discrimination by public authorities and the importance of comprehensive data broken down by grounds such as ethnic origin for acting effectively against racism and discrimination.

The report contains the Commissioner’s conclusions and recommendations addressed to the German authorities and is published on the Commissioner’s website along with the authorities’ comments.

INTRODUCTION

1. The present report follows a visit to Germany by the Council of Europe Commissioner for Human Rights (“the Commissioner”) on 24 April (Karlsruhe) and from 4 to 8 May 2015 (Berlin and Potsdam).¹ The visit focused on the human rights of asylum seekers, refugees and immigrants, on the fight against racism and extremism and on the legal and institutional framework for the protection and promotion of human rights.
2. During his visit the Commissioner held discussions with the German authorities, including the Federal Minister for Foreign Affairs, Mr Frank-Walter Steinmeier, the Federal Minister of Justice, Mr Heiko Maas, the Federal Minister of Labour and Social Affairs, Ms Andrea Nahles, the State Secretary at the Federal Ministry of the Interior, Ms Cornelia Rogall-Grothe, the State Secretary and Federal Government Commissioner for Migrants, Refugees and Integration, Ms Aydan Özoğuz, the Federal Government Commissioner for Human Rights Policy and Humanitarian Aid, Mr Christoph Strässer, the Federal Government Commissioner for Human Rights, Ms Almut Wittling-Vogel, the Deputy Director-General for the Federal Intelligence Services, Mr Hans-Jörg Schäper, the Foreign policy advisor to Chancellor Angela Merkel, Mr Christoph Heusgen, members of the German delegation to the Parliamentary Assembly of the Council of Europe, the Chairman of the NSA investigative committee of the German Bundestag, Mr Patrick Sensburg, as well as with the Federal Prosecutor General, Mr Harald Range.
3. In Potsdam, the Commissioner met with the Minister of Justice of Brandenburg, Mr Helmut Markov, and with the Minister of Interior of Brandenburg, Mr. Karl-Heinz Schröter. In Karlsruhe, he met with the Chief Administrative Officer of the Karlsruhe District (*Regierungspräsidentin*), and the Head of Department for the reception of asylum seekers and refugees in Baden-Württemberg.
4. The Commissioner also held meetings with the Director of the German Institute for Human Rights, Ms Beate Rudolf, the Director of the Federal Anti-Discrimination Agency, Ms Christine Lüders, the Federal Commissioner for Data Protection and Freedom of Information, Ms Andrea Voßhoff, a member of the Joint Commission of the States of the National Agency for the Prevention of Torture, Mr Hartmut Seltmann, and a member of the G-10 Commission, Mr Ulrich Maurer.
5. In addition, the Commissioner met with representatives of non-governmental organisations in Berlin, Potsdam and Karlsruhe and with representatives of the UNHCR. He also visited four reception centres for asylum seekers, two in Karlsruhe and two in Berlin.
6. The Commissioner wishes to thank sincerely the German authorities in Strasbourg and in Berlin, as well as in the Land of Baden-Württemberg and the Land of Brandenburg, for their assistance in organising his visit and facilitating its independent and smooth execution. He also extends his thanks to all his interlocutors for their willingness to share with him their knowledge and views.
7. The Commissioner notes that the aforementioned topics, which he selected for specific examination in this report on Germany, have been the subject of extensive public debate in the country in recent years. This debate has included questioning on the sustainability of Germany’s asylum system, the authorities’ ability to deal effectively with hate crimes committed by extremists and the extent to which institutional racism may affect law enforcement, as well as the effectiveness of the German oversight system of intelligence and security services.
8. With the present report, the Commissioner hopes to contribute to this debate and wishes, in particular, to continue his constructive dialogue with the authorities on how to improve human rights protection in Germany. Accordingly, the present report covers the following areas: the legal and institutional framework for the protection and promotion of human rights (section I); the human rights of asylum seekers, refugees and immigrants (section II); and the fight against racism and intolerance (section III).

¹ During his visit the Commissioner was accompanied by the Deputy to the Director of his Office, Mr Giancarlo Cardinale and his Adviser, Ms Anne Weber.

Each section of the report ends with the Commissioner's conclusions and recommendations addressed to the German authorities.

1 THE INSTITUTIONAL AND LEGAL FRAMEWORK FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

9. The court system is generally relied upon in Germany as the best guarantor for the protection of fundamental rights in the country. As in all countries however, specific institutions with a mandate to protect and promote human rights are essential in Germany to ensure expertise and effectiveness and to complement or support as necessary the work carried out by the courts in this area. In this connection, the Federal structure of the country proves to be both a strength and a weakness: while some Länder have set up specific institutions which could serve as a model, notably in the field of anti-discrimination, federalism is often invoked to justify the absence or the weakness of some structures at the level of the Federation, due to the competences of the Länder. The result is a highly diversified landscape of institutions dedicated to the protection and promotion of human rights in Germany.
10. Germany also plays an active role in the international institutions for the protection and promotion of human rights: in November 2012, it was re-elected to the UN Human Rights Council for the 2013-2015 period and in 2015 it chairs the Council for the first time.
11. Germany has ratified most of the Council of Europe and other international treaties on human rights and set up an independent national human rights institution, the German Institute for Human Rights. This human rights infrastructure has recently been reinforced through the establishment of a Federal Anti-Discrimination Agency in 2006 and a National Agency for the Prevention of Torture in 2010. However, certain improvements could be made to this human rights architecture in order to fulfil its potential in securing better outcomes for the promotion and protection of human rights in Germany.

1.1 HUMAN RIGHTS TREATIES

12. Since the report of the previous Commissioner in 2007, Germany has ratified a number of international and European conventions of relevance to human rights, including: the UN Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol thereto, which entered into force on 26 March 2009 (in 2011, a national action plan to implement the Convention was adopted and an Advisory Council established); the International Convention for the Protection of all Persons against Enforced Disappearance; the Council of Europe Convention on Cybercrime and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems; and the Council of Europe Convention on Action against Trafficking in Human Beings, which entered into force on 1 April 2013.
13. However, the Commissioner notes that a number of human rights conventions have not yet been ratified. These include Protocol No. 12 to the European Convention on Human Rights (hereinafter the Convention), which provides for a general prohibition of discrimination and was signed by Germany on 4 November 2000. 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 European Court of Human Rights (the Court) applies it. Another treaty that Germany has not yet ratified is the revised European Social Charter (signed on 29 June 2007) along with its Additional Protocol providing for a collective complaints mechanism.
14. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence was signed by Germany on 11 May 2011 and the Government has reported that it is preparing its ratification.
15. Moreover, the German authorities have not yet ratified the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which enables alleged victims of violations to file communications with the Committee monitoring the implementation of the Covenant for consideration.

16. As for the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Commissioner regrets that German authorities have indicated during the 2013 Universal Periodic Review² that they do not intend to ratify this instrument, both because fundamental human rights enshrined in the UN Covenants apply directly to all migrants in Germany and because the Convention uses the term “migrant worker” in a way that includes irregular migrants and is therefore not compatible with German law.

1.2 THE GERMAN INSTITUTE FOR HUMAN RIGHTS

17. The German Institute for Human Rights (GIHR) was established as an independent association on 8 March 2001, after the German Federal Parliament (*Bundestag*) had, on 7 December 2000, taken the unanimous decision to set up such an Institute as Germany’s national human rights institution, on the basis of the UN Paris Principles³ and the relevant Recommendation of the Committee of Ministers of the Council of Europe.⁴ Since 2001, the Institute is accredited with an A-status by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), which indicates the highest level of compliance with the Paris Principles.
18. The overall mandate of the GIHR is to report and raise awareness on the situation of human rights in Germany and abroad and contribute towards the prevention of human rights violations and towards the promotion and protection of human rights in Germany and by Germany. Its tasks include providing policy advice, applied research on human rights issues, human rights education, dialogue and co-operation with national and international organisations, documentation and information. Since a decision of the German Government in 2009, the Institute is also in charge of monitoring the implementation of the UN Convention on the Rights of Persons with Disabilities.
19. In his 2007 report on Germany,⁵ the Commissioner’s predecessor recommended the strengthening of the Institute’s monitoring functions, described as very limited. He stressed that the GIHR should be authorised to carry out structural and factual monitoring. He also stated that the Institute’s consultative role in the process of drafting legislation which impacts on human rights should be enhanced, and that it should be enabled to issue opinions and recommendations on proposed legislation in a timely and informed manner.
20. During his visit, the Commissioner could observe that the Institute enjoys broad support of all political parties and civil society groups in Germany and that its independence is well-respected. However, the ongoing review of the Institute’s status under the UN Paris Principles has sparked controversy within the country in the face of the risk of losing the A-status. The possible downgrading of the Institute’s status was prompted by critical remarks made by the Sub-Committee on Accreditation (SCA) of the ICC. In its 2013 report,⁶ the SCA made a number of recommendations concerning the legal basis, the mandate and the independence of the GIHR. It notably reiterated the need for a national human rights institution to be established by constitutional or legislative text, called for amendments to provide the GIHR with the powers necessary to fulfill a broad protection mandate and recommended some changes in its governance structure.
21. The examination of the Institute’s status by the SCA began in November 2013 and was deferred two more times (October 2014 and March 2015), the third deferral having been made possible by the

² The Federal Republic of Germany’s [response](#) to the recommendations set out by the UN Human Rights Council in the Universal Periodic Review on 25 April 2013, A/HRC/24/9/Add.1, p. 2.

³ [Principles](#) relating to the Status of National Institutions (The Paris Principles), adopted by UNGA Resolution 48/134 of 20 December 1993.

⁴ [Recommendation](#) R(97)14 of the Committee of Ministers of the Council of Europe of 30 September 1997 on the establishment of independent national human rights institutions for the promotion and protection of human rights.

⁵ Report by the Commissioner for Human Rights, Thomas Hammarberg, on his visit to Germany (9-11 and 15-20 October 2006), [CommDH\(2007\)14 / 11 July 2007](#), para. 30.

⁶ ICC Sub-Committee on Accreditation [Report](#), November 2013, p. 21.

Federal Government's adoption of a proposal for a law on the GIHR.⁷ Although the Government coalition had agreed, in its coalition agreement in 2013, to provide the GIHR with a solid basis in line with the Paris Principles, the discussions on the law proved lengthy due to proposals that called into question the institutional structure of the GIHR and its focus on human rights in Germany.

22. The Commissioner notes that a draft law, giving a legal basis to the GIHR in conformity with the UN Paris Principles, was finally agreed upon by the governmental coalition on 18 March 2015. The first reading took place on 27 March 2015 and the law was unanimously adopted by the Bundestag on 18 June 2015, followed by the Bundesrat (Federal Council) on 10 July 2015. The SCA will thus be able to complete its review of the GIHR at its next session (16-20 November 2015).
23. The changes that have been made with regard to the functioning of the GIHR are limited, as the Institute remains an association, though from now on with a legal basis, with the same tasks. The Institute has been mandated to analyze the continuing human rights-related consequences of totalitarian dictatorships and war and post-war situations. The main change concerns the governance structure, and in particular the composition of the Board of Trustees, which notably adopts the guidelines for the Institute's work. The number of members with voting rights in the Board of Trustees was increased from 13 to 18, the Bundestag keeping two representatives⁸ and appointing six additional members: three representatives of human rights NGOs as well as three representatives of academic institutions working in the field of human rights. In this respect, the Commissioner notes the recommendation made by the SCA that members of parliament should not be members of, nor participate in the decision making organs of a national human rights institution, since this has the potential to impact on both the real and perceived independence of the institution.⁹ The Commissioner also notes the increase of non-voting members representing government departments and institutions and recalls the recommendation made by the SCA that a national institution's rules of procedure should establish practices to ensure that such persons are unable to inappropriately influence decision-making.
24. In accordance with the new law, the GIHR will be financed through the Bundestag¹⁰ and will have to present an annual report on its activities and the evolution of the human rights situation in Germany to the Bundestag.
25. While the provision of a legal basis for the GIHR represents clear progress, in the Commissioner's view, the authorities could have been more ambitious and taken the opportunity of the legislative reform to increase the powers and resources of the GIHR. The Commissioner notes, for instance, that the Institute still has very limited investigation powers (no right to access official documents and places or power to compel testimony from any authority, for instance), which would permit it to better fulfill its monitoring mandate, in particular its obligation to report to parliament. In addition, the Commissioner recalls the State's obligation to match the increase in tasks of a national human rights Institution by an increase in financial resources. The Commissioner finally notes that the GIHR cannot bring complaints before the Federal Constitutional Court to check the constitutionality of a law in light of Germany's international human rights obligations.

1.3 THE FEDERAL ANTI-DISCRIMINATION AGENCY

26. The Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*, or ADS) was set up in 2006 within the Federal Ministry for Family Affairs. While the Agency is functionally dependent on the Ministry and its head is appointed by the Government, the General Equal Treatment Act describes the Agency as "independent in the execution of its duties and only subject to the law". The main mandate of the ADS is to receive complaints from any person who believes he or she has been discriminated

⁷ *Entwurf eines Gesetzes über die Rechtsstellung und Aufgaben des Deutschen Instituts für Menschenrechte*, [Drucksache 18/4893](#).

⁸ Two members of the German Bundestag's Committee on Human Rights and Humanitarian Aid.

⁹ ICC Sub-Committee on Accreditation [Report](#), November 2013, p. 22.

¹⁰ Until now the Institute was financed by four Ministries: the Federal Ministry of Justice and Consumer Protection, the Federal Foreign Office, the Federal Ministry for Economic Cooperation and Development and the Federal Ministry of Labour and Social Affairs; in addition, it accepts funding from Federal, State and European institutions for specific projects.

against on the grounds provided in the General Equal Treatment Act.¹¹ The Agency is then mandated to “give independent assistance” to such persons, in particular by (a) providing information on claims and possible legal action; (b) arranging for advice to be provided by another authority; and (c) endeavouring to achieve an out-of-court settlement. The Agency therefore is not empowered to bring about formal discrimination complaints against persons or institutions alleged to have engaged in discrimination. The Agency has more of an information and counselling mandate than one of providing legal support.

27. In its Conclusions adopted on 23 March 2012, the European Commission against Racism and Intolerance (ECRI) voiced concern about the reduction of the already low budget of the ADS.¹² In its 2014 report on Germany however,¹³ ECRI considered that the ADS had made excellent use of its low budget (2.99 million Euros in 2013). This applies, for instance, to the marketing of its project on using anonymous recruitment procedures. The exceptional media coverage motivated a considerable number of other organisations, particularly in the public sector, to try out these procedures. Still, ECRI stressed that with only 26 posts the ADS was clearly unable to be present nationwide or to perform all its tasks, and recalled that the ADS, as a body specialising in action against racism and intolerance, should alert the general public to discrimination issues, produce and publish information and provide aid and assistance to victims throughout Germany.
28. In its report, ECRI also noted that “the low level of financial and human resources allocated to the ADS contributed to the decision by several Länder to set up their own specialised agencies to combat racism and racial discrimination.” ECRI recommended that the German authorities set up in all the Länder an independent authority to combat racism and racial discrimination or that they ensure that the Federal Anti-Discrimination Agency performs throughout German territory all the functions and responsibilities provided for in ECRI General Policy Recommendation No. 2 on specialised bodies. In particular, it considered that the ADS should have wider powers to carry out investigations and provide legal assistance to victims of discrimination.
29. The Commissioner observes that, despite a number of successful awareness campaigns organised in the past years, the ADS remains little known in Germany. In 2014, it received a total of 1534 complaints/counseling requests, mainly on the ground of ethnic origin (415), which in itself is not really representative of the level of discrimination in the country. Several interlocutors of the Commissioner underlined that Germany’s equality body was very weak and should be strengthened. This task is particularly urgent given the increasing diversity of German society brought about by a large and growing number of migrants, including asylum seekers (see below). Most importantly, the ADS should be an independent body, able to investigate complaints relating to discrimination, notably racial discrimination, and to file anti-discrimination lawsuits.¹⁴
30. It should also become obligatory for Federal Ministries to consult the ADS on all legislative, regulatory and other major projects with a bearing on groups which are protected by the General Equal Treatment Act. Wherever planned legislation is likely to have consequences for anti-discrimination policy, the ADS should have the right to propose amendments so that the interests of people affected by discrimination are duly taken into account in any new project.

1.4 THE NATIONAL AGENCY FOR THE PREVENTION OF TORTURE

31. Germany ratified the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on 4 December 2008. It entered into force on 3 January 2009, with a declaration postponing the obligation of setting up a national preventive mechanism (NPM) within one year. On 8 November 2010, the NPM was established, comprising two

¹¹ See below, section 3.1.1.

¹² ECRI [Conclusions](#) on the implementation of the recommendations in respect of Germany subject to interim follow-up, CRI(2012)28.

¹³ ECRI, [Fifth report on Germany](#) (adopted on 5 December 2013, published on 25 February 2014), CRI(2014)2.

¹⁴ See also the Opinion of the Commissioner for human rights on national structures for promoting equality, [CommDH\(2011\)2](#), 21 March 2011.

institutions: a Federal Agency for the Prevention of Torture for places of detention under Federal jurisdiction (detention facilities operated by the Federal Army (*Bundeswehr*), the Federal Police and the German Customs Administration) and a Joint Commission for the Prevention of Torture for places of detention under the jurisdiction of the Länder (police, judiciary, detention facilities in psychiatric hospitals, establishments of custody pending deportation, nursing homes, youth welfare establishments). The Federal Agency and the Joint Commission constitute one institution: the National Agency for the Prevention of Torture (hereinafter the National Agency).

32. The Commissioner notes that, from the outset, the Federal Agency was marked by extremely limited resources: at the Federal level, only one honorary director, working on a voluntary basis and assisted by one paid research assistant, was tasked with monitoring all places of deprivation of liberty, while the Joint Commission, with a mandate extending to some 13,000 places of detention, could count on four volunteer members. Moreover, the Joint Commission was affected by a high turnover of its members due to frequent resignations.
33. The UN Subcommittee on Prevention of Torture (SPT) visited Germany in April 2013 in order to provide advisory services and technical assistance to the National Agency. In the report following the visit, the SPT stressed that, while the National Agency was operational, it was facing serious challenges in relation to human and financial resources, a fact which had also been acknowledged by the German authorities.¹⁵ The SPT also noted that some legal, structural and institutional problems could jeopardize the efficiency and the institutional credibility of the NPM as a whole. The SPT therefore made a series of recommendations to the authorities concerning the human and financial resources, as well as the composition and mandate of the National Agency in order to improve its functioning.
34. The lack of adequate resources for the National Agency has also been constantly highlighted by NGOs and other international monitoring mechanisms, including the UN Committee against Torture, the UN Special Rapporteur on Torture and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).
35. The Commissioner notes that some steps have been taken in order to increase the efficiency of the National Agency. Further to the appointment of a Vice-Chairperson of the Federal Agency for the Prevention of Torture, the Länder Conference of Ministers of Justice decided on 26 June 2014 to double the membership of the Joint Commission by 1 January 2015. Four new members, with more diverse backgrounds, have been nominated by the Conferences of Ministers of the Interior, Labour and Social Affairs, Health, and Youth and Family Affairs. The National Agency's budget has also been increased (from 300,000 EUR to 540,000 EUR). Lastly, an increase by 2 to 2.5 full-time positions at the secretariat¹⁶ of the National Agency is envisaged. The Commissioner was informed that these measures should allow the Joint Commission to start monitoring facilities in the healthcare sector, such as homes for elderly persons and psychiatric hospitals.
36. In the Commissioner's opinion, these measures remain far from sufficient. He considers that Germany did not live up to the expectations deriving from the ratification of the OPCAT by setting up a rather low-profile mechanism. The authorities appear to espouse the misguided view that prevention is not an absolute necessity in Germany, as there are hardly any cases of torture, and that the National Agency was just established to fill in some gaps, since other institutions at the Land and international level were already carrying out similar functions. However, such a small institution cannot even fill the existing gaps.
37. In this respect, the Commissioner shares the concerns expressed by the UN Special Rapporteur on Torture in 2010 that the National Agency "is evidently unable to ensure complete geographic coverage of all places of detention. Such approach to the implementation of OPCAT is counter-productive since it

¹⁵ Report on the visit made by the SPT for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany, [CAT/OP/DEU/1](#), 16 December 2013, para. 16.

¹⁶ The secretariat, based in Wiesbaden, is currently composed of six research associates, but not all in a full-time position, and two employees for secretariat and administration.

does not take the problem of torture and ill-treatment in detention seriously and sets a bad example for other States.”¹⁷

1.5 POLICE COMPLAINTS MECHANISM

38. There is no independent police complaints mechanism in Germany, a gap repeatedly highlighted by the Commissioner’s predecessors. Internal police investigative units exist in some Länder and the Public Prosecutors Offices are required since January 2009 to collect data about criminal investigations against police officers for alleged killings, bodily harm and other serious crimes.
39. In November 2010, the Commissioner’s predecessor wrote a letter¹⁸ to the Federal Minister of the Interior to discuss, among other matters, the conduct of law enforcement officers. In the letter, he took note of the fact that each Land had adopted a specific approach, ranging from investigations of complaints by officers from a district (Kreis) or Land different from that in which originate the police officers at issue, to the creation of special, permanent investigation units. He stressed that, while any approach is useful as long as it fully and effectively ensures the independence and impartiality of the investigators, an Independent Police Complaints Body in charge of the investigative process is crucial for ensuring accountability and enhancing the public’s trust in the police. He therefore suggested that the German authorities introduce an independent police complaints body, referring to his Opinion concerning Independent and Effective Determination of Complaints against the Police.¹⁹
40. In its report following the visit to Germany in 2010,²⁰ the CPT also dealt with the issue of complaints against the police, underlining that “an essential means of preventing ill-treatment by the police lies in the diligent examination by the competent authorities of all complaints of such treatment brought before them and, where appropriate, the imposition of a suitable penalty. As a matter of general principle, for an investigation into such complaints to be effective, it is essential that the persons responsible for carrying it out are independent – and also perceived as being independent – of those implicated in the events. Independence cannot be said to apply where the investigators and the police officers who are the subject of the investigation belong to the same service.”
41. Several arguments are put forward by the authorities to justify the absence of such a complaints mechanism, ranging from specificities of the German legal system (including the possibility to lodge complaints before courts, the federal structure of the country) to the low occurrence of instances of ill-treatment by the police. While he does not consider these arguments persuasive, the Commissioner notes that some progress has been made at the Land level. In Rhineland-Palatine, a State Commissioner for the Police (*Landesbeauftragter für die Polizei*), in charge of processing complaints from citizens and from within the police, was set up in 2014. The establishment of a complaints mechanism more or less independent from the police has also been included in the coalition agreements of some Governments, notably in Schleswig-Holstein, where an independent police commissioner is planned, as well as in Saxony, where a central complaints management unit in the Ministry of the Interior is envisaged. However, investigation of ill-treatment by police officers at the Federal level remains an outstanding issue, despite the fact that the Federal Police is one of the largest German police forces and was recently involved in cases of alleged ill-treatment in Hannover.²¹

¹⁷ [Report](#) of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/13/39/Add.5, 5 February 2010, paragraph 164.

¹⁸ [Letter](#) from the Council of Europe Commissioner for Human Rights to Dr Thomas De Maizière, German Federal Minister of the Interior, CommDH(2010)52, 15 November 2010.

¹⁹ Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, [CommDH \(2009\)4](#), 12 March 2009.

²⁰ 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 from 25 November to 7 December 2010, [CPT/Inf \(2012\)6](#).

²¹ See below section 2.1.2.2.

1.6 DEMOCRATIC OVERSIGHT OF NATIONAL INTELLIGENCE AND SECURITY SERVICES

42. During his visit, the Commissioner examined the framework in place in Germany for the oversight system of intelligence and security services, a topical issue in both Germany and Europe following recent revelations exposing both human rights violations and widespread disregard for the rule of law.
43. The compatibility of the German framework for the operation of intelligence and security activities with the European Convention on Human Rights has been examined by the European Court of Human Rights as early as in 1978, in its leading judgment *Klass and Others v. Germany*.²² As stressed by the Court in this judgment and ensuing case-law, while some legislation granting powers of secret surveillance over mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime, states do not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance.²³ While the Court found at the time that the facts of the case did not disclose any violation of the Convention, it left a number of questions unanswered as to the effective protection of human rights in the context of intelligence and security activities in Germany.

1.6.1 OVERVIEW OF THE LEGAL FRAMEWORK FOR THE OVERSIGHT OF GERMAN INTELLIGENCE AND SECURITY SERVICES

44. There are three intelligence services at the Federal level in Germany: the Federal Intelligence Service (*Bundesnachrichtendienst*, or BND), the Federal Office for the Protection of the Constitution (*Bundesverfassungsschutz*, or BfV) and the Military Counterintelligence Service (*Militärischer Abschirmdienst*, or MAD). The BND is the foreign intelligence agency of Germany, under the authority of the Federal Chancellery; it gathers foreign intelligence information relevant to German foreign policy and national security interests. The BfV is the domestic security agency, under the responsibility of the Federal Ministry of Interior, and has specific regional offices in all 16 Länder. Finally, the MAD, which has similar functions as the BfV, is the domestic military intelligence service and is part of the German armed forces, under the responsibility of the Federal Ministry of Defense.
45. Strategic surveillance and interception of communications by these agencies is regulated through the G-10 Act,²⁴ which allows for certain restrictions on the privacy of correspondence, post and telecommunications as guaranteed by Article 10 of the German Constitution (Basic Law).²⁵ The G-10 Act also authorises the three intelligence agencies to intercept up to 20% of international telecommunications traffic that is transmitted in “bundled form” (telecommunications cables, satellite transmissions and microwave radio relay).
46. In Germany, the resort to intrusive information-collection measures is overseen by the Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*), composed of nine elected members of the Bundestag and which meets regularly in camera. The Federal Government must, at intervals of no more than 6 months, report to the Control Panel on the use of intrusive measures. Based on these periodic reports, the Control Panel prepares a brief annual report for the Bundestag on the nature and scope of the intrusive measures employed. While the Control Panel is informed *ex post* about operations in general, it has the right to request documents and data and conduct hearings with members of the intelligence services.

²² *Klass and Others v. Germany*, application no. [5029/71](#), judgment of 6 September 1978.

²³ *Ibid.*, para. 48-50.

²⁴ *Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses* (Act restricting the Privacy of Correspondence, Posts and Telecommunications or G-10 Act).

²⁵ Article 10 [Privacy of correspondence, posts and telecommunications] of the Basic Law: (1) The privacy of correspondence, posts and telecommunications shall be inviolable. (2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

47. Any activities that interfere with Article 10 of the Basic Law and fall within the scope of the G-10 Act also need to be authorised by the G-10 Commission. Although members of the G-10 Commission are nominated by the Parliamentary Control Panel, the Commission operates independently. The Commission, which meets in camera one day per month, is chaired by a person who is qualified to hold judicial office; the other three members of the Commission may or may not be members of the Bundestag. It is served by a secretariat of thirteen persons, including one director. The secretariat is also the secretariat of the Parliamentary Control Panel and is part of the administration of the Bundestag.
48. One of the main functions of the G-10 Commission is to evaluate the legality (including the proportionality) of the intrusive information-collection measures by the intelligence services and to decide whether the use of these measures is permissible. Such measures must in the first place be authorised by the competent Federal Minister who then applies to the G-10 Commission for authorisation when the measure is deemed to fall within the ambit of the G-10 Act. The G-10 Commission is also responsible for controlling the implementation of the surveillance measures pertaining to the collection, storage and analysis of personal data. With regard to untargeted surveillance, the G-10 Commission also scrutinizes the minimisation of data²⁶ obtained through surveillance. In addition, the G-10 Commission has a complaint-handling function: it can receive complaints from persons who believe that they have been affected by surveillance of their telecommunications by the German intelligence services.
49. The German Federal Commissioner for Data Protection and Freedom of Information can examine security services' compliance with data protection law but has a limited role in this area: the Data Protection Commissioner is not entitled to supervise the processing of data collected through telecommunications surveillance by the intelligence services (even if they are processed together with other data) which is subject to the G-10 Act and dealt with by the G-10 Commission. However, the Data Protection Commissioner recently reported²⁷ about a new informal agreement with the Federal Ministry of the Interior allowing her office to access G-10 data if necessary to assess the legality of data processing, but not the legality of the G-10 measure itself.
50. Finally, the German Bundestag's Confidential Committee (*Vertrauensgremium*), which is part of the Budget Committee of the Bundestag, is responsible for scrutinising the budgets – which are kept secret – and monitoring expenses of the intelligence and security services.
51. In parallel to the oversight existing at the Federal level, similar authorities have been established at the Land level to control the activities of surveillance operated in the Länder.

1.6.2 REVELATIONS ON MASS SURVEILLANCE AND THE RESPONSE OF THE GERMAN AUTHORITIES

52. Revelations by former US National Security Agency (NSA) contractor Edward Snowden that the USA and the UK were conducting mass surveillance of the Internet and of global electronic communications systems and social networks, have prompted heated debates in Germany about the need to reinforce the democratic oversight of intelligence and security services.
53. The report of the Parliamentary Assembly of the Council of Europe on mass surveillance of March 2015²⁸ notes that the Snowden disclosures have revealed extensive collaboration between Germany and the United States. In 2013, the BND confirmed in response to these disclosure that 417 million

²⁶ Principle according to which data collected and processed should not be retained or further used unless this is necessary for purposes that were clearly stated in advance.

²⁷ *Tätigkeitsbericht 2013 und 2014 der Bundesbeauftragten für den Datenschutz und die Informationsfreiheit – 25. Tätigkeitsbericht, Unterrichtung durch die Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*, [Drucksache 18/5300](#), 17 June 2015, p. 34.

²⁸ Report of the Parliamentary Assembly of the Council of Europe on mass surveillance, [Doc. 13734](#), 18 March 2015, Rapporteur: Mr Pieter Omtzigt.

metadata collected in December 2012 in the context of its “open sky” surveillance – consisting in the interception of communications in or between foreign countries - were transferred to the NSA. In June 2014, *Der Spiegel* revealed that the NSA was more active in Germany than anywhere else in Europe and described the increasingly intimate relationship that the American agency had developed over the past thirteen years with the BND.

54. These revelations took a new turn during the Commissioner’s visit, when leaks revealed that the BND had in fact conducted surveillance on other European countries as well as private companies on behalf of the NSA, and that the German authorities should have known about it.
55. As a consequence of the Snowden revelations, the Bundestag set up a committee of inquiry on the NSA affair on 20 March 2014. The mandate of this parliamentary inquiry committee is three-fold: enquiring whether the NSA, the UK’s Government Communications Headquarters (GCHQ) and their partners in the 5EYES²⁹ group, have put in place a global surveillance on Germany; enquiring whether the BND, the Federal Office for the Protection of the Constitution and the MAD have collaborated with the NSA in this context and, if so, whether it was lawful; and suggesting possible improvements, especially with regard to parliamentary oversight.
56. All interlocutors of the Commissioner stressed during the visit that these revelations will impact on the structure of parliamentary oversight and that the legal framework governing the operations of intelligence and security services in Germany should be reformed as a result. While the need to have effective national security and intelligence agencies was undisputed, the importance to secure the rule of law in relation to their activities and to have more effective control over these agencies had become obvious in the light of these revelations.

1.6.3 SHORTCOMINGS IN THE OVERSIGHT OF GERMAN INTELLIGENCE AND SECURITY SERVICES

57. In the Commissioner’s view, current challenges relating to effective oversight of intelligence and security services in Germany include the lack of resources and expertise, the scope of the oversight of telecommunications, problems of coordination, as well as the absence of effective remedies for persons affected by surveillance of their telecommunications.
58. The Commissioner is particularly concerned by the lack of resources and technical expertise of the oversight bodies and their secretariat. In this respect, the ratio of the number of overseers to the number of those subject to oversight is especially telling: two bodies of 13 members, supported by a small secretariat, are responsible for the oversight of activities involving, for the largest agency (the BND), a staff of about 6,000.
59. Moreover, the tasks of the G-10 Commission have increased in the recent years, while the number of its members and administrative support staff has remained unchanged. For instance, since 2002, the G-10 Commission supervises the so-called “special requests for information” by the intelligence services (requests for customer data, financial transfers, metadata or inventory data at airlines, financial institutions, telecommunication services or internet service providers).³⁰ Since 2002, it also supervises the use of IMSI catchers (used to locate and track cell phones). From 2002 to 2013 more than 770 such special requests for information and deployments of IMSI catchers were ordered and, hence, approved by the G-10 Commission – 113 in 2013, according to a recent annual report by the Parliamentary Control Panel.³¹ Since 1 January 2015, the G-10 Commission is also responsible for the control and approval of analysis projects, such as data mining, social network analysis, or run on the “big data” pool of the two counterterrorism databases that are fed with data from both the intelligence services and the police.

²⁹ The intelligence partnership between the USA, the UK, Australia, Canada and New Zealand.

³⁰ For statistics on these requests, see *Bericht zu den Maßnahmen nach dem Terrorismusbekämpfungsgesetz für das Jahr 2013, Unterrichtung durch das Parlamentarische Kontrollgremium, Drucksache 18/3708*, 8 January 2015.

³¹ *Ibid.*

60. The Commissioner is also concerned that the G-10 Commission and its support staff are not fully equipped to read and analyse G-10 data and therefore to effectively supervise the processing of such data. There is reportedly no IT expert in the secretariat who would be able to keep pace with developments in the digital world. While the law provides for the possibility for both the Parliamentary Control Panel and the G-10 Commission to ask the Federal Data Protection Commissioner for expertise, this never happens in practice. The G-10 Commission is therefore in a position to review some files and ask questions to the competent authorities, but not to verify whether the answer is correct, which makes the oversight ineffective in practice.
61. Another outstanding issue highlighted by several interlocutors includes the insufficient level of coordination and the actual competition between the different supervisory bodies, especially between the G-10 Commission and the Federal Data Protection Commissioner. The oversight of German intelligence and security services appears to be very fragmented, with no oversight body having a general overview of all surveillance activities.
62. One major shortcoming relates to the fact that the Federal Government actually defines the areas of supervision itself. The Commissioner notes that there are no real checks and balances in this field, since the Chancellery decides for instance which measures fall within the scope of the G-10 Act and thus need an authorization by the G-10 Commission. It is reported that the G-10 Commission only sees about 10% of the overall surveillance operated by the Federal intelligence services. In addition, the Commissioner was informed that approximately 2% of “G-10 requests” was denied by the G-10 Commission, all others being authorized.
63. In this context, the interpretation of the scope of Article 10 of the Basic Law plays a specific role. According to the authorities, the protection afforded by Article 10 of the Basic Law does not extend to activities outside Germany and is limited to German citizens or activities taking place in Germany. This means that it covers telecommunications from and to Germany, but not telecommunications between two other countries. Interception of communications in foreign countries by German intelligence agencies are thus not subjected to authorization by the G-10 Commission. This interpretation is however disputed since the Federal Constitutional Court ruled in 1999³² that the protection afforded by the Basic Law is not limited to Germany’s territory and fundamental rights have to be respected, at least when information that was obtained abroad is processed in Germany. The Commissioner notes with concern that, in the absence of full clarity as to the scope of Article 10, a grey zone persists, leaving a gap in the oversight of telecommunications.
64. Lastly, the Commissioner’s attention was drawn to the difficulty for those who are affected by the surveillance to gain access to justice. Persons subjected to surveillance should be notified after the termination of the measure. However, the Commissioner was informed that notification of the persons concerned remains an exception in practice, since notifications can be waived if it might jeopardise the purpose of the surveillance. Persons who believe that they have been under surveillance can request from the BND information collected about them. To support their request, they would need to refer to “precise circumstances” and indicate a “special interest” in the disclosure of the information. The BND can reject the request if it considers that the disclosure would threaten its mission, sources, or public safety or if there are other compelling reasons to keep the information secret. In such situations, the persons concerned are left with no other options than complaining to the G-10 Commission (see above), complaining to the Data Protection Commissioner (in case the information requested enters into her sphere of competence), or turning to the court system.
65. Legal complaints challenging the issuing and implementation of surveillance orders can be lodged with the Federal Administrative Court (*Bundesverwaltungsgericht*), which is competent for all issues related to the BND, or beyond that with the Federal Constitutional Court (*Bundesverfassungsgericht*). These remedies are however employed only on rare occasions.

³² Federal Constitutional Court, 1 BvR 2226/94, 14 July 1999.

1.7 CONCLUSIONS AND RECOMMENDATIONS

66. The Commissioner is pleased to note that the German authorities have ratified a significant number of human rights treaties and urges them to also ratify those treaties which have been signed, including the revised European Social Charter, the Convention on Preventing and Combating Violence against Women and Domestic Violence and Protocol No. 12 to the Convention. With respect to the latter in particular, the Commissioner shares the view expressed by ECRI in its last report on Germany that the notion of discrimination has been interpreted consistently in the case-law of the European Court of Human Rights and that Germany should accept scrutiny by the Court in this field.³³ The Commissioner also calls on Germany to ratify the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
67. The Commissioner welcomes 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. At the same time, and based on the GIHR's successful experience so far, the Commissioner calls on the German authorities to increase the powers of the GIHR so that it can fulfil its mandate more effectively. This should include in particular a strengthening of its investigation powers and the right to bring complaints before the Federal Constitutional Court to check the constitutionality of laws in light of Germany's international human rights obligations. The Commissioner also recommends matching the increase in tasks of the GIHR by an increase in financial resources. While members of the Bundestag only represent a small portion of the voting members of the Board of Trustees of the GIHR, the Commissioner shares concerns that their participation in a decision making organ of the GIHR might impact on the independence of the Institute. As for the role of the Bundestag in the nomination process of other members, he recalls the SCA recommendation that a clear, transparent, merit based and participatory selection and appointment process is fundamental in ensuring the independence and effectiveness of, and public confidence in, national human rights institutions.³⁴
68. The Commissioner also would like to stress that other institutions for the protection and promotion of human rights in Germany currently have inadequate means and powers available to them and are not sufficiently independent. In particular, the Federal Anti-Discrimination Agency and the National Agency for the Prevention of Torture are in need of considerable strengthening to ensure they can fulfil their mandates effectively.
69. The mandate of the ADS should in particular be extended, to allow it to investigate complaints brought to its attention and go to courts if necessary. This should be accompanied by an increase of the Agency's budget so as to allow for more effective public awareness campaigns and more substantial research on discrimination risks, as well as an increase of its legal and research staff.
70. Concerning the National Agency for the Prevention of Torture, the Commissioner urges the authorities to ensure that it is adequately resourced and to increase the number of its members and support staff. Further substantial institutional changes, as recommended by the UN Subcommittee for the Prevention of Torture, are also needed.
71. The Commissioner finds it important that the authorities establish as a priority a fully independent and well-functioning complaints mechanism covering all law enforcement officials, usefully drawing on the standards developed by the Council of Europe in this area.
72. While he welcomes the existence of a general framework for the democratic oversight of the intelligence and security services in Germany, the Commissioner encourages the authorities to draw the necessary lessons from the recent revelations of mass surveillance and acknowledge that the existing legal framework should be strengthened, and legal remedies improved, in order to ensure that human

³³ ECRI, [Fifth report on Germany](#) (adopted on 5 December 2013, published on 25 February 2014), CRI(2014)2, para. 3.

³⁴ See [General Observations](#) of the SCA, 1.8.

rights are fully protected against any abuse by these services. Overall, better coordination between the various oversight bodies is needed.

73. In the Commissioner's view, the parliamentary oversight currently operated by the Parliamentary Control Panel must be bolstered by considerably strengthening its support staff and the latter's technical expertise. Further consideration should also be given to the resource needs of the G-10 Commission so that it has sufficient technical expertise to carry out its activities and the capacity to effectively scrutinise intrusive information-collection measures by the intelligence services. In particular, the Commissioner calls upon the authorities to align any increase of the budget of intelligence services with an increase of the budget of overseeing bodies. The oversight bodies should also be authorised by law to have recourse to independent specialists in information and communications technology who can enable them to better comprehend and evaluate surveillance systems and thus to better understand the human rights implications of these activities.
74. The authorities should also guarantee that all oversight bodies have access to all information, regardless of its level of classification, which they deem to be relevant to the fulfillment of their mandates. Access to information by oversight bodies should be enshrined in law and supported by recourse to investigative powers and tools which ensure such access.
75. The question of surveillance operated by the German intelligence services over non-German citizens outside of Germany should be clarified. The Commissioner urges the authorities to ensure adherence to Article 8 of the European Convention on Human Rights, guaranteeing the right to private life, which should apply to all activities of the states that are party to this Convention, including all its national security and intelligence activities. Useful guidance in this regard can be found in the Commissioner's *Issue paper on the rule of law on the Internet and in the wider digital world*.³⁵
76. Furthermore, the oversight bodies should be mandated to scrutinise the human rights compliance of security service co-operation with foreign bodies, including co-operation through the exchange of information, joint operations and the provision of equipment and training, as further detailed in the Commissioner's *Issue Paper on democratic and effective oversight of national security services*.³⁶

³⁵ [Issue Paper](#) "The rule of law on the Internet and in the wider digital world", December 2014.

³⁶ [Issue Paper](#) "Democratic and effective oversight of national security services", June 2015.

2 HUMAN RIGHTS OF IMMIGRANTS, ASYLUM SEEKERS AND REFUGEES

77. According to the OECD, in 2013, net immigration to Germany reached about 437,000 persons, which represented a significant increase compared with previous years (in 2012, it was 370,000).³⁷
78. After a continued drop in the number of asylum applications in Germany since the mid-90s, this number has increased considerably since 2008. The country notably faced a 70% increase in asylum applications from 2012 to 2013 and a further increase of 60 % in 2014, when 202,834 applications (including 173,072 first applications) were submitted. In 2014, Germany became the country which received the highest number of asylum applications worldwide, with first asylum applicants coming mainly from Syria, Serbia, Eritrea, Afghanistan, Albania, Kosovo*, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Somalia and Iraq.
79. The Commissioner acknowledges the very considerable efforts made by Germany in the field of asylum in recent years. However, with an estimate of 400,000 asylum applications for 2015, a number of important challenges lie ahead, in particular regarding reception conditions and the need to guarantee an expedient but fair asylum procedure.
80. Another challenge relates to the increased number of manifestations of hostility towards asylum seekers and refugees (on this point, see section 3 on the fight against racism and intolerance), including demonstrations in the immediate vicinity of accommodation centres, attacks targeting these centres or incidents of violence against inhabitants.

2.1 ASYLUM PROCEDURES

2.1.1 AN OVERVIEW OF THE GERMAN ASYLUM SYSTEM

81. The main text relating to asylum in Germany is the Asylum Procedure Act (*Asylverfahrensgesetz*). The Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, or BAMF), located in Nuremberg, is the authority responsible for asylum applications. To register as asylum seekers, applicants must first contact an initial reception facility and then make their asylum applications in person at a branch of the Federal Office,³⁸ where their personal data will be recorded.
82. During his visit, the Commissioner received reports about long delays in the registration of asylum applications, ranging from several weeks to one year. In the Land of Baden-Württemberg for instance, the Commissioner was informed that, in a number of districts, some applicants (including approximately 500 persons in the district of Offenburg and more than 100 persons in the city of Pforzheim) who arrived in summer 2014 had not had their claim registered yet at the end of April 2015.
83. While the authorities' aim is to process asylum applications within 3 months, the duration of procedures varies greatly (from 3.6 months in prioritised applications³⁹ to more than one year in other cases).⁴⁰ In 2014, the overall average for processing an asylum application amounted to 7.1 months, a figure which rises to 13.1 months if Dublin procedures and prioritised applications are not taken into account, or even longer in case an appeal against the rejection of an asylum application is lodged.
84. A related concern which was raised by the Commissioner's interlocutors lies in the backlog in processing applications (over 169,000 cases at the end of 2014, and reportedly more than 200,000 at

³⁷ OECD, [International Migration Outlook 2014](#), published on 1 December 2014.

* 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.

³⁸ The Federal Office is represented in all Länder as it has a decentralised structure with 24 branch offices.

³⁹ See section 2.1.2 below.

⁴⁰ [Bundestagsdrucksache 18/3850](#): *Antwort der Bundesregierung an die Kleine Anfrage der Abgeordneten Ulla Jelpke, Jan Korte, Sevim Dagdelen u.a. und der Fraktion DIE LINKE: Ergänzende Informationen zur Asylstatistik für das Jahr 2014*, 28 January 2015, p. 11.

the end of the first quarter of 2015). Given the sharp increase in the number of asylum applications during the first months of 2015,⁴¹ this already significant backlog is likely to further increase in 2015.

85. The government has responded to these challenges in the processing of applications by recruiting 650 additional staff at the BAMF: 300 persons have already been recruited, while 350 are expected to be recruited before the end of the year. Furthermore, on 8 May 2015, the government announced the creation of up to 2,000 new posts at the BAMF for the upcoming years, including 750 for this year, which represents almost a doubling of its current capacity.

2.1.2 SAFE COUNTRIES OF ORIGIN AND PRIORITISED ASYLUM PROCEDURES

86. In order to cope with the high number of asylum applications, in 2014 the Government decided to prioritise certain categories of applications, which are regarded as either manifestly founded (Syrians, Iraqi minorities) or manifestly unfounded (applicants from the Western Balkans).
87. On 18 November 2014, prioritised procedures were introduced for Syrian nationals and for members of religious minorities (Christians, Yazidi and Mandaeans) from Iraq, whose applications can be decided without an interview on the basis of a questionnaire. An interview will therefore only take place if further questions arise. The idea is to prioritise the processing of these applications, as they are generally associated with protection needs. The refugee recognition rate for Syrian nationals was for instance of 85.8% in 2014 while the overall protection rate for this group amounted to 99.9%.
88. The Commissioner notes with satisfaction that, thanks to the prioritised procedure, expediency of procedures is guaranteed for these groups of applicants. However, he is concerned that applicants from other nationalities consequently face long delays in the processing of their claims. While the average processing time for Syrian nationals was 4.2 months only in 2014, Afghan nationals, whose protection rate amounted to 68.4% in 2014, had to wait on average 13.9 months for a first decision on their asylum application.
89. On 19 September 2014, the Bundesrat approved the Federal Government's draft legislation, adding Serbia, the former Yugoslav Republic of Macedonia and Bosnia and Herzegovina to the list of "safe countries of origin". As a result, applications from nationals of these countries are presumed to be manifestly unfounded and are considered in an expedited procedure, with a shortened interview (50 minutes instead of 60 minutes usually). In practice, at the time of writing this report, more than 50% of asylum proceedings concern applicants from the Western Balkans. However, their refugee recognition rate is close to zero. Discussions are currently ongoing at the Federal level on the possible addition of Kosovo and Albania to the list of "safe countries of origin".
90. The BAMF already decided in 2015 to prioritise applications from people coming from Kosovo. This decision was taken in response to the sharp increase, since early 2015, in the number of asylum seekers from Kosovo: between January and April 2015, 27,767 asylum applications were submitted, compared to 1,722 applications over the same period in 2014. The authorities have indicated that the aim of this procedure was to decide on applications as fast as possible, ideally within two weeks.⁴² However, it has been reported that, in some branch offices of the BAMF, the staff had to devote all its attention to the prioritised examination of these applications and applications from nationals of other countries, including Syria and Iraq, could therefore not be registered, further delaying their possible recognition as refugees and subsequent family reunification.
91. The Commissioner has criticised the drawing up of list of "safe countries of origin" in the past.⁴³ He points out that even countries regarded as safe overall might not be safe for some persons or groups. Discrimination may for instance be so serious as to constitute inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights, particularly when directed

⁴¹ Between January and April 2015, 114,125 asylum applications were registered in Germany, a 129.3% increase compared to the same period in 2014.

⁴² [Sharp rise in asylum seekers from Kosovo](#), Press release of the Federal Ministry of the Interior, 13 February 2015.

⁴³ See also [UNHCR's position on safe countries of origin](#), 28 February 2014.

against members of minority groups or lesbian, gay, bisexual or transgender communities. Moreover, discrimination and other measures taken cumulatively may constitute an “act of persecution” in the sense of the 1951 Convention relating to the Status of Refugees. He therefore considers that the nationality of an asylum seeker should not be, as such, a sufficient ground for considering an asylum request to be manifestly unfounded and thus assigning it to a specific type of procedure, which should be determined based on a study of the asylum seeker’s personal situation.

2.1.3 DUBLIN PROCEDURE

92. About 20% of all asylum decisions issued by the BAMF in 2014 concerned Dublin cases, *i.e.* cases in which it is necessary to examine whether another EU state is responsible for processing an asylum claim, based on the Dublin Regulation. On this basis, the BAMF made 35,115 requests⁴⁴ to EU countries to take charge of an asylum seeker in 2014. However, only 4,772 persons were actually sent to another country. At the same time, Germany received back 2,275 persons in Dublin cases from other EU countries - a net difference of 2,297 persons in total.
93. In the Commissioner’s view, these figures clearly show the limits of the Dublin system, which instead of allowing a fair repartition of asylum seekers between participating states overburdens the German administration and courts’ system, without even securing the outcome, in terms of net returns, for which it is purportedly maintained.
94. Moreover, the Commissioner is concerned that most of the above requests to return asylum seekers to other countries under the Dublin procedure concern states in which reception conditions for asylum seekers are problematic and where the system to support the integration of refugees and other beneficiaries of international protection still suffers from serious deficiencies, as also described in some of his recent reports.⁴⁵ Thus, out of the 35,115 requests, 9,102 requests were sent to Italy, 4,405 to Bulgaria and 3,913 requests to Hungary. Dublin transfers to these countries have prompted a high number of appeals and several court cases resulted in suspension of such transfers. In a significant number of cases, “asylum” was granted by churches in order to wait for the expiration of transfer deadlines.
95. Owing to the high number of legal appeals against Dublin decisions, the possible absconding of individuals, the failure of target member states to sometimes facilitate the transfer, and the limited capacities of the German authorities to carry out the transfers, only a small number of these transfers are actually conducted: for example, according to official statistics, 14 Dublin returns of asylum seekers from Germany to Bulgaria effectively took place in 2014.
96. Greece is the only country to which Dublin transfers are generally suspended: in January 2015, and for the fourth consecutive year, Germany decided to suspend returns of asylum seekers to Greece under the Dublin Regulation for another year. The Commissioner notes that the recent judgment of the European Court of Human Rights in the *Tarakhel* case⁴⁶ might lead to more suspensions of Dublin transfers to Italy when the treatment of vulnerable asylum seekers upon their return is at stake.⁴⁷
97. Civil society organisations reported to the Commissioner that these returns are often the source of a further trauma for the persons concerned, and that many of them have indicated that they will anyway try to come back to Germany or have already done so in practice.

⁴⁴ BAMF, *Das Bundesamt in Zahlen 2014 - Asyl*, p. 26.

⁴⁵ See in particular the Commissioner’s report on Hungary, [CommDH\(2014\)21](#), 16 December 2014, and the report on Bulgaria, [CommDH\(2015\)12](#), 22 June 2015. See also the Commissioner’s report on Italy, [CommDH\(2012\)26](#), 18 September 2012.

⁴⁶ *Tarakhel v. Switzerland*, application no. [29217/12](#), Grand Chamber judgment of 4 November 2014.

⁴⁷ See, to that effect, the recent decision of the German Constitutional Court, [2 BvR 746/15](#), 30 April 2015, suspending the return of a Syrian family with five children to Italy under the Dublin Regulation.

2.2 RECEPTION CONDITIONS FOR ASYLUM SEEKERS

98. Two positive steps have been recently taken by the German authorities, significantly reducing restrictions imposed on asylum seekers with regard to their access to the labour market and their freedom of movement. Firstly, as part of a law adopted in November 2014, asylum seekers are now allowed to work three months after the submission of their claim (instead of nine months previously): employers may then hire them after demonstrating that no German or EU nationals were available for the position, a restriction lifted after 15 months. Secondly, according to the same law, the existing limitations on the freedom of movement within Germany have now been largely removed for asylum seekers. After an initial three-month period, they are still obliged to reside in the area assigned by the authorities but may move freely within Germany and no longer need permission from the authorities to travel to another region. The geographic restriction can however be re-imposed if the person concerned has been convicted of a criminal offence or is subject to imminent deportation. Alongside these positive developments, the Commissioner wishes to highlight some issues relating to the accommodation of asylum seekers, their access to healthcare and social benefits and the situation of vulnerable asylum seekers which require the attention of the German authorities.

2.2.1 ACCOMMODATION

99. During the first stage of the asylum procedure, asylum seekers are accommodated in initial reception centres for a period no longer than three months.⁴⁸ Asylum seekers are assigned to reception centres throughout the 16 Länder according to a formula defined in the Asylum Procedure Act (the so-called “Königsteiner Schlüssel”). After this initial stage, asylum seekers are usually transferred to local accommodation centres, where they have to stay for the remaining time of the procedure. The responsibility for reception rests with the Länder, which are notably in charge of initial reception centres, while subsequent accommodation falls in general within the responsibility of municipalities. This results in marked differences in this type of accommodation, which may vary from housing in collective settings to individual homes. The Commissioner notes that according to the German Institute for Human Rights, the practice of forcing people to live in shared accommodation facilities for periods lasting several years, thereby denying them access to the housing market, is not compatible with the right to housing.⁴⁹
100. There are currently 21 initial reception centres operating in Germany; 15 new ones are expected to be opened soon and 10 more are planned for 2016. The Commissioner has received some critical reports on overcrowded facilities, improvised shelter not meeting basic standards - asylum seekers being sometimes provisionally accommodated in tents or gyms - and increasing challenges in finding new sites for reception centres.
101. During his visit, the Commissioner was informed that most of the improvised shelters had been or were in the process of being closed and replaced by long-term solutions. He could see the progress made when visiting a new extension of the initial reception centre in Karlsruhe, where the IT headquarters of a bank were being renovated to house up to 1000 asylum seekers. The Commissioner also went to the initial reception centre (*Erstaufnahmeeinrichtung*) in Karlsruhe, which had been under particular strain during last autumn and winter, with, at times, as many as 400 new arrivals per day. In addition, the Commissioner visited two emergency shelters (*Notunterkünfte*) in Berlin, which were recently opened in former schools. In the four centres he visited, the Commissioner witnessed overall good living conditions. He was particularly impressed by the commitment and professionalism of the staff, but also by the support provided by the local population through in-kind donations and volunteer efforts.

⁴⁸ In practice, asylum seekers are sometimes staying in the initial reception centres for periods exceeding 3 months due to delays in the registration of their claims by the BAMF. In addition, asylum seekers from Kosovo, who are in a prioritised procedure, are required to stay in the initial reception centres for the duration of the procedure.

⁴⁹ German Institute for Human Rights, [Parallel Report](#) to the UN Committee on the Elimination of All Forms of Racial Discrimination, April 2015, p. 13.

102. Several interlocutors of the Commissioner have pointed to the need to better spread the burden of accommodation costs between the Bund (the Federation), the Länder and the municipalities, the latter bearing most of the costs in the current system. Many municipalities claim to be overburdened with financial and political challenges in this respect, having sometimes to justify how the money spent on asylum seekers locally might concur with expenditures on local institutions such as libraries or kindergartens. The Commissioner understands that ongoing discussions about these costs should lead to more transfers of money from the Bund to the local level in the future.
103. Another issue of concern relates to the absence of minimum standards for reception of asylum seekers which would apply throughout Germany. As a result, the quality of accommodation and services available to asylum seekers varies widely, including within the same Land, where the management of facilities can be subcontracted to an NGO, a charity organisation or a private service provider. During his visit to the Land of Brandenburg, the Commissioner was informed that such standards were developed in this Land; he notes the intention of the Minister of Interior to promote similar initiatives in other Länder.
104. Finally, the Commissioner's attention was drawn to cases of ill-treatment of asylum seekers by security staff employed at reception facilities, which came to light in 2014. In one case, a local journalist received a DVD allegedly showing guards abusing an asylum seeker in a reception centre located in the town of Burbach. In a picture published by a number of newspapers, a handcuffed asylum seeker lies on the floor while a guard stands over him pressing his boot into his neck.

2.2.2 HEALTH CARE AND SOCIAL BENEFITS

105. Following the Federal Constitutional Court's ruling on 18 July 2012 that the asylum seekers benefits then in force contravened the right to a dignified minimum existence, as the benefits for asylum seekers were too low to enable a life in dignity, the Asylum Seekers' Benefits Act (*Asylbewerberleistungsgesetz*) was reformed in 2014 and social benefits were increased. Under the new system, asylum seekers will only receive benefits in kind while accommodated in initial reception centres. After three months, they will be given cash benefits. However, the Government decided to maintain the special legal regime for asylum seekers in a separate law, with the result that the limitations on health care provision for asylum seekers remain.
106. The access of asylum seekers to health care remains problematic in a number of Länder in Germany. According to the law, health care for asylum seekers is limited to instances "of acute diseases or pain", a provision which has been diversely interpreted. The general view is that health care for asylum seekers should not be limited to "emergency care", since chronic diseases are equally likely to cause pain.
107. The Commissioner has noted that the access to health care is also regulated differently in the Länder: while in some Länder asylum seekers get a health card which enables them to have a direct access to health services, in other Länder they have to go through an administrative procedure first in order to obtain a health insurance voucher, which in practice can lead to some delays in medical treatment. It has also been reported that in some cases medical treatment has been denied due to the incompetence of administrative staff in deciding on health issues, causing on some occasions irreversible health damage.
108. The Commissioner considers that the system operated in Bremen and Hamburg, which includes asylum seekers into the general social health insurance and gives them direct access to health services through the health card, could be replicated in other Länder as well.

2.2.3 THE SITUATION OF VULNERABLE ASYLUM SEEKERS

109. According to a number of the Commissioner's interlocutors, the asylum system in Germany is not fully equipped to identify and provide special support to certain categories of vulnerable persons. In particular, Germany has no consistent practice regarding rehabilitation of victims of torture. A general

problem of access to treatment for victims of torture has been observed, due to their high number, staff shortages and the lack of infrastructures: only 25 centres across the country, usually run by NGOs, carry out some rehabilitation work. An additional problem relates to the lack of interpreters, especially in the mental health care system, where assistance to victims cannot always be provided adequately.

110. In its first evaluation report on Germany, the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) stressed that the identification of victims of trafficking among asylum seekers and irregular migrants in detention facilities should also be improved, including through training of staff working in asylum and detention centres.⁵⁰
111. The Commissioner notes that, contrary to other asylum seekers, unaccompanied minors are allowed to stay in the place where they were registered as asylum seekers (and where they can benefit from specific assistance and support from the Youth Welfare Service) and are not assigned to another Land. However, he also notes that since their number steadily increased in the past few years, the Federal Ministry of Youth has put forward a proposal regarding the re-distribution of unaccompanied minors after an initial period, which, according to some of the Commissioner's interlocutors, might impact on the specific support they receive, as not all municipalities across Germany have sufficient means and expertise in dealing with unaccompanied minors.

2.3 OTHER HUMAN RIGHTS ISSUES PERTAINING TO IMMIGRATION

2.3.1 IMMIGRATION DETENTION

112. A foreign national may be detained in Germany pending deportation in two circumstances: as a preparatory measure, pending the decision on whether to expel him/her (*Vorbereitungshaft*), for a maximum period of six weeks; and/or as a preventive measure, to ensure the enforcement of an expulsion order (*Sicherungshaft*) for up to six months. In this case, the detention period may be extended to a total of 18 months maximum.
113. Germany's immigration detention regime contrasts sharply with those of its EU neighbours in that it made, until recently, widespread use of prisons to hold immigration detainees and allocates responsibility for this detention at the Land level, rather than federal authorities. This situation has been criticised on numerous occasions by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).
114. In its report following its 2010 periodic visit to Germany, the CPT stressed "that a prison is by definition not an appropriate place in which to detain someone who is neither suspected nor convicted of a criminal offence. Regrettably, there are no specific detention centres for foreigners outside the prison system in Baden-Württemberg, Bavaria and Saxony. (...) It is of all the more concern that, in those Länder where immigration detainees are still being held in prisons (including Baden-Württemberg, Bavaria and Saxony), no specific regulations governing detention pending deportation exist. As a result, immigration detainees continue to be subjected to the same rules and restrictions as sentenced or even remand prisoners."⁵¹ The CPT therefore called upon the German authorities to take immediate steps to ensure that, in all German Länder (including Baden-Württemberg, Bavaria and Saxony), detention pending deportation is governed by specific rules reflecting the particular status of immigration detainees and recommended to these Länder to take the necessary measures to ensure that immigration detainees are accommodated in centres specifically designed for that purpose.
115. The country's detention policies were the subject of recent ground-breaking legal cases at the Court of Justice of the European Union (CJEU), which ruled that Germany cannot rely on the fact that there are no dedicated immigration detention facilities in most Länder to keep foreign nationals in prison pending their removal. In July 2014, the CJEU found in particular Germany's practice of using prisons for

⁵⁰ GRETA, [First evaluation report](#) on Germany, 3 June 2015, para. 138.

⁵¹ [CPT Report](#) on the visit to Germany carried out from 25 November to 7 December 2010, CPT/Inf (2012) 6, 22 February 2012, para. 33.

immigration purposes to be incompatible with the EU Returns Directive and ruled that a Member State which has a federal structure must ensure that the competent authorities always provide accommodation for third-country nationals in specialised detention facilities. If the federal state in question does not have such facilities it may transfer the persons concerned to a federal state which does.⁵²

116. The Commissioner notes with satisfaction that, following these judgments, the practice of carrying out detention for the purpose of deportation in regular prisons came to an end in the second half of 2014 and, pending the construction of new specialised institutions, deportees were in the meantime sent to facilities in other Länder.

2.3.2 RETURNS TO KOSOVO

117. Since the 2010 readmission agreement concluded between Germany and Kosovo, Germany has returned a number of persons, most of them Roma families, back to Kosovo.
118. In November 2009, the Commissioner's predecessor wrote a letter⁵³ to Chancellor Merkel in respect of the forced returns, mostly of persons of Roma origin, to Kosovo. He stressed that Kosovo did not have the infrastructure that would allow a sustainable reintegration of the returnees. These concerns were reiterated in a letter⁵⁴ sent to the Ministry of Interior, Thomas De Maizière, in November 2010, in which the Commissioner's predecessor once again called upon the German government to look into this serious humanitarian issue and prevent any further forced returns, particularly of Roma people, to Kosovo, as long as the situation on the ground provides reason to believe that these returns put the returnees' lives and personal security at risk.
119. In 2012, the United Nations' Children's Fund (UNICEF) published a report⁵⁵ which assessed the situation of repatriated children to Kosovo and their psycho-social health, focusing on children repatriated from Germany and Austria. Many of them had lived in Germany for years, had grown up there and many were also born in Germany. The report's conclusions pointed to an alarming situation, with children, especially those belonging to minorities or born outside of Kosovo, describing their return as traumatic and every third repatriated child suffering from post-traumatic stress syndrome. The report also highlighted the almost non-existent reintegration possibilities in Kosovo for these children, as many returned children were living in abject poverty and 70% of minority children had dropped out of school upon return.
120. The Commissioner notes reports indicating that Germany has continued to carry out forced returns to Kosovo since 2010.⁵⁶ According to the United Nations High Commissioner for Refugees (UNHCR), returnees still may include many Roma, some of whom born in Germany.
121. The Commissioner would like to stress that issues pertaining to the continued forced returns, especially of Roma, from Germany to Kosovo, should not be overlooked in the current context of increasing numbers of asylum seekers from Kosovo. Whereas the latter have recently arrived in Germany and have their asylum applications dealt with through an accelerated procedure, with a view to rapidly return all rejected asylum seekers, other persons from Kosovo came to Germany already years ago, many of them

⁵² Judgments in [Joined Cases](#) C-473/13 and C-514/13 and in Case C-474/13, *Adala Bero v. Regierungspräsidium Kassel, Ettayebi Bouzalmate v. Kreisverwaltung Kleve and Thi Ly Pham v. Stadt Schweinfurt*, 17 July 2014.

⁵³ Letter from the Council of Europe Commissioner for Human Rights to Mrs Angela Merkel, Chancellor of the Federal Republic of Germany, concerning forced returns to Kosovo, [CommDH\(2009\)42](#), published on 15 December 2009.

⁵⁴ Letter from the Council of Europe Commissioner for Human Rights to Dr Thomas De Maizière, German Federal Minister of the Interior, [CommDH\(2010\)52](#), published on 9 December 2010.

⁵⁵ Verena Knaus et al., [Silent Harm](#) - A report assessing the situation of repatriated children's psycho-social health, *UNICEF Kosovo in cooperation with Kosovo Health Foundation*, 2012.

⁵⁶ The number of forced returns of individuals originating from Kosovo was relatively stable in the past few years: 573 individuals in 2010; 555 individuals in 2011; 444 individuals in 2012; 526 individuals in 2013 and 546 individuals in 2014.

having been granted a “temporary suspension of deportation” (*Duldungsstatus*). In the Commissioner’s opinion, a forced return of these persons could still lead to serious and irreparable damage.

2.4 RESETTLEMENT AND PROGRAMMES FOR SYRIAN REFUGEES

2.4.1 RESETTLEMENT

122. Although Germany has repeatedly admitted foreigners with protection needs on a spontaneous basis and according to specific criteria set by the Government, the country did not participate in regular resettlement activities in co-operation with UNHCR until recently. However, since 2012, a resettlement pilot-programme was carried out in Germany with 300 places per year. Following a decision adopted in December 2014, resettlement should continue permanently, in 2015 and beyond, on the basis of an annual quota of 500 persons.
123. While welcoming this decision, the Commissioner shares the concern expressed by UNHCR that persons admitted to Germany by way of resettlement are not granted full-fledged refugee status. In particular, under the current provisions, resettled refugees are not granted a refugee travel document. While legislation is under way to address some of the remaining gaps -- a special residence permit for resettled refugees, including a right to family reunification on an equal footing with recognised refugees, should be established – the Commissioner notes that differences remain between the two categories of refugees (in particular resettled refugees would still not benefit from a specific protection against expulsion and would not be privileged in naturalisation procedures with a view to maintaining their old nationality).

2.4.2 SYRIAN REFUGEES IN GERMANY

124. The Commissioner commends the important role played by Germany in the context of the Syrian refugees crisis. Germany has pledged by far the largest concrete number of humanitarian and other admissions of Syrian refugees pledged by any state in the world and contributes as one of the largest donors to the humanitarian operation for the benefit of Syrian refugees and IDPs in the region.⁵⁷
125. Three Humanitarian Admission Programmes were launched in Germany for Syrian refugees since May 2013, under which 20,000 individuals can be admitted. As of December 2014, almost 16,000 individuals had arrived in Germany under these programmes.
126. The first Humanitarian Admission Programme, established in May 2013, provided admission places for 5,000 Syrian nationals with a focus on those individuals who had sought refuge and were registered by UNHCR in Lebanon (“UNHCR submissions”). In addition, Syrian nationals still residing in Syria as well as in Jordan could also be considered for admission, if they had previously applied for a visa to Germany (“Embassy cases”). Admission criteria were the following: (i) humanitarian criteria, *i.e.* children with particular protection needs and their parents, medical cases, women in precarious situations and members of religious minorities if they were persecuted due to their religious confession, (ii) links to Germany, such as family relations, previous stays in Germany and German language skills, (iii) ability to support reconstruction of Syria when returning.
127. On 23 December 2013, the German Federal Government launched a second Humanitarian Admission Programme, comprising another 5,000 admission places for Syrian refugees. This second programme was also open to stateless persons and third-country nationals who used to live in Syria as well as individuals who fled to Turkey and Egypt, and focused on the admission of Syrian refugees with relatives legally residing in Germany.

⁵⁷ At the “Conference on the Syrian Refugee Situation – Supporting Stability in the Region” (Berlin, 28 October 2014), Germany pledged an additional 500 million euros to help Syria’s neighbouring countries.

128. A third Humanitarian Admission Programme was adopted in June 2014, with another 10,000 admission places. With admission criteria similar to those under the first programme, the third programme also extended admission to people residing in Libya following their flight from Syria.
129. In addition, 15 of Germany's 16 Länder have launched programmes for Syrian nationals with relatives in Germany. Approximately 15,000 visas have been issued under this scheme to date. Whereas in most of the Länder, the number of places under these programmes is not limited, access to the programmes is in practice restricted by the requirement of a written commitment of the family members in Germany to financially maintain their relatives upon arrival and cover their costs for accommodation and living.
130. Finally, a number of Syrian nationals were accorded a residence permit over the last three years on the basis of Section 22 of the German Residence Act (*Aufenthaltsgesetz*), which regulates admission from abroad on urgent humanitarian grounds, or humanitarian visa, and the number of scholarships available for young Syrians was strongly enhanced by the Federal Ministry of Foreign Affairs. German authorities have also extended residence permits for Syrian students who were studying in Germany.
131. It is estimated that about 130,000 Syrians are now living in Germany. More than 105,000 persons have found refuge in the country since the beginning of the conflict in 2011, including 75,000 who had applied for asylum (about 39,000 in 2014 alone). Syrians made up a quarter of all asylum applications in Germany in 2014.
132. During the visit, the Commissioner talked to a number of persons who fled Syria in the two reception facilities he visited in Berlin. They had reached Germany after a perilous trip and often had to pay smugglers to cross the Mediterranean Sea in very hazardous conditions. The Commissioner notes that, while all of them had a very high chance of being granted a protection status in Germany, they still had to risk their lives to seek safety in Europe. In comparison, the refugees the Commissioner met during a mission to Germany in December 2013⁵⁸ could benefit from decent travel conditions, since they were admitted under the Humanitarian Admission Programme or the resettlement scheme. In the Commissioner's view, this clearly stresses the need to increase legal avenues for Syrian refugees to find protection in Europe, notably through sustainable resettlement programmes and other forms of admission, such as using private sponsorship, humanitarian visas, student and work visas, so that people seeking safety can find it without having to resort to smugglers and dangerous routes.⁵⁹

2.5 INTEGRATION OF REFUGEES AND OTHER BENEFICIARIES OF INTERNATIONAL PROTECTION

133. In 2014, Germany ranked 10 out of 38 countries on the Migrant Integration Policy Index,⁶⁰ placing it just above the average for Western Europe. Good practices in Germany include the existence of a Federal Commissioner for Migrants, Refugees and Integration at the Chancellery, which has made it easier to discuss integration and coordinate plans with different federal ministries, Länder and municipalities, the decentralised infrastructure of the BAMF, guaranteeing that immigrants across the country can benefit from the same quality integration courses and programmes, and the development of a National Action Plan on Integration.⁶¹
134. Many of the Commissioner's interlocutors have pointed out that German language courses should be strengthened, as it is the most important factor enabling integration. Currently, asylum seekers have the possibility to start learning German while their claims are being processed in five Länder only;⁶² elsewhere, they have to wait for the outcome of their asylum claims, or rely on non-formal language

⁵⁸ See the Commissioner's Human Rights Comment, [Syrian refugees: a neglected human rights crisis in Europe](#), 20 December 2013.

⁵⁹ UNHCR's proposals, [UNHCR unveils far-reaching proposals for European action in the Mediterranean Sea](#), Press release, 12 March 2015.

⁶⁰ MIPEX 2014 Report on [Germany](#).

⁶¹ On the National Action Plan on Integration, see ECRI [Fifth report on Germany](#) (adopted on 5 December 2013, published on 25 February 2014), CRI(2014)2, para. 76 et seq.

⁶² Bavaria, Brandenburg, Rhineland-Palatinate, Saxony-Anhalt and Schleswig-Holstein.

courses provided on a voluntary basis in some reception facilities. A recent study highlighted the beneficial impact of starting language courses at an early stage on the asylum seekers' integration prospects.⁶³

135. Another issue of concern relates to family reunification. Under the regulations on family reunification contained in the German Residence Act, foreign spouses and minor unmarried children of recognised refugees may qualify for admission. The Commissioner notes that, in its recent case-law, the European Court of Human Rights has reiterated that family unity is an essential right for refugees and that family reunification is a fundamental element in enabling persons who have fled persecution to resume a normal life.⁶⁴ The Council of Europe Committee of Ministers has also recommended to member states to "deal with applications for family reunion from refugees and other persons in need of international protection in a positive, humane and expeditious manner."⁶⁵ However, during the visit, the Commissioner was informed of a number of obstacles which in practice prevent family members from joining beneficiaries of international protection in Germany. One main problem relates to the long delays in obtaining an appointment in German embassies abroad, in order to get a visa. This seems to be a major issue in Turkey, where family members have to wait between nine and twelve months for an appointment, but also in Lebanon.

2.6 CONCLUSIONS AND RECOMMENDATIONS

136. The Commissioner welcomes the efforts made by the German authorities to rise to the challenge posed by a significant increase in the number of asylum seekers in the past years. He is also heartened by the attitude of the local population, whose vast majority supported their reception. While some aspects, notably regarding accommodation needs, have been problematic, the Commissioner considers that the German authorities have made progress in ensuring respect of the rights of asylum seekers and strongly encourages them to sustain such progress. At the same time, the Commissioner draws the attention of the German authorities to a number of areas in which further improvement is needed in order to ensure the sustainability of the asylum system.
137. First of all, with the number of asylum applications steadily increasing, having a sufficient number of staff responsible for making asylum decision will be critical to both keep pace with the new applications and to reduce the backlog in decisions. The Commissioner thus welcomes the recent decision of the Government to increase the number of staff at the BAMF. At the same time, the government should secure appropriate training of the new personnel. Moreover, the Commissioner draws the authorities' attention to the need to ensure that the reception centres for asylum seekers are also adequately staffed.
138. Secondly, the Commissioner points out that all foreign nationals requesting asylum must have access to asylum procedures and that their requests must be examined on a case-by-case basis in a rigorous and fair manner.
139. The Commissioner considers that the figures on the operation of the Dublin system in Germany, and notably the minimal differential between transfers of asylum seekers from and to the country, provide a powerful illustration of the fact that Europe is maintaining a system which is unfair to asylum seekers without even obtaining the results for which it is purportedly kept alive. Dublin cases are also further aggravating the considerable backlog of cases pending before German courts. The Commissioner strongly believes that there is a pressing need to overhaul the Dublin Regulation. He calls on Germany to take the lead in promoting the necessary steps to replace the Dublin Regulation with a more human-rights oriented system, able to ensure effective access to asylum and humane treatment of migrants, as

⁶³ Bertelsmann Stiftung, [Die Arbeitsintegration von Flüchtlingen in Deutschland](#), *Humanität, Effektivität, Selbstbestimmung*, February 2015.

⁶⁴ *Tanda-Muzinga v. France*, application no. [2260/10](#), judgment of 10 July 2014, paragraph 75.

⁶⁵ [Recommendation N° R \(99\)23](#) of the Committee of Ministers to member states on family reunion for refugees and other persons in need of international protection, 15 December 1999, Rec(99)23, paragraph 4.

well as a fairer, solidarity-based distribution of responsibilities among member states in providing protection to those in need.

140. The Commissioner appreciates the Government's efforts to meet the challenges arising from the reception of a high number of asylum seekers. While recognizing these challenges, the Commissioner underlines the importance of always securing reception conditions in line with human rights standards. In particular, he invites the authorities to develop nationwide obligatory minimum standards for the operation of reception facilities to ensure that reception conditions and services available to asylum seekers are in line with human rights standards throughout the country. Regarding allegations of ill-treatment of asylum seekers at reception facilities, the Commissioner urges the German authorities to ensure that all these allegations are promptly, adequately and effectively investigated.
141. Moreover, the Commissioner calls on the Federal Government to better support the Länder and municipalities in shouldering the costs and implementation of reception. He also draws the attention to the need to take further steps as regards asylum seekers' access to health care, for instance on the basis of the models already in place in the Hamburg and Bremen Länder. More generally, greater attention should be paid to improving the identification of persons in vulnerable situations and ensuring that adequate measures are available to meet their needs and ensure their protection.
142. As concerns immigration detention, the Commissioner recalls the CPT's recommendation that, in all Länder, detention pending deportation should be governed by specific rules reflecting the particular status of immigration detainees.
143. The Commissioner also reiterates his predecessor's call upon the German Government to refrain from any forced returns, particularly of Roma people, to Kosovo, which would put the returnees' lives and personal security at risk.
144. The Commissioner welcomes the measures the German authorities have taken since 2013 to help Syrian refugees to face the humanitarian crisis and encourages the authorities to continue to play a leading role in this regard.
145. With regard to resettlement, the Commissioner calls on the German authorities to increase the resettlement quota over the next years and to fully align the status of resettled refugees to that of persons granted status after an asylum procedure in the country.
146. Finally, the Commissioner calls on the German authorities to strengthen their efforts to improve the integration of recognised refugees and other beneficiaries of international protection and further promote a welcoming culture for refugees. One important aspect is the strengthening of language courses, which should start as early as possible.
147. The Commissioner urges the German authorities to ensure that refugees and other beneficiaries of international protection fully enjoy their right to family reunification, in line with the case-law of the European Court and the guidance of the Council of Europe Committee of Ministers in this area. In particular, the Commissioner draws the attention of the German authorities to the urgent need to reduce waiting times for obtaining a visa. In this respect, he welcomes the creation, announced by the Government in May 2015, of simplified procedures to process applications for family reunification for Syrians.

3 THE FIGHT AGAINST RACISM AND INTOLERANCE

3.1 THE RISE OF RACISM AND INTOLERANCE IN GERMANY

148. As mentioned above, the response of the German population to increasing numbers of asylum seekers has been overwhelmingly positive. At the same time, the Commissioner is concerned at clear signs that racism and intolerance are on the rise in Germany. According to official data,⁶⁶ in 2014 acts of violence motivated by right-wing extremism increased by 22.9% over the previous year, reaching the highest level since 2001. Antisemitic acts were also on the rise with a 25.2% increase in 2014. While these figures point to an alarming increase on their own, the Commissioner notes that they only take account of violence perpetrated by extremist groups, and not of all violence motivated by racism and intolerance, for which there are no comprehensive data in Germany. Furthermore, in absolute numbers, the Commissioner notes that the figures relating to racist acts of violence recorded by civil society organisations tend to be considerably higher, all of which lends additional urgency to the problem.
149. The rise of racism and intolerance is particularly reflected in an upsurge of attacks against facilities for asylum seekers. Official data shows that there were 203 attacks against such facilities in 2014 (221 according to NGOs), of which 175 were motivated by right-wing extremism, compared to 58 the year before. 150 such attacks are reported for the first half of 2015. The Commissioner notes that regular demonstrations against a supposed “Islamisation” of Germany and Europe have gained support among different layers of the society and favoured negative attitudes toward immigrants. At the same time, there has also been a noticeable civil society mobilisation with many counter-demonstrations across the country in favour of a diverse German society.
150. Two reports recently published by the European Commission against Racism and Intolerance (ECRI) and the United Nations Committee on the Elimination of Racial Discrimination (CERD) have also highlighted the extent and seriousness of this problem.

3.1.1 THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR COMBATTING RACISM AND DISCRIMINATION

151. The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*), which transposes in German law the EU non-discrimination directives,⁶⁷ came into force in 2006 and prohibits discrimination on the grounds of race or ethnic background, sex, religion or belief, age, disability and sexual orientation.
152. The Commissioner notes with concern that the General Equal Treatment Act does not cover discrimination in the area of public law. The German authorities have stressed that any victims of discrimination by public authorities can rely on the protection afforded by the Federal Constitution (Basic Law), which guarantees the equality of all human beings before the law in its Article 3. Nevertheless, the Commissioner notes that in its recent concluding observations on Germany, the CERD expressed concern at the fact that “while the Basic Law can in principle be invoked in court against public authorities, in practice, administrative courts only very infrequently address racial discrimination through the Basic Law; and compensation cannot be obtained through the same proceedings.”⁶⁸
153. Regarding hate speech, Article 130 of the Criminal Code prohibits public incitement to violence, hatred or any arbitrary measure, as well as public insults and defamation, while Article 185 of the Criminal

⁶⁶ Federal Ministry of the Interior, *Motivierte Kriminalität im Jahr 2014* (PMK 2014), May 2015.

⁶⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁶⁸ CERD, [Concluding observations](#) on the combined nineteenth to twenty-second periodic reports of Germany, 15 May 2015, para. 8.

Code criminalizes insults. The Commissioner notes that the implementation of Article 130 has raised some issues of compatibility with, inter alia, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), particularly because of the criterion of disturbance of public peace, which is taken into consideration in Germany to determine whether ideas based upon racial superiority or hatred reach the criminal threshold. For example, in an Opinion adopted in 2013, the CERD found that, due notably to the application of this principle, Germany had failed to carry out an effective investigation into statements made by Thilo Sarrazin, a German politician and at the time a member of the *Deutsche Bundesbank* executive board, who had expressed racist views directed primarily against “Turks” and “Arabs”. The CERD therefore found Germany in violation of ICERD.⁶⁹ The Commissioner also notes that in its 2014 report, ECRI also recommended that the proviso relating to disturbance of public order be removed from Article 130.⁷⁰

154. As regards hate crimes, the Commissioner welcomes the adoption, on 8 May 2015, of an amendment to Article 46 of the Criminal Code, which provides that the racist motivation of an ordinary offence constitutes an aggravating circumstance, a long-standing recommendation of international bodies, such as ECRI and CERD, as well as civil society organisations. At the same time, the Commissioner notes that some victim support organisations have expressed reservations about the fact that the amendment does not expressly refer to other bias motivation that should be covered, such as homophobic and transphobic motives.
155. While the new amendment to Article 46 of the Criminal Code should allow for a better response to instances of hate crimes that go through the criminal justice system, the Commissioner remains concerned that data collection on the real incidence of hate crimes in Germany still presents a number of important shortcomings. In particular, data on hate crimes are currently gathered and stored as “politically motivated crime” (*Politisch motivierte Kriminalität - PMK*), and divided into four categories: right-wing politically motivated crimes, left-wing politically motivated crimes, politically motivated crimes committed by foreigners, and other politically motivated crimes. However, the Commissioner notes that only a fraction of hate crimes are committed by extremist groups. In this connection, German civil society groups converge in saying that the classification of hate crimes as “politically motivated crime” means that in practice hate crimes that lack any ties to organised extremist groups often escape recording, investigation and prosecution. Furthermore, the Commissioner was informed that, if the police fail to register a hate crime as “politically motivated” and to classify it in the appropriate category, any potential racist or discriminatory motive is likely to be overlooked in the course of the investigation and subsequently ignored by prosecuting authorities and courts. Against this background it is perhaps not surprising that considerable discrepancies exist between the police and NGO figures on hate crimes, the latter being as a rule higher.
156. Concerning measures aimed at combatting organisations which promote or call for racial discrimination, the authorities have indicated that the Federal Government and the Länder prohibited a total of 20 right-wing extremist organisations from March 2005 to September 2012.⁷¹
157. The Commissioner notes that the controversial debate on a possible ban of the far-right National Democratic Party of Germany (NPD) resulted in a December 2012 decision by the Bundesrat to file another formal application for the NPD to be banned before the Federal Constitutional Court. This follows an unsuccessful attempt at banning the NPD in 2003, when the Federal Constitutional Court found that too many of the NPD supporters, including leading party members, were state-sponsored undercover agents, a circumstance which tainted the evidence.
158. Lastly, the Commissioner has received reports according to which the lack of comprehensive data broken down by grounds such as ethnic origin limits the authorities’ ability to act effectively against racism and discrimination. One difficulty highlighted in this connection regards a certain reluctance to collecting this type of data in Germany due to the country’s history. Another criticism relates to the fact

⁶⁹ CERD, [Communication No. 48/2010](#), Opinion adopted on 26 February 2013.

⁷⁰ ECRI, [Fifth report on Germany](#) (adopted on 5 December 2013, published on 25 February 2014), CRI(2014)2, para. 10.

⁷¹ [Nineteenth to twenty-second periodic reports](#) submitted by Germany under Article 9 ICERD, 18 October 2013, para. 88.

that instead of this type of disaggregated data the authorities rely on other classifications (notably “persons with a migration background”), which according to civil society groups are imprecise and fail to capture certain segments of the German population who are affected by racism and discrimination.

3.1.2 MANIFESTATIONS OF INTOLERANCE AND RACISM

3.1.2.1 GROUPS PARTICULARLY VULNERABLE TO RACISM AND INTOLERANCE

159. As mentioned above, the Commissioner is concerned that hate crimes are on the rise in Germany. Official data notably show an increase in the number of violent crimes directed at foreigners, which reached 512 in 2014, compared to 473 the year before.⁷²
160. The Commissioner is also worried by the recurrent expression of racist views in the public sphere, as also highlighted by international monitoring mechanisms. In May 2015, the CERD expressed its great concern “at the proliferation and dissemination of racist ideas by certain political parties and movements and the lack of efficient measures taken to strongly sanction and deter such discourses and behaviours” and “at the increase of consequences that such discourses have on racially motivated acts, including violence, against groups protected” under the ICERD.⁷³ In its 2014 report on Germany, ECRI also regretted that the hate speech fuelled by racism manifests itself in public debates without always being clearly condemned. It considered that the xenophobic and therefore racist character of such discourse is still not clearly identified in public debates.⁷⁴
161. Asylum seekers and refugees are increasingly the target of hate speech and hate crimes, a phenomenon which seems to have unfortunately accompanied the sharp rise in applications for asylum in Germany in recent years (see above). In 2014, according to civil society data,⁷⁵ there were 292 protests against refugees, and notably against the establishment of reception facilities for asylum seekers. 81 attacks against asylum seekers were reported, as well as 36 arson attacks against accommodation facilities for asylum seekers.
162. An arson attack against an accommodation centre which was planned for 40 asylum seekers in Tröglitz, in eastern Germany, has hit the headlines in April this year. Though the Commissioner praised the public condemnation of this event by the German authorities and is also heartened by the broad counter-movement providing and expressing support for asylum seekers, he remains concerned at the continuing occurrence of attacks, which have since been reported: in June 2015, another arson attack took place in Meissen, against an uninhabited facility for asylum seekers, following an anti-refugee protest in the city. In the nearby town of Freital, a number of protests were also held against a hotel which was turned into an accommodation centre, hosting about 100 asylum seekers. This trend continued in July 2015, with attacks taking place every week, in Remchingen, near Karlsruhe, in Waldaschaff and Winden (Bavaria), where a former guesthouse which was supposed to open in September and host 67 asylum seekers was set on fire, as well as in Böhlen, near Leipzig, where shots were fired at an accommodation centre which hosts approximately 160 asylum seekers.
163. Other groups particularly exposed to racism and intolerance are Black people and Muslims. However, civil society organisations regret that this reality remains somewhat invisible in official statistics, because data on hate crimes and discrimination against members of these groups are not collected separately, as mentioned above.
164. The Commissioner notes that negative opinions about Muslims in Germany are widespread. Since 2012, a huge rise of attacks against mosques as well as against Muslim people has been noted. The weekly “PEGIDA” (Patriotic Europeans against the Islamisation of the Occident) demonstrations, which began in

⁷² 2014 Annual Report on the Protection of the Constitution, published on 30 June 2015, [Facts and Trends](#).

⁷³ CERD, [Concluding observations](#) on the combined nineteenth to twenty-second periodic reports of Germany, 15 May 2015, para. 9.

⁷⁴ ECRI, [Fifth report on Germany](#) (adopted on 5 December 2013, published on 25 February 2014), CRI(2014)2, para. 35.

⁷⁵ Amadeu Antonio Stiftung, [Gewalt gegen Flüchtlinge 2014](#).

Dresden in 2014 and quickly spread to other cities, also contributed to stirring up hostility against Muslims. Some incidents targeting Muslims have reportedly taken place immediately after some of these demonstrations.

165. The Commissioner welcomes that the decision of the Federal Constitutional Court, on 13 March 2015, striking down a blanket prohibition for teachers to wear religious and cultural symbols or dress in the Land of North-Rhine Westphalia, is seen by many as an important step towards combating discrimination based on religion or belief, notably against Muslims.
166. Germany's Roma and Sinti population also suffers from widespread negative attitudes among the general population. One of the main problems seems to be the way they are depicted in the media as well as during electoral campaigns, which often reinforces prejudices against them. The NPD for instance has used posters with the slogan "Geld für die Oma statt für Sinti und Roma" (Money for grandma instead of for Sinti and Roma). A study published in September 2014 on "Popular Attitudes against Roma and Sinti" under the auspices of the Federal Anti-Discrimination Agency⁷⁶ revealed that one-third of the German population rejected having a Roma as a neighbor while more than half of the respondents insinuated that Roma and Sinti have criminal tendencies. The Commissioner is concerned at the increasing insults and threats against Sinti and Roma on the Internet and notes that the Central Council of German Sinti and Roma had called on the authorities to take more effective measures against Internet operators such as Facebook to fight hate speech on the Internet.
167. Finally, antisemitic attitudes also remain a concern in Germany. Data on antisemitic acts of violence are collected in a separate category of right-wing politically motivated crimes and an independent expert panel on antisemitism was set up by the Federal Ministry of the Interior in 2009, following a Bundestag resolution of 4 November 2008 calling upon the Government to strengthen the fight against antisemitism and to further promote Jewish life in Germany.⁷⁷ According to the findings of a survey carried out by the EU Fundamental Rights Agency's (FRA) on experiences and perceptions of antisemitism,⁷⁸ of all the Jewish respondents, 61 % regarded antisemitism as the greatest problem in Germany in comparison to the other issues listed in the survey, such as unemployment (59 %), racism (57 %) or others, in contrast with other countries where unemployment was often cited as the greatest problem.
168. During the visit, the Central Council of Jews in Germany informed the Commissioner about antisemitic incidents which happened in 2014 in the wake of protests prompted by the conflict in Gaza, during which virulently antisemitic slogans such as "gas the Jews" could be heard. To denounce these incidents, the authorities, including the Federal Chancellor, participated in a rally against antisemitism organised by the Central Council of Jews in Germany in September 2014.

3.1.2.2 CONDUCT BY LAW ENFORCEMENT OFFICIALS

169. The Commissioner is concerned at reports of racially motivated conduct by German law enforcement bodies, including allegations of acts of violence and insults. Shortly after the visit, two incidents involving the Federal Police in Hannover were uncovered: in 2014, officers had reportedly ill-treated two migrants who had been brought to the police station; one of them was dragged on the floor with his feet shackled while the other was notably forced to eat pork.
170. The Commissioner has also received numerous reports of racial profiling practices among the German police. Members of minority groups are reported to be routinely subject to police checks without objective and reasonable justification, which, in accordance with the case-law of the Strasbourg Court, constitutes discrimination. In this connection, human rights organisations have pointed to Article 22 of

⁷⁶ [Antidiskriminierungsstelle](#) des Bundes legt Großstudie "Bevölkerungseinstellungen zu Sinti und Roma" vor, Press release, 3 September 2014.

⁷⁷ See the Panel [report](#) on the forms, conditions and prevention of antisemitism in Germany, published by the Bundestag in November 2011.

⁷⁸ European Union Agency for Fundamental Rights (FRA), [Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism](#), November 2013, p. 17.

Federal Police Act (*Bundespolizeigesetz*) in particular. Under this provision, for the purpose of controlling immigration, the Federal Police can stop, question, demand identity documents from and inspect objects in the possession of, any person in railway stations, trains and airports without reasonable suspicion. The Commissioner notes reports⁷⁹ indicating that less than 1% of the checks are leading to the detection of irregular migrants.

171. The Commissioner is pleased to note that, on 29 October 2012, the higher administrative court of Koblenz ruled that an identity check carried out by the Federal Police had violated the prohibition of discrimination (Article 3 (3) of the Basic Law) because the police had used skin colour as the selection criterion. This practice has also been condemned by both the CERD and ECRI, which have called upon the authorities to expressly prohibit racial or discriminatory profiling.

3.2 EXTREMISM AND RACISM IN GERMANY

172. Most of the Commissioner's interlocutors have pointed to the narrow approach prevailing in Germany on combating racism. The German Institute for Human Rights for instance stressed that the term "racism" is frequently equated with organised and violent right-wing extremism.⁸⁰ This approach has been criticized by the CERD as well as other international bodies such as ECRI and the UN Special Rapporteur on contemporary forms of racism, racial discrimination and xenophobia and related intolerance.
173. The Commissioner notes in particular that only a small part of racially motivated offences are committed by members of organised extremist groups. Conversely, research has shown that only about 60% of crimes committed by right-wing groups or individuals are racist crimes. The Commissioner has stressed on numerous occasions that racist violence, as opposed to other forms of violence, has a broader destructive impact on human dignity and social cohesion. This is why it should be treated more seriously than other forms of violence and extremism. In Germany, however, the true extent of racist violence continues to be concealed by the system of recording of politically motivated crimes, as mentioned above.⁸¹
174. The focus on crimes committed by extremist groups has even been reinforced following the National Socialist Underground (NSU) affair - a specific case of right-wing extremism. During the Commissioner's visit, particular attention was given to the follow-up to this case, which exposed clear institutional bias and other serious deficiencies among the police and security services in dealing with racially motivated crime.

3.2.1 THE NSU TERROR GROUP AND THE RESPECTIVE PARLIAMENTARY INQUIRY COMMITTEE

175. The discovery in 2011 of the right-wing NSU terror group and the ensuing series of revelations deeply shocked Germany, notably due to the failure of institutions to identify the perpetrators of a series of racially motivated murders for several years.
176. Members of the NSU group are accused of having committed at least ten murders (nine persons of Turkish and Greek origin and one police officer) between 2000 and 2007, as well as two bombings and at least 15 bank robberies. In November 2011, two male members committed suicide before they could be arrested. A third female member is currently on trial, along with four other males who are alleged accomplices of the NSU group, and has been indicted for membership of a terrorist organization, the ten murders, the bomb attacks and the armed robberies.

⁷⁹ [Drucksache 17/14569](#): Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Heidrun Dittrich, Annette Groth, weiterer Abgeordneter und der Fraktion Die Linke, 15 August 2013, p. 7.

⁸⁰ German Institute for Human Rights, [Parallel Report](#) to the UN Committee on the Elimination of All Forms of Racial Discrimination, April 2015, p. 4.

⁸¹ See also [Parallel Report](#) submitted to the CERD by a group of German NGOs, "Racial Discrimination in Germany", April 2015, p. 7.

177. Despite indications that the murders could have had a racist background and were linked, investigations were primarily pursued in the victims' environment and in the field of organised crime. As a result, the relatives of the victims were often treated with suspicion in the course of the investigations. In the Commissioner's view, the main feature of this affair is that the police, prosecutors and judges were not able to detect the racist motivation of the crimes. Perhaps even more important, however, is that such inability has resulted from structural bias against foreigners, or persons perceived as such, prevailing in the police and prosecution authorities, and widespread mistrust existing towards foreigners in society in general. These failures have been examined in parliamentary committees of inquiry at both federal and Länder level.
178. At the federal level, the parliamentary inquiry committee was established in January 2012 by a unanimous decision of all parties represented in the Bundestag. The Commissioner had the opportunity to meet and discuss with the Chair as well as members of this committee during a mission to Germany in February 2013. The Committee was tasked to provide an overall picture on the NSU terror group, and find an answer to the much discussed question of how this group could remain uncovered for so many years. The Committee was also asked to clarify the role of the Federal Office for the Protection of the Constitution⁸² as well as the role of the regional offices for the Protection of the Constitution of the Länder Hessen, Thuringia, Saxony and Berlin. In addition, the Länder of Thuringia, Saxony and Bavaria also established parliamentary committees of inquiry in order to clarify the role of the security and justice authorities at the Land level.
179. The inquiry committee of the Bundestag presented its final report on 22 August 2013. It contains 47 recommendations, including on how to improve cooperation between security, police and judicial services, a process of critical self-examination within the police, and changes to police investigation procedures.

3.2.2 THE RESPONSE OF THE GERMAN AUTHORITIES

180. The Commissioner had fruitful discussions about the follow-up to the NSU affair during his meetings with the German authorities, who recognized that many mistakes were made. In the view of many, this case had been an eye-opener for all those concerned, a circumstance which in itself should prevent the repetition of the same mistakes and omissions. The Commissioner was notably informed of the measures taken to remedy the shortcomings by federal and Länder bodies highlighted in this context.
181. Besides the amendment to the Criminal Code allowing for the racist motivation of offences to be taken into account in sentencing,⁸³ these measures mainly aim to better coordinate the work of the police and the authorities responsible for the protection of the constitution. A Joint Defence Centre against right-wing Extremism was established in December 2011 and integrated into a Joint Defence Centre against Extremism and Terrorism (*Gemeinsame Extremismus- und Terrorismusabwehrzentrum - GETZ*) in November 2012. It regroups police and intelligence officials from the Federation and the Länder in joint meetings with a view to detecting specific manifestations and potential threats posed by right-wing extremism and terrorism. To optimise the exchange of information, a joint database on right-wing extremism for the police authorities and for the authorities responsible for the protection of the constitution of the Federation and the Länder, as well as for the Military Counterintelligence Service, has been created, compiling and linking data on countering violent right-wing extremism.⁸⁴ Furthermore, the authorities have indicated their willingness to increase diversity in the police by recruiting more police officers with a migration background.⁸⁵

⁸² See above section 1.6.

⁸³ See above.

⁸⁴ See [Nineteenth to twenty-second periodic reports](#) submitted by Germany under Article 9 ICERD, 18 October 2013, para. 83.

⁸⁵ On the use of this classification, see above section 3.1.1.

182. The Federal Minister of Justice also informed the Commissioner about steps taken to clarify the responsibility and criteria under which crimes not limited to one Land but crossing borders of several Länder can be prosecuted.
183. The Federal Prosecutor General, whose role has been strengthened to allow him to act more directly and effectively on specific cases, drew the Commissioner's attention to the recent adoption, by the Working Group of Prosecutor Generals of the Länder on extremism, of a list of indicators for prosecutors to detect right-wing terrorism motive.⁸⁶
184. The Commissioner welcomes these measures, which aim at improving the response of the German authorities to right-wing extremism. At the same time, he remains concerned that these measures only marginally address what appears to lie at the root of the NSU affair, namely the structural bias in German law enforcement which led to a failure to see and acknowledge the racist dimension of the crimes. As underlined by a group of lawyers acting in this case and NGOs, this affair "conceals institutional racism as a significant cause for the investigations into the individual actions of the NSU systematically being pursued in a false direction and for investigations being carried out against the victims and their families."⁸⁷ Several interlocutors of the Commissioner insisted on the need of a more vigorous reaction from the authorities, who should above all recognise the existence of institutional racism as such, in order to better tackle it.
185. In addition, while the NSU affair clearly exemplifies the seriousness of the hate crimes committed by extreme-right wing movements, the Commissioner believes that it would be a missed opportunity if the reform efforts resulting from this affair were limited to, or even predominantly aimed at, improving the response of the German authorities to right-wing extremism alone. He considers that similar efforts should be put into improving the response of Germany's law enforcement and criminal justice system to racist hate crimes generally, irrespective of whether the perpetrators belong to organised groups. The amendments to the Criminal Code introducing the racist motivation as an aggravating circumstance of ordinary offences clearly go in the right direction. However, this should be accompanied by both formal guidance for the police and prosecutors and by training of all the actors of the criminal justice system, including judges, on how to deal professionally with racist offences. Concerning training, the authorities have indicated that additional measures for the police have been introduced. However, according to civil society groups, most of these training measures tend to focus on "intercultural skills" and not on addressing racist hate crimes specifically or even racism and discrimination more generally, which entails the risk of reinforcing prejudices rather than combating them. As regards formal guidance for police and prosecutors, the Commissioner notes that the CERD recommended that Germany "include provisions in the Police Staff Regulations and the Guidelines for Criminal and Summary Proceedings imposing an explicit duty to investigate and document any racist or other discriminatory motives".⁸⁸
186. An interesting initiative developed in the aftermath of the NSU affair, in the field of hate crimes motivated by right-wing extremism, was presented to the Commissioner during his visit to the Land of Brandenburg. The authorities of this Land decided in 2013 to entrust an academic institute at the University of Potsdam⁸⁹ with the task to review murder cases which might not have been properly identified as hate crimes. The institute worked together with a working group, including representatives of the local authorities, police, prosecutor's office and victim support organisations. Based on the premise that official statistics for the period 1990 to 2008 indicated a lower number of hate crimes (namely 9 "right-wing politically motivated crimes") compared to figures provided by civil society

⁸⁶ *Indikatoren zum Erkennen rechtsterroristischer Zusammenhänge, Merkblatt für Staatsanwälte*, 12/13 May 2015.

⁸⁷ Institutional Racism as exemplified by the case of the terror group "National Socialist Underground" (NSU) and necessary steps to protect individuals and groups against racial discrimination, [Parallel report](#) to the UN Committee on the Elimination of All Forms of Racial Discrimination, April 2015, p. 3.

⁸⁸ CERD, [Concluding observations](#) on the combined nineteenth to twenty-second periodic reports of Germany, 15 May 2015, para. 9 (c).

⁸⁹ Moses Mendelssohn Zentrum, [Forschungsprojekt](#) „Überprüfung umstrittener Altfälle – Opfer rechtsextremer und rassistischer Gewalt.“

organisations and journalists (33 crimes) over the same period, its task was to examine in detail the files of these 24 murder cases in which a racist motive might have been overlooked.

187. The Commissioner found this project exemplary, in that it allowed an external body to have unhindered access to case files and enabled a discussion between the different parties involved, thus enhancing mutual trust. The results of this project were presented on 29 June 2015. The experts involved in the project came to the conclusions that, among the 24 cases reviewed, 9 had a right-wing extremism or racist motive⁹⁰ which had not been taken into account during the investigation and trial phase. Accordingly, the Ministry of Interior of the Land had to revise upwards the statistics of “right-wing politically motivated” murders in Brandenburg from 9 to 18.
188. In the Commissioner’s opinion, such initiatives are not only important for the family of the victims; they also help to keep the issue of racist violence high on the agenda. Hopefully other Länder will follow suit with similar initiatives.

3.3 CONCLUSIONS AND RECOMMENDATIONS

189. Against the background of a rise in manifestations of racism and intolerance in Germany, the Commissioner calls on the German authorities to step up their efforts aimed at combating these phenomena. Two general paradigm shifts, on which the German authorities should lead, appear necessary in this respect. First, the approach to combating racism should be significantly broadened, from one which focuses almost exclusively on the activities of extremist, and notably far-right, organised groups to one which reflects the reality that racism, including racially motivated offences, often come from individuals not at all associated with these groups. Second, the German authorities should look more deeply into the extent to which structural forms of racism may be preventing law enforcement authorities from providing a professional service to Germany’s minority groups.
190. However painful, the NSU affair provides opportunities for progress to be made on both of these fronts and the Commissioner calls on the German authorities to ensure that all the necessary lessons are learnt from this case. While the NSU affair clearly illustrates the seriousness of hate crimes committed by extreme-right wing movements, the Commissioner strongly believes that the reform efforts it is prompting should have a much broader reach. In this respect, the Commissioner welcomes the amendments to the Criminal Code introducing the racist motivation as an aggravating circumstance of ordinary offences. However, this should be accompanied by both formal guidance for the police and prosecutors and by training of all the actors of the criminal justice system, including judges, on how to deal professionally with racist offences. The Commissioner strongly urges the German authorities to make the most of the guidance provided by the European Commission against Racism and intolerance in this area, notably in its General Policy Recommendation No. 11.⁹¹ On the recording of hate crime data specifically, the Commissioner recalls ECRI’s recommendation that the German authorities reform their system for recording and following up “racist, xenophobic, homophobic and transphobic” incidents in order to ensure that all cases involving such a motive are recorded and invites the German authorities to revisit their current system of recording “politically motivated crimes” accordingly.⁹²
191. The Commissioner urges the German authorities and political leaders to condemn firmly and unequivocally all instances of hate speech and hate crime, and to abstain from using rhetoric that stigmatises particular groups of the society. The Commissioner also reiterates that the use of hate speech and participation in racist activities should be a basis for serious, dissuasive disciplinary measures to be imposed on MPs by parliaments and political parties. The Commissioner also recalls ECRI’s recommendation that the German authorities introduce into the law an obligation to discontinue

⁹⁰ Concerning the other cases, the experts found that no right-wing motivation could be proved in four cases; in six others, while there was a right-wing background, no specific motive for the crime could be identified; the motive of the remaining five cases could no longer be clarified.

⁹¹ [ECRI General Policy Recommendation No.11: Combating racism and racial discrimination in policing](#), adopted by ECRI on 29 June 2007, Section III.

⁹² ECRI, Fifth report on Germany, above.

public financing of organisations, including political parties, which promote racism, in line with its General Policy Recommendation No. 7.⁹³

192. In the Commissioner's view, the NSU affair has not only revealed a failure of the law enforcement authorities to see and acknowledge the racist dimension of hate crimes; crucially, it has also exposed how this failure is rooted in existing structural bias *vis-à-vis* members of minority groups prevailing among the police and prosecuting authorities. The Commissioner believes that the German authorities should acknowledge this fact and initiate a thorough reflection, in close co-operation with civil society and all relevant stakeholders, on the roadmap for addressing this situation.
193. The Commissioner considers that accepting to address the issue of racial profiling by the police would be a very important step in this context. Firstly, there should be a readiness to look into the problem and carry out professional, in-depth research on the extent to which these practices are in place. The German authorities should also consider introducing a reasonable-suspicion standard, whereby powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria and strengthening the training of law enforcement officers on the subject of identity checks. On all these aspects, the Commissioner invites the German authorities to refer to ECRI's General Policy Recommendation No. 11, which provides extensive guidance on how to address racial profiling.⁹⁴
194. As regards the conduct of law enforcement officials, the Commissioner stresses that allegations of racist or racially discriminatory conduct by these officials should be effectively investigated and that the possible racist motivation of such acts should always be closely examined. The Commissioner wishes to draw the German authorities' attention to the case-law of the European Court of Human Rights, which has affirmed on various occasions that state authorities have a positive obligation to carry out a meaningful investigation to uncover a possible racist motivation in cases of abusive use of force by law enforcement officials. Specific guidance and training on this topic should also be provided through initial and ongoing, systematic training of all law enforcement officials.
195. The Commissioner calls on the German authorities to keep their legislation against racial discrimination and racist hate speech under review to ensure that it provides the necessary tools to deal effectively with these phenomena. In particular, he draws the attention of the German authorities to the need to ensure that victims of discrimination by public authorities can enjoy the protection provided by the General Equal Treatment Act.
196. Moreover, the Commissioner reiterates the importance of comprehensive data broken down by grounds such as ethnic origin for acting effectively against racism and discrimination. The Commissioner calls on the German authorities to introduce a system for collecting such data, with due respect for the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. The study "'Ethnic' statistics and data protection in the Council of Europe countries" published by ECRI in 2007⁹⁵ provides useful guidance in this sense.
197. The Commissioner would like to stress that the assessment of the 2008 National Action Plan against Racism which is currently envisaged presents a good opportunity for Germany to review its legislation and policies against racism and intolerance and take into account these recommendations. He calls on the authorities to carry out this assessment as soon as possible and invites Germany to consider the possibility of incorporating this plan into a national action plan for the promotion and systematic protection of human rights.⁹⁶

⁹³ [ECRI General Policy Recommendation No.7](#): National legislation to combat racism and racial discrimination, adopted by ECRI on 13 December 2002.

⁹⁴ [ECRI General Policy Recommendation No.11](#): Combating racism and racial discrimination in policing, adopted by ECRI on 29 June 2007.

⁹⁵ ECRI [Study Report](#), "Ethnic' statistics and data protection in the Council of Europe countries", 2007.

⁹⁶ See the Commissioner's [Recommendation](#) on systematic work for implementing human rights at the national level, CommDH(2009)3, 18 February 2009, and the Commissioner's relevant [thematic page](#).