

# **JURISTRAS**

Case Study Report: Germany

**Supranational rights litigation, implementation and the domestic  
impact of Strasbourg Court jurisprudence:  
A case study of Germany**

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## A. Introduction

### *The interrelationship of supranational and domestic human rights protection*

The importance of the ECtHR as supranational protection system and how judgments are implemented, are mainly shaped by the existing judicial system in Germany and the subsidiary role of the ECtHR. This has its reason in the history of the domestic Basic Law and the prominent role of the judiciary, mainly the Federal Constitutional Court as a special appellation instance. The Basic Law with its fundamental rights provisions was created in the same period of time as the ECHR: after the atrocities of the Second World War. Therefore, the same general awareness, namely, that human rights had to be protected effectively shaped the two catalogues.<sup>1</sup> The outcome of the consultations by the delegates in each process led to very similar provisions. Even though some articles in the ECHR are more detailed, like Article 5 ECHR or Article 6 ECHR and even though some provisions of the German Basic Law provide more guarantees, like Article 3 Basic Law concerning equal treatment, it can be asserted that in general the ECHR and the Basic Law protect similar human rights areas. In the following decades, the domestic development led in Germany to a highly efficient and very sophisticated judicial human rights protection system. Based on the Basic Law, the Federal Constitutional Court established a wide range of interpretations of the Basic Law protecting human rights. As all domestic courts have to abide by the provisions of the Basic Law the domestic incorporation of human rights standards is highly developed. Additionally, individuals are entitled to file a constitutional complaint with the Federal Constitutional Court. As a result, this system has the most profound impact on the judicial practice and on the public awareness because it already covers most of the human rights questions arising.

This situation has direct repercussions on the role of the ECHR and the ECtHR. Generally, human rights questions are addressed in domestic court proceedings or before the Federal Constitutional Court. It can be argued that most of the questions arising in different fields are redressed on that level. This can be seen as well with regard to the cases stemming from Germany. Although some 3.950 cases are pending with the ECtHR against Germany, very few cases have been declared admissible in the past and even less have triggered an adverse judgment against Germany.<sup>2</sup> From 1978 till 1998, Germany was found to violate the ECHR in 14 cases concerning all articles of the ECHR.<sup>3</sup> The number increased in the period from 1999 until 2007. Germany was found to violate the ECHR in 60 cases,<sup>4</sup> although most of them concerned Article 6 ECHR. With regard to the judgments analysed for this project the numbers are even less: The ECtHR decided over the whole period of time in 14 cases that Germany has violated the ECHR. On the basis of all adverse judgments against Germany it seems justifiable that most of the pending cases will be declared inadmissible.

The low rate of adverse judgments can be deemed as a success of the domestic human rights protection system. However, the other side of the coin of an effective domestic system can be seen in a lack of awareness of the supranational mechanism. This leads to one of the main topics of this report: The awareness of the supra national human rights system and the interrelationship of the supra national and the national legal orders. The focus on the national

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<sup>1</sup> An interesting aspect was raised by Moravcsik with regard to the motivation to accept an international human rights regime. See A. Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, in: *International Organization* 2000, p. 220ff.

<sup>2</sup> Council of Europe, *European Court of Human Rights, Survey of activities 2006, Strasbourg 2007*, p. 51.

<sup>3</sup> Based on a research in the HUDOC-database of the ECtHR.

<sup>4</sup> S. Greer, *The European Convention on Human Rights*, Cambridge 2006, p. 77; *European Court of Human Rights, Annual Report 2007, Provisional Edition*, p. 144.

systems can obstruct the understanding of the interconnectivity of both systems and hinder the awareness of the development the European system can take.

This systematic understanding can be seen as a prerequisite for the relevant issues further discussed in this report. It underlies almost all of the questions of litigation and implementation. It is interesting that this topic was named frequently in the interviews with human rights experts from various fields. It was stated that even until now the ECtHR has not met a certain public resonance in political debates nor has it found its expression in judicial reviews like in other countries.

### *Judgments against Germany. Issue areas*

Unlike other countries of the Council of Europe, the judgments against Germany within the scope of this project do not tend to disclose specific streams pointing to a systemic failure. In most of the cases, the ECtHR pronounced only one judgment in each area. The adverse judgments cover a wide range of different areas as follows: police law, inner security measures, rights of mentally ill people, freedom of press and protection of private life, protection of family life, social child benefits for foreigners. To be able to draw a bigger picture of the implementation processes in Germany, one judgment concerning the lack of an acceleration procedure of civil law cases as well as one judgment concerning the breach of Article 3 ECHR shall be outlined complementarily. These fields will be addressed in this report with regard to the implementation of judgments and the way how they and the ECHR are utilized in the political debate.

### *Do immigrants and refugees seek recourse in Strasbourg?*

It is worth analysing the general and individual significance of the ECtHR for immigrants and asylum seekers, as Art. 3 and Art. 8 ECHR do have a practical influence on the work of the national administrations and the lawmaker. One reason might be that Article 3 and Article 8 ECHR provide additional protection measures which can be invoked within the domestic legal order. The questions of granting asylum and the expulsion of foreigners touch the core of the state sovereignty. In this instance, the ECHR and the relationship to the domestic legal order is palpable.

### *Empirical basis and composition of the report*

The question shall be discussed which role the ECHR is circumscribed in the national sphere and in which specific areas the ECtHR rectifies domestic shortcomings. Therefore, the legal support system for litigants, the motivation for a litigation, the actors involved in the implementation of judgments, the adverse judgments and their broader political effect shall be outlined and contextualized in the following chapters. The analysis is based on 28 interviews held with 30 interviewees, among them practitioners involved in the implementation, judges, and human rights experts. Moreover, the relevant ECtHR case law as well as the domestic case law, articles in public media and law magazines, statements by human rights organizations, and press releases with regard to the ECtHR judgments are covered. Public documents of the German Federal Parliament complete the empirical material.

## **B. Mobilizing European human rights law. Patterns of litigation and legal mobilization**

### **I. Legal support in Germany for litigants taking recourse in Strasbourg**

#### **1. Financial support**

As is well known, the ECtHR *can* provide legal aid in accordance with the rules 91 - 96 of the Rules of Court<sup>5</sup> if the applicant needs a legal representative for the proper conduct of the case and if he or she has insufficient means to meet the costs (rule 92, rules of court). Even if the Court should decide in favour of an applicant, rule 91 para 1 stipulates that the Court has to submit the complaint to the respondent state for further statements on the admissibility before it can decide on granting legal aid. Therefore, the preparation of a proper application needs to be financed by the individual litigant.

The legal aid provisions in Germany do not reduce the financial burden in this regard. The existing provisions in Germany on legal aid do not cover the costs for the application and the advocates with the ECtHR, as they are provided for court procedures concerning civil-, administrative-, social-, and labour subjects. As a result, there does not exist any other publicly financed legal support for individual applicants planning to lodge a complaint with the ECtHR.

This leads to the question whether private organizations, non-governmental organizations and churches support litigants financially. It can be observed that no network does granting financial support for individual litigants. Nor does a single organization, working in a specific field of interest regarding the ECHR, systematically provide support for applicants. Only very few cases are reported in which assistance was provided, as happened with *amnesty international* and *Pro Asyl*, a national human rights organization.

It can only be assumed why there are no tangible financial support structures, but it seems to be justifiable to present some possible explanations for the state of the art. First of all, most of the organizations do not have the necessary financial means to establish a broad system that could grant legal aid. Even if they could provide some aid in individual cases, which would transfer less financial risk on them than a systematic approach, it does not seem to be feasible or the estimated risk is thought to be still too high. Secondly, with regard to the estimated risk, the organizations have to be convinced that the presented evidences will sufficiently prove the violation of a human rights provision and that the litigant himself proves to be reliable. Thirdly, the organization needs the legal knowledge to assess the perspective of the present case. The appraisal of how the court will decide and if, for instance, an interference of a right falls within the margin of appreciation as formulated in former judgments need an expertise most of the organizations lack.<sup>6</sup> This exemplifies additionally that the ECtHR is not deemed as the main actor in the practical protection of human rights.

#### **2. Legal support**

In Germany, only advocates and other persons or organizations specialized in an area of law as laid down in the federal legislation on legal counselling<sup>7</sup> are entitled to give practical advice in legal affairs. This applies also to cases of legal counselling out of altruistic reasons

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<sup>5</sup> Council of Europe, European Court of Human Rights, Rules of Court, Strasbourg 2006.

<sup>6</sup> This does not diminish the effective and necessary work of them.

<sup>7</sup> Rechtsdienstleistungsgesetz vom 12. Dezember 2007. § 1 und § 3 Rechtsdienstleistungsgesetz.

without charge. The legislation has been amended in 2007.<sup>8</sup> However, the person offering legal counselling without charging for it needs to be a professional as well.<sup>9</sup>

As a result, human rights organizations that assist and support individual litigants in their application, and litigants themselves, if they want the counselling and the help of another person, need to consult a professional skilled person, in general a lawyer. Some organizations provide very general legal information, for example on asylum procedures or in cases of a forthcoming expulsion, but do not analyse the respective case in depth. One of the rare examples of a support by an organization in a case against Germany can be found in *Kalantari v. Germany*.<sup>10</sup> The applicant, an Iranian national who applied for political asylum status in Germany, was represented in the case by his sister and by “ELISA”, an association for the defence of asylum-seekers, established in Switzerland.<sup>11</sup>

With regard to the knowledge of the ECHR and the case law of the ECHR, lawyers and law firms themselves tend to have a limited expertise on this subject - of course with some exceptions.<sup>12</sup> Without having conducted a comprehensive analysis on that topic it can be assumed, nevertheless, that German lawyers in general do not comprehensively take the ECHR and the case law into consideration in their practical work.<sup>13</sup> This might be the result of the much more influential position of the Federal Constitutional Court. Another reason might be the fact that in the day to day work of national courts even the German Basic Law does not have the same eminent position among questions like, for example, the payment of the rent or car accidents compared to its highly influential function in the political debate and in cases with an outstanding human rights aspect. Bearing that all into mind, one has to ask what role can be ascribed to the ECHR and the case law of the ECtHR.

## II. Motivation for a litigation

Litigations originating from Germany can be differentiated in two different groups. The vast majority comprises cases in which individuals try to alter the outcome of their court procedure within Germany. The individual position serves as main motivation in this type of cases. A more detailed analysis clarifies the fact that the litigants in Strasbourg seeking protection in cases against Germany cover a wide range of individuals with very different social backgrounds and different interests.<sup>14</sup> Immigrants try to avert their impending expulsion, they contest the national child benefit legislation, and they try to resume a personal contact to their own children born out of wedlock. Besides this group, one litigant alleged a violation because she was dismissed from the civil service as teacher. In other cases the litigants went to Strasbourg because they were not granted a position in the civil service. The cases concerning the civil service generally had the political activities of the litigants at the centre of their complaints. Some cases reflect several political incidences in Germany.<sup>15</sup>

Besides the above mentioned constellations, however, litigants pursued their case further on to the ECtHR in Strasbourg even if they had been successful before the Federal Constitutional

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<sup>8</sup> Gesetz zur Neuregelung des Rechtsberatungsrechts vom 12. Dezember 2007, BGBl. 2007, Teil I, S. 2840ff.

<sup>9</sup> See § 6 para. 2 Rechtsdienstleistungsgesetz.

<sup>10</sup> ECtHR, *Kalantari v. Germany*, judgment of 10 October 2001, no. 51342/99.

<sup>11</sup> ECtHR, *Kalantari v. Germany*, para. 2.

<sup>12</sup> This is very likely in areas like family law, media law, and immigration law.

<sup>13</sup> Although it was stated that certain law firms and lawyers are eager to receive more accessible information about the case law of the ECtHR and the necessary techniques to lodge a successful complaint.

<sup>14</sup> See Juristras, State of the Art Report Germany, pp. 17 -20.

<sup>15</sup> As e.g. the complaint from members of the Red Army Faction or from the members of the peace movement after they were convicted for an unlawful demonstration in front of a US military basis.

Court and had received an advantageous judgment. The main reason, as it was stated in some of the interviews, can presumably be found in the different procedures of the two courts. Although the Federal Constitutional Court has been charged with more competences as regards the annulment of the contested legislation or judgment of a national court, it is not entitled to include a pecuniary just satisfaction within its judgment. On the other hand, the ECHR provides the ECtHR with the legal basis to grant a just satisfaction, which can be deemed as an additional motivation to lodge a complaint. Even though it is not possible to prove that assumption beyond doubt, the fact that the pecuniary advantage might trigger the complaint before the ECtHR can hardly be neglected.

This short overview reveals the motivation of the respective litigants. Therefore, the statement is justifiable that hardly any kind of strategic litigation can be observed with the aim to amend the national legislation or administrative practice. The second group, which follow a broader aim or whose litigation might have had a broader impact, shall be outlined in the following section in more detail.

### **III. Strategic rights litigation in Germany?**

As stated in the introduction, the predominant role within the German legal order of the Federal Constitutional Court shapes the implementation and importance of the ECHR within Germany. This counts especially for the question whether there exists strategic litigation or not. The Federal Constitutional Court is entitled to quash any legislation when this is deemed not in accordance with the Basic Law. Therefore, litigants pursuing a strategic aim find a much more efficient tool on domestic level, because they can directly challenge the law before the Federal Constitutional Court. A power, which the ECtHR is lacking. This circumstance can explain why there are only few cases that can be regarded having or pursuing a broader societal and legal impact. These cases shall be outlined as follows.

#### **1. Freedom of press v. protection of private life**

The case *Caroline von Hannover*<sup>16</sup> regarding the freedom of media and the protection of private life covers a bi-polar human rights position. Therefore, both stakeholders were interested in the outcome of the procedure as the lesser protection of the one side would mean the greater freedom to enact for the other side. The case touches the question of the freedom of press, a fundamental issue in modern democracies.

The representatives of publishers tried to lobby the German government to appeal before the Grand Chamber of the ECtHR. They published open letters (before and after the judgment by the ECtHR) and asserted that the decision would trigger the end of a free press in Germany.<sup>17</sup> In this case, the opponents of the court ruling organized a public opinion to change the findings of the Chamber judgment. This attempt can be understood as strategic in the sense that the affected group of publishers challenged the position of the government, which were reluctant to appeal before Grand Chamber and finally did not do it.

#### **2. Secret communication surveillance and respect of private of life**

Two applications that challenged the national legislation on secret communication surveillance originated from Germany. The ECtHR judged already in 1978 in a case, in which the violation of the respect for private life was alleged because of the German legislation on

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<sup>16</sup> ECtHR, *Hannover v. Germany*, judgment of 24 June 2004, no. 59320/00.

<sup>17</sup> See *Zwischen den Zeilen*, *Frankfurter Allgemeine Zeitung*, 1 September 2004, p. 36.



surveillance, namely the legislation for secret communication surveillance by official forces, and the subsequent control procedure.<sup>18</sup> The Court, however, could not discern any reasons for not justifying the legislation and therefore held that there was no violation of Article 8 ECHR. In 2006, the legislation was contested again. The case in the words of the Court, „ (...) concerns several provisions of the Act of 13 August 1968 on Restrictions on the Secrecy of Mail, Post and Telecommunications (*Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses*), also called “the G 10 Act”, as modified by the “Fight against Crime Act” of 28 October 1994 (*Verbrechensbekämpfungsgesetz*).<sup>19</sup> The Court decided having undertaken an in depth assessment of the case that it is inadmissible. It „(...) finds that there existed adequate and effective guarantees against abuses of the State’s strategic monitoring powers.<sup>20</sup> The same shall apply to the interference of Art. 10 ECHR, even though, as the Court stated, the legislation did not contain specific rules to safeguard the sources of information.<sup>21</sup>

In conclusion, both litigations challenged the federal legislation and pursued the amendment of the impugned legislation. Even though this did not include a broader societal movement, it is a rare example in which the litigants directly question the lawfulness of federal state legislation.

### **3. Dismissal of civil servants due to their political opinion and activities**

In 1972, the Federal Chancellor and the Prime Ministers of the states (Länder) decided upon a common approach on extremists in civil service and adopted a decree on employment of extremists in the civil service,<sup>22</sup> amended in 1975 after a decision of the Federal Constitutional Court in 1975.<sup>23</sup> Usually, the membership of an extreme left or right party was regarded as a breach of the loyalty necessary for a functioning administrative body in a democracy. After the breakdown of the communist regimes and the fall of the Berlin-Wall, in some states (Länder) the decree was repealed or amended taking the new political situation into consideration.

It is reported in the public media that some 1.100 applicants for a civil servant post were not granted the position as a direct repercussion of the state practice.<sup>24</sup> Additionally, it is asserted that some 130 civil servants have been dismissed on the legal basis of the aforementioned decree.<sup>25</sup> Even though it is not possible for the authors to clarify or affirm the numbers mentioned, it seems justifiable to assume that the decree had an effect on a relevant amount of people.

In the case *Vogt v. Germany*, a former school teacher and permanent civil servant brought her case before the ECtHR after she had been dismissed from her position.<sup>26</sup> Presumably, the applicant lodged the complaint with the ECtHR and waged a litigation in that case, because

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<sup>18</sup> ECtHR, *Klass and others v. Germany*, judgment of 6 September 1978, no. 5029/71.

<sup>19</sup> ECtHR, *Weber and Saravia v. Germany*, decision of 29 June 2006, no. 54934/00.

<sup>20</sup> ECtHR, *Weber and Saravia v. Germany*, para. 137.

<sup>21</sup> ECtHR, *Weber and Saravia v. Germany*, para. 152.

<sup>22</sup> Decree on employment of extremists in the civil service, Bulletin of the Government of the Federal Republic of Germany no. 15, 3 February 1972, p. 142.

<sup>23</sup> See decision of 22 May 1975, in: Bundesverfassungsgericht Entscheidungssammlung (BVerfGE), Band 39, S. 334ff.

<sup>24</sup> <http://www.wdr.de/themen/kultur/stichtag/2006/05/19.jhtml>, accessed 1 April 2008.

<sup>25</sup> See: Parliamentary activity of the faction “Die Linke” at the Federal Parliament. Deutscher Bundestag, Drucksache 16/6210, Introduction.

<sup>26</sup> ECtHR, *Vogt v. Germany*, judgment of 26 September 1995, no. 17851/91.

she had already been appointed as permanent civil servant, her activities in the *German Communist Party (DKP)* had not been outstanding or extreme, and the party had not been prohibited by the Federal Constitutional Court. These circumstances of the case predestined her to challenge the national practice based on the contentious governmental decrees on the employment of extremists in the civil service before the ECtHR. Admittedly, no facts have been found to underpin this assumption, although it was stated during the interviews that this case had been brought strategically before the court. The number of the cases in the wake of the decrees as well as the aforementioned circumstances arguably suggest a strategic approach.

## **IV. Gender**

### **1. Evaluation of the gender break down of the litigants**

It can be said, after an analysis of the decisions and judgments regarding the scope of this project,<sup>27</sup> that the litigations in Strasbourg derive from four different groups consisting of women, men, families, and in some cases organizations.<sup>28</sup> In total 53 applicants can be discerned, out of them 29 male applicants, 9 female applicants, 9 families, and 6 organizations.<sup>29</sup> To put them in comparison, some 55 % of the applicants were men, some 17 % were women, some 17 % were families, and some 11 % organizations. In contrary to the high number of individuals, associations lodged only a few applications - a violation was found in none of them. The few cases concern the activities of societal and religious groups as well as of a small political association.<sup>30</sup>

Looking at each category of cases lodged with Strasbourg, there does not exist any specific category as regards right claims of women that could be highlighted. The claims raised in the relevant judgments do not relate to any specific gender issues. The sole exemption entails the judgment *van Kück v. Germany*, in which a private health insurance did not want to pay for the gender reassignment treatment of a transsexual.<sup>31</sup>

### **2. Applications from non-German nationals**

As regards non-German litigants, an overview of this group should be given as well. On the basis of the decisions and judgments analysed as listed in the annex of this report, it can be concluded that more than the half of the litigations stemmed from non-German litigants. The largest group comprises litigants seeking recourse after they had failed to receive a legal status as a refugee. In most of the cases the ECtHR decided that the litigation is manifestly ill-founded. Those cases conduct the view to an interesting controversial political and legal discussion within Germany: The procedures of the Federal Office for Migration and Asylum, conducting the application procedures, are discussed highly controversial among the experts

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<sup>27</sup> See the cases listed in the annex. Some cases were added to the original scope of the project to be able to explain some execution issues.

<sup>28</sup> It has to be mentioned that in some cases the application was lodged by a woman and a man or by a group of men.

<sup>29</sup> The 53 applicants stem from 44 decisions or judgments.

<sup>30</sup> See: *Commission, A. Union v. Germany*, decision of 14 July 1983, no. 9792/82; *Commission, Universelles Leben e.V. v. Germany*, decision of 27 November 1996, no. 29745/96; ECtHR, *Johannische Kirche & Peters v. Germany*, Decision of 10 July 2001, no. 41754/98; *Commission, Scientology Kirche Deutschland e.V. v. Germany*, decision of 7 April 1997, no. 34614/97; *Commission, Association X., Y. and Z. v. Germany*, decision of 18 May 1976, no. 6850/74.

<sup>31</sup> ECtHR, *van Kück v. Germany*, judgment of 12 June 2003, no. 35968/97.

(like lawyers, church organizations as well as the UNHCR).<sup>32</sup> It is said that the interviews during the procedures are not sufficient, because they focus more on the information allowing to deny the status as refugee. In addition, so the critics, no special safeguards are foreseen for vulnerable individuals like women fleeing sexual violence. Despite the criticism, the Commission and subsequently the ECtHR accepted the findings of the national authorities in its decisions as sufficient and do not question them. The ruling of the Strasbourg organs can be deemed as surprisingly uncritical – and as a result had almost no effect on the asylum procedures in Germany.

Then, litigants sought recourse out of different reasons pertaining to their status as non-German nationals, namely in expulsion cases, costs for interpreters and in cases of different requirements to receive the state child benefits. Interestingly, the group of litigants facing expulsion consists only of four cases. In two of them, the ECtHR decided that the expulsion order of the German authorities breached the litigants' right to respect their family life (Art. 8 ECHR).<sup>33</sup> The other applications were declared inadmissible.<sup>34</sup> With regard to the practical importance of expulsion orders in Germany, the low number of cases leaves some questions open. One can only speculate about the reasons. It might be that the litigants are not aware of the possibility to lodge an application. It might also be that the prediction of the outcome of a litigation is ambiguous. This can be the case because of the factual background of the person concerned. But it can also be that the requirements laid down in the case law of the ECtHR are relatively vague, which makes it not easy to assess the possible success of an application. As the litigant, in general, has to finance the lawyer with its own means, he or she will maybe retreat from such a step. It can also be that most of the administrations and courts do comply with the judgments of the ECtHR. At least, the Federal Constitutional Court decided that the circumstances concerning the respect for family life has to be taken into consideration.<sup>35</sup>

The third category concerns litigants with a non-German background in which the nationality has no direct relevance for the litigation.<sup>36</sup>

## **C. Assessing implementation**

### **I. Actors and institutions involved in implementation**

The actors and institutions involved in the implementation of judgments of the ECtHR consist of different European and national organs, institutions, courts, and individuals.<sup>37</sup> The very differentiated implementation system with regard to the domestic level shall be outlined here to provide the background for the assessment of the implementation of the adverse judgments against Germany. Therefore, the main actors and the designated function of each of them will be described and explained in the following chapter.

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<sup>32</sup> See *amnesty international* et al. (eds.), *Memorandum zur derzeitigen Situation des deutschen Asylverfahrens*, Frankfurt a.M. 2005; UNHCR, *UNHCR-Eckpunkte zum Flüchtlingsschutz*, Berlin 2002, pp. 4-5.

<sup>33</sup> ECtHR, *Yilmaz v. Germany*, judgment of 17 April 2003, no. 52853/99; ECtHR, *Keles v. Germany*, judgment of 27 October 2005, no. 32231/02.

<sup>34</sup> ECtHR, *Caglar v. Germany*, decision of 7 December 2000, no. 62444/00; ECtHR, *Kaya v. Germany*, decision of 28 June 2007, no. 31753/02.

<sup>35</sup> Federal Constitutional Court, decision of 10 May 2007, no. 2 BvR 304/07.

<sup>36</sup> This is the case in ECtHR, *Stürmeli v. Germany*, judgment of 8 June 2006, no. 75529/01, in ECtHR, *Hannover v. Germany*, judgment of 24 June 2004, no. 59320/00 and ECtHR, *Jalloh v. Germany*, judgment of 11 July 2006, no. 54810/00.

<sup>37</sup> See the good analysis by Sundberg of the role of the Committee of Ministers in the execution process: F. G. E. Sundberg, *Control of Executions of Decisions Under the ECHR - Some Remarks on the Committee of Ministers' Control of the Proper Implementation of Decisions Finding Violations of the Convention*, in: Alfredsson, et al. (eds.), *International Human Rights Monitoring Mechanisms*, The Hague 2001, pp. 561-585.

To facilitate the understanding of the implementation system in Germany, it seems necessary to note that no single system or single entity is mandated to ensure the execution of a judgment or to provide assistance for an applicant after receiving an advantageous judgment. Many very different actors are involved in the process, some of them assigned with more responsibility, some of them with less importance.

## **1. Federal Government**

### **a) The Commissioner for Human Rights at the Federal Ministry of Justice**

On the level of the Federal Government, the Federal Ministry of Justice has been charged with the execution of the judgments. Within the assigned remit, the Commissioner for Human Rights of the Ministry of Justice<sup>38</sup> has been mandated with the task to carry out the execution. This includes - concerning the *individual measures* - the payment of the just satisfaction regardless whether the infringement of the ECHR has been caused by a federal act or a state (Länder) act. The Federal Government endorses this practice to ensure the payment within the time period laid down in the judgments of the ECtHR. The Federal Government has to be reimbursed in cases in which the violation should have stemmed from a state (Länder) authority.<sup>39</sup> Additionally, the Commissioner ensures that the judgment will be translated into German and sent to the applicant. The Commissioner also carries out some *general measures* which should be outlined. Firstly, the office provides the state (Länder) Ministries of Justice or, where it is deemed appropriate, the Ministries for Interior with the translated versions of the judgments complemented with a letter that stresses the necessity to adhere to the judgment or to refer to the measures that should be undertaken. This can also take place in working groups. The state (Länder) Ministries of justice are requested to disseminate the adverse judgment to the appropriate courts to ensure the knowledge of the case law and to prevent further violations in similar cases. The same applies to those cases that found an administrative practice violating the ECHR. The Federal Ministry of Justice urges the state (Länder) governments to determine the practice or to rectify the contested circumstances in order to prevent the recurrence of similar infringements. Secondly, the appropriate Committee at the Federal Parliament will be informed of the judgments against Germany. This is an important mechanism to ensure a coherent knowledge of the judgments in the Ministry and in the Parliament respectively. Presupposed the findings of the ECtHR suggest the introduction of new legislation or the amendment of existing provisions, the Federal Ministry of Justice might prepare a bill to be introduced by the Federal Government into the legislative process.<sup>40</sup> Thirdly, the Commissioner for Human Rights at the Ministry for Justice took over the task of a broader dissemination of the judgments concerning Germany.<sup>41</sup>

### **b) The Federal Foreign Office. The Permanent Mission at the Council of Europe**

Even though not so prominently involved in the execution of judgments in Germany, the Federal Foreign Office and namely the Permanent Mission at the Council of Europe has to be mentioned to complement and finalize the depiction of the Federal Governments tasks. The

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<sup>38</sup> The Commissioner for Human Rights at the Federal Ministry of Justice is also known as Agent for Matters Relating to Human Rights.

<sup>39</sup> This is laid down in a domestic law, the “Lastenausgleichsgesetz”.

<sup>40</sup> After the judgments of the ECtHR in *Kudla v. Poland*, (judgment of 26 October 2000, no. 30210/96) the Federal Ministry of Justice prepared a bill for a domestic procedure for overlong court procedures. The bill has not yet been adopted by the Federal Parliament.

<sup>41</sup> This is done via the homepage of the Ministry and the financial support of private publication projects pertaining to the case law of the ECtHR.

Federal Foreign Office endorses and supports the translation of ECtHR's judgments into German. Moreover, the Permanent Mission monitors the developments in the Council of Europe and especially in the Committee of Ministers in the function as supervisory organ. It reports to the Federal Foreign Office and informs the Commissioner for Human Rights at the Federal Ministry of Justice on decisive developments.

## **2. The German Federal Parliament (Deutscher Bundestag)**

The role of the Federal Parliament regarding the execution process can be best described as the organ on federal level which is focussing more on supervisory functions than on execution matters. This, firstly, can be explained as a result of the case law against Germany. Out of the cases analysed within the scope of this project, the ECtHR found only in three cases domestic provisions in breach of the Convention.<sup>42</sup> Even a broader consideration of the case law does not reveal a different result that were worth mentioning. Namely the dearth of a domestic acceleration remedy for excessive length of court procedures was explicitly mentioned by the ECtHR. Secondly, and this has its reason in the legal culture in Germany, the Parliament's main frame of reference regarding fundamental rights can be found in the German Basic Law and consequently in the judgments of the Federal Constitutional Court.

Presumably because of the low number of cases directly linked to the situation in Germany, the Parliament focusses more on general questions of how to enhance the efficiency of the execution process of the Council of Europe and the ECtHR. In a resolution, adopted in June 2007, the Parliament stresses, inter alia, the need to implement the recommendations of the Group of Wise Persons<sup>43</sup> and urges the government to support the requisite steps on European level.<sup>44</sup> As for the domestic supervision, it decided on the following procedure: "The German Parliament urges the Federal Government to report annually and in an adequate form to the appropriate Committees (Committee on Human Rights and Humanitarian Aid, Committee on Legal Affairs, and the Petitions Committee) on the execution of judgments against Germany."<sup>45</sup> With regard to the reports to come, it will be interesting to see how they differ from the existing reporting procedure and if they will alter the monitoring system of the Parliament.<sup>46</sup>

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<sup>42</sup> This counts for two regulations on the costs for interpreters and the child benefit regulation because of the connection to the legal residence status.

<sup>43</sup> The Council of Europe mandated the Group of Wise Persons to ascertain the efficiency of the ECtHR. See Council of Europe, Committee of Ministers, Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203.

<sup>44</sup> See: Deutscher Bundestag, Antrag der Fraktionen der CDU/CSU und SPD. Den Europäischen Gerichtshof für Menschenrechte reformieren und durch die konsequente Befolgung seiner Urteile stärken [The need to reform the European Court for Human Rights and to enforce its judgments through the consequential execution], Drs. 16/5734 of 20 June 2007, adopted by the German Parliament on 21 June 2007.

<sup>45</sup> Ibid., p. 5, no. 5.

<sup>46</sup> The Federal Government already reports biannually about the activities carried out by the Council of Europe. Besides the comprehensive presentation of the Council of Europe's work, the report includes a brief summary of the adverse judgments against Germany and some judgments against other states considered important. See Deutscher Bundestag, Unterrichtung durch die Bundesregierung. Bericht der Bundesregierung über die Tätigkeit des Europarates für die Zeit vom 1. Januar bis 30. Juni 2005, in: Drucksache 16/2156; für die Zeit vom 1. Juli bis 31. Dezember 2005, in: Drucksache 16/2157; für die Zeit vom 1. Januar bis 30. Juni 2006 in: Drucksachen 16/5828; für die Zeit vom 1. Juli bis 31. Dezember 2006 in: Drucksache 16/5829. See also for the year 2005: Deutscher Bundestag, Unterrichtung durch die Bundesregierung. Siebenter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen, 17.06.2005, Drucksache 15/5800, pp. 128ff and p. 156.

### 3. The implementation on state level (Länder)

The competences of the states (Länder) comprise some highly affiliated spheres towards the ECHR and the judgments of the ECtHR. The state police and the execution of the domestic immigration law fall under the remit of the states. Therefore, the daily activities of the police may under specific circumstances concern aspects of Article 3 ECHR and the decisions adopted by the state authorities with regard to the immigration law consider Art. 3 and Art. 8 ECHR, especially in cases of expulsion orders. The latter area can be deemed the most relevant field of the implementation of the ECHR in daily administrative practices in Germany.<sup>47</sup>

### 4. The Federal Constitutional Court

The Federal Constitutional Court, as special appeal court, complements the execution of judgments. Even though it is not directly part of a mechanism, it has taken over an important task to guarantee the full implementation and to prevent national authorities to circumvent the full consequences of a judgment. It has quashed in 2004 a domestic judgment of a court because the case law of the ECtHR had not been taken into full consideration. Furthermore, and this development enforces the implementation of the ECtHR judgments, it ruled that a constitutional complaint (Individualbeschwerde) can be filed with the Constitutional Court if a domestic state authority did not take the judgments of the ECtHR into consideration or if it disclosed a dearth in its reasoning with regard to the judgment of the ECtHR. To quote the Constitutional Court: “On that background, it has to be possible, based on the appropriate provision in the Basic Law, to raise an objection in the proceedings before the Federal Constitutional Court that state organs disregarded a decision of the European Court of Human Rights or failed to take it into consideration. In this regard, the provision of the Basic Law has to be seen closely connected to the priority of statute embodied in the principle of the rule of law, under which all state organs are bound by statute and law within their competences.”<sup>48</sup> Therefore, the Federal Constitutional Court enforces the implementation system in Germany as domestic state authority’s decisions, including court decisions, can be contested in a proceeding before the Constitutional Court. Recently, the Constitutional Court reiterated in a decision from 2008 that a claim can be persuaded before the Constitutional Court alleging that the jurisdiction of the ECtHR was disregarded or not taken into due consideration.<sup>49</sup>

An interesting question arose in the interview with the former German judge of the ECtHR, Prof. Georg Ress, with regard to reopening procedures in cases in which a political party is prohibited. The procedure of the Federal Constitutional Court does not foresee an explicit reopening provision allowing a revision in the same case after the judgment of the ECtHR. The Constitutional Court is the only court at a national level which is entitled to prohibit and dissolve a political party. The practical implications remain marginal as not many proceedings have been initiated before the Constitutional Court and because the prerequisites for a prohibition can be deemed very high. *If* the Constitutional Court decided to prohibit a political party and *if* then the ECtHR came to the opposite result, the court procedure does not provide an explicit reopening procedure for this situation. This is worth mentioning because

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<sup>47</sup> In addition, the immigration law stipulates the establishment of special hardship commissions (Härtefallkommissionen), which are, inter alia, mandated with the task to scrutinize immigration law cases to allow in outstanding cases the revision and ordering of a residence permit status (§ 23 a) Residence Act). It was said that the judgments of the ECtHR are regularly considered in the work of the commission. However, the provision will be revoked by 31 December 2009 according to the applicable law in April 2008.

<sup>48</sup> Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, para. 63. Non-official translation.

<sup>49</sup> Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07, 1 BvR 1626/07, para. 98.

the domestic court procedures foresee reopening provisions with a clear reference to the ECtHR. It can only be assumed that because of the little case law the question has not been arisen so far. But this fact can also lead to the conclusion that the attitude towards the ECtHR and the perception as main safeguard foster the assumption that such a provision is superfluous.

## **5. Domestic court system. Reopening procedures and general recognition of ECtHR's judgments**

The execution of judgments by the domestic court system is twofold. Firstly, all five branches of the national court system (the regular branch comprises the civil and criminal courts, social, financial, labour, and administrative branch) entail reopening provisions and therefore enable the applicant to initiate a new procedure. The reopening procedure of a criminal case was introduced in 1998 (§ 359 Nr. 6 Criminal Code of Procedure) while the reopening procedures in all other branches were adopted in 2006 (§ 580 Nr. 8 Civil Code of Procedure with conjunction of the respective Code of Procedure).<sup>50</sup> In general, the respective successful applicant has to file a motion with the appropriate court in order to enable the court to revise the decision and to take the reasoning and the findings of the ECtHR in full consideration. Secondly, in considering the judgments of the ECtHR in other cases the courts fulfil the obligation to respect the ECHR and adverse judgments generally. This includes the jurisprudence against Germany and, especially in the area of immigration law, against other member states of the Council of Europe.

## **II. Attitude of the actors**

### *General remarks on the attitude of all actors*

It can be said that all actors involved in the broader implementation of the ECHR and the execution of the ECtHR judgments regard the existence of the human rights system of the Council of Europe and especially the judicial system of the ECtHR as an eminent prerequisite for an European orientated democratic development and for the establishment of an European common area of legal culture. The irreplaceable role of the ECtHR as highly significant institution for a complementing judicial system that is able to efficiently rectify flaws in the domestic legal system were highlighted. Although there exists a very positive attitude towards the Strasbourg court in general, some contentious aspects with regard to the role of the Federal Constitutional Court could be named and shall be outlined.

### *The attitude of the Federal Constitutional Court towards the ECtHR*

It was reported that the general attitude towards the ECtHR can be described in a way that the Constitutional Court accepts and respects the ECtHR and the system of an European judicial system unanimously. Moreover, with regard to the number of cases lodged in Strasbourg against Germany (in general 2.500 cases each year) and to the number of violations found in recent years (an average of 7 judgments finding a violation) the function of the Federal Constitutional Court as filter can be deemed as highly efficient. Nevertheless, two subjects were mentioned in which some tensions can be discerned. Firstly, different approaches in cases with dual fundamental rights constellation. These cases consist generally of two dichotomous interests protected equally by the Basic Law or the jurisprudence of the Federal Constitutional Court and where a balance between the interests has to be found. Namely in the case of "Caroline von Hannover", with regard to freedom of media enshrined in Art. 5 Basic

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<sup>50</sup> § 173 Administrative Court Code of Procedure (Verwaltungsgerichtsordnung); § 202 Social Court Code of Procedure (Sozialgerichtsgesetz); § 79 Labour Court Code of Procedure (Arbeitsgerichtsgesetz); § 134 Financial Court Code of Procedure (Finanzgerichtsordnung).

Law and the respect for private life, which has been created by the Constitutional Court, revealed a different approach of the two courts. The Görgülü case revealed as well that the each of the courts had different approaches towards the human rights concerned. This is partly the result of different legal orders. As mentioned, the right of freedom of press is enshrined within the national Basic Law, whereas the right to respect privacy has been created by the Federal Constitutional Court in its case law. In contrast, the ECHR entails both fundamental rights position in its provisions (Art. 8 and Art. 10 ECHR). Secondly, it was stated in some of the interviews that the Constitutional Court itself had to learn and accept that another court on an European level is scrutinizing its own adjudication and that this is not always done with the same outcome favoured by the Constitutional Court.

Especially the last statement points to the general perception in Germany, that the national human rights protection mechanisms are deemed highly effective and sufficient. This is true, with some exceptions as it can be seen in the violations found before the ECtHR. On the other hand, this attitude obfuscates the developments of European human rights and the interrelationship of both legal orders.

### **III. Assessment of the importance of supra national human rights protection**

To assess the importance of the ECHR and the judgments of the ECtHR in the domestic legal order, some aspects shall be analysed that can enlighten the stance towards the ECHR and depict different patterns of understanding.

#### **1. Knowledge and implementation of the ECHR and the judgments**

##### **a) The dissemination**

In Germany, with regard to the reception among lawyers and judges, the main legal journal is called *Neue Juristische Wochenschrift*. It is published weekly, covers all legal areas and can be found in almost every law firm and legal library. Additionally, some other legal journals are well known, which cover specific areas, like public law, or even more specific subjects like immigration law. The question seems justifiably whether all cases of the ECtHR against other countries with a relevant factual and legal basis are covered by the *Neue Juristische Wochenschrift*. The legal journal published some 105 cases between January 2000 and May 2008, including the judgments against Germany. The ECtHR itself pronounced between 2000 and 2007 some 8.000 judgments.<sup>51</sup> Only in 2007 it found in 1.349 cases at least one violation of the ECHR.<sup>52</sup> The question cannot conclusively be answered in this report. But even if the repetitive cases are taken into consideration and all cases which are not relevant for the legal situation in Germany, the numbers point to a relatively low coverage of the ECtHR's judgments.

Again, the area of immigration law, family law, and to a certain degree law of criminal procedure constitute an exemption to the aforementioned observation. Namely the judgments effecting the situation of immigrants and asylum seekers are covered, for example, by the very detailed and comprehensive website called *Migrationsrecht.Net*.<sup>53</sup> Furthermore, the specialized human rights journal *Europäische Grundrechtszeitschrift* covers a broad range of

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<sup>51</sup> See Council of Europe, European Court of Human Rights, Annual Report 2007, Provisional Edition, Strasbourg 2008, p. 147.

<sup>52</sup> Ibid, p. 143.

<sup>53</sup> <http://www.migrationsrecht.net>, accessed in April 2008.



judgments of the ECtHR, the European Court of Justice and the Federal Constitutional Court and informs about the case law in German language.

## **b) Assessment of the knowledge among the actors**

It is a risky endeavour to write something about the knowledge of the ECHR among the actors. Firstly, we just did not have the means to conduct a representative survey among all lawyers, judges, politicians, and representatives of all possible non-governmental organizations. Secondly, to assume that some actors lack the appropriate knowledge can provoke some kind of opposition and might not even be right in one or the other case. Therefore, we will only summarize the results of the interviews and the observations made by analysing the written material being fully aware that these results can only depict the state of the art in a very general manner.

As for the *Federal Constitutional Court*, there does not exist any systematic ascertainment of the judgments. The Constitutional Court has not established a focal point assigned with the task to collect and analyse them. The same applies to the *Federal Court of Justice*. However, the developments are carefully scrutinized in the respective departments of the courts and it is very likely that all decisive judgments are taken into account by the Federal Constitutional Court and the Federal Court of Justice alike. A decision, adopted in 2008, with regard to the right to respect for private life exemplifies the broader consideration of the ECtHR's jurisdiction.<sup>54</sup> The Constitutional Court had to balance the different interests on the one hand of a prominent person for privacy and on the other hand of the media that wishes to report about their activities. The Constitutional Court referred to judgments of the ECtHR (mainly against other countries) to clarify the criteria under which circumstances publications and reports about prominent persons do not violate the right to respect for private life.<sup>55</sup>

With regard to the *administrative courts*, the jurisprudence of the ECtHR seems to be comprehensively incorporated into the adjudication in specific areas, like immigration law. Thus, the knowledge of the ECHR and the judgments can be deemed sufficient. As for the dissemination system, on the level of the higher regional administrative court no network is established among the courts in the different states (Länder) to inform each other concerning new judgments of the ECtHR. Such a system exists with regard to procedures before the European Court of Justice. It can only be anticipated which effect this might have on the daily work of the courts. It seems that this lacuna of an information network does not necessarily diminish the quality of the judgments of the regional courts, although it would be desirable and would facilitate the reception of the ECHR.

We were able to ask the Minister of Internal Affairs of the state (Land) Rhineland-Palatinate (Rheinland-Pfalz) and a police director, which is a high rank position among the police in Germany about the knowledge of the ECHR and the judgments. The same picture was drawn as it was concerning the other actors, too. The Basic Law and the Federal Constitutional Court are perceived as the main frame of reference. This applies for the educational training of young police personnel as well as for the practice. This assessment is underpinned by a study published by the *German Institute for Human Rights*. The study "Human Rights education for police forces" analysed the effect of human rights, including the ECHR, based on 41 curricula and expert interviews with regard to the vocational training.<sup>56</sup> The study reveals that human rights topics are entrenched in the curricula, however, mainly concerning provisions of the

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<sup>54</sup> Federal Constitutional Court, decision of 26 February 2008, 1 BvR 1602/07.

<sup>55</sup> Federal Constitutional Court, decision of 26 February 2008, 1 BvR 1602/07, paras. 99-100.

<sup>56</sup> G. Schicht, *Menschenrechtsbildung für die Polizei*, Berlin 2007.

Basic Law. Only little reference is made to the United Nation's or the Council of Europe's protection mechanisms.<sup>57</sup> Hence, the ECHR arguably complements the domestic fundamental rights. Two exemptions were stated: The case *Jalloh v. Germany* on the administration of emetics, where Germany was found violating Art. 3 ECHR, was discussed in the vocational training of police candidates. Additionally, and that has to be underlined, the case law regarding immigrants (especially Art. 3 ECHR and Art. 8 ECHR-cases against other countries and against Germany) are well known and taken into consideration, even though it seems that the state authorities sometimes try to circumvent the full array of the judgments.

## **2. Domestic legal culture. Attitude towards a different system**

### **a) General remarks**

Like in other European countries, the process of integration towards a common area with a single legal order or a single legal frame elicited supportive and opponent arguments exchanged not only among scholars, lawyers and judges, but also among politicians and the public opinion. This development could be and still can be observed with regard to the European Union and its accompanying integration process. Today, Europe in terms of the European Union has become generally accepted. Presumably, the more tangible effects in daily life, like EU agriculture policies or the common boarder in the Schengen-states, facilitate the understanding of the European Union. Additionally, the legal culture of the EU resembles the German legal culture in terms of statutory provisions in the European Treaties the directives and the resolutions.

It can only be assumed that the main aims of the Council of Europe namely to guarantee democratic structures, the maintenance of the rule of law, and the protection of human rights are relatively abstract forms thus do not easily promote a general understanding of its work. Additionally, the ECtHR created its own legal culture and working methods to decide cases, more resembling the case law from the Anglo-American tradition than the systematic approach undertaken in France or in Germany. Thus, the legal culture in Germany with its systemized statutory provisions and jurisdiction might have led, as it was stated in one interview, to a mediocre understanding of the international jurisdiction and, therefore, might hinder a comprehensive understanding of the institution and the working methods.<sup>58</sup>

### **b) The predominant role of the Federal Constitutional Court**

As already mentioned, the position the Federal Constitutional Court holds within the national legal system and its decisions are highly acknowledged even though some contentious cases or its function within the political process has triggered discussions among legal professionals<sup>59</sup> or in the public media. However, among all state institutions the Federal Constitutional Court has always been and still is regarded as an outstandingly trustworthy actor and deemed as irreplaceable in the protection of fundamental rights in Germany. It has

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<sup>57</sup> Ibid., p. 50.

<sup>58</sup> Interestingly, the discussion within the legal literature has begun whether the Federal Constitutional Court had moved towards a more single case approach than a systemized one. The position of the Constitutional Court and the number of judgments, published in more than 100 volumes, could lead to the assumption that the jurisdiction has gained the character of a case law to a certain degree. See B. Schlink, *Abschied von der Dogmatik. Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel*, in: *Juristen Zeitung (JZ) 2007*, pp. 157-162.

<sup>59</sup> See, inter alia, W. Brohm, *Die Funktion des Bundesverfassungsgerichts - Oligarchie in der Demokratie?*, in: *Neue Juristische Wochenschrift (NJW) 2001*, p. 1-10; J. Limbach, *Vorrang der Verfassung oder Souveränität des Parlaments?*, Stuttgart 2001.

gained a position as an acknowledged authority.<sup>60</sup> It can arguably be assumed that the constitutional procedure entitling individuals to claim a fundamental rights infringement promotes this perception as it allows citizens to participate in the political process.<sup>61</sup> As domestic judicial system to protect human rights, the Constitutional Court is in line with the concept of subsidiarity and, therefore, actively involved to decrease the workload of the ECtHR in contentious cases. It was stated in the interviews, however, that the outstanding position of the Constitutional Court tends to obfuscate the European dimension of the legal development to a certain degree and that even a narrow mindedness could be observed in this regard.

### **c) Language problems**

Although English and French are taught in schools in Germany, the qualification one needs to work with the judgments as well as the comprehensive knowledge of the legal vocabulary required often hinder practitioners from all branches (administration, judges, and parliaments) to take all relevant judgments into due consideration. Especially, the degree needed to receive and understand the judgments accurately obstructs the incorporation and elicits more feelings of resentments than of acceptance. In the area of law, one has to take every single word into consideration and gauge its consequences. The German judge, Renate Jaeger, raised this issue in the interview and requested to employ lawyers and translators who could work on the basis of a common thesaurus to guarantee the best translation possible. She deemed this a very important prerequisite for a better implementation within Germany.

Admittedly, the government has enhanced the situation considerably. The judgments against Germany have been translated so far and can be found on the website of the Ministry of Justice and the respective website of the Council of Europe. It has initiated a publishing project for a systematic publication and translation of all relevant judgments. Moreover, on the private sector, the legal journal *Europäische Grundrechtszeitschrift* informs regularly about the jurisprudence of the ECtHR and complementing developments. For the time being, however, the dearth remains that no translation of all relevant judgments based on a common vocabulary agreed on exists, nor does the widely read law journals take them fully into account which diminishes the access to the case law.<sup>62</sup>

### **d) Debates on the binding force of judgments**

Drawing from the decisions of the Federal Constitutional Court regarding the binding force of judgments made by the ECtHR for domestic state authorities and the comprehensive discussion in the legal literature, it seems quite clear that outstanding questions do not remain. However, the debate of the position of the German Basic Law towards the ECHR and the different approach concerning the balance of equally protected fundamental rights position may have paved the way for some misunderstandings. This can be evidenced in the public sphere referring to newspaper articles in the wake of two contentious judgments. One large newspaper titled in 2004: “Strasbourg judgments not binding.”<sup>63</sup> However, more differentiated

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<sup>60</sup> H. Simon, Verfassungsgerichtsbarkeit, in: Benda, Maihofer und Vogel (Hg.), Handbuch des Verfassungsrechts, Berlin u.a. 1994, p. 1654.

<sup>61</sup> See C. Gusy, Die Verfassungsbeschwerde, in: van Ooyen und Möllers (Hg.), Das Bundesverfassungsgericht im politischen System, Wiesbaden 2006, p. 210.

<sup>62</sup> The importance to translate the judgments into German was stressed by Prof. Ress in a public hearing in 2006 at the German Parliament as well. See: Deutscher Bundestag, Ausschuss für Menschenrechte und humanitäre Hilfe. Wortprotokoll 13. Sitzung. Protokoll Nr. 16/13, vom 31.5.2006, p. 27-28.

<sup>63</sup> See: *Straßburger Urteile nicht bindend*, Die Welt, 20 October 2004, p. 4.

articles were published as well.<sup>64</sup> Nevertheless, it can be observed that in some instances a more ambiguous attitude towards the binding force is expressed. For instance, this question was also discussed among politicians of the Federal Parliament in the wake of the judgments *Kudla v. Poland* and *Sürmeli v. Germany* regarding the inauguration of a special acceleration remedy to tackle overlong procedures. This should not obstruct the general attitude of state actors complying with the ECHR and the ECtHR, but it reveals to some extent the unintended side effects of a differentiated protection system. Briefly, this discussion reflects the perception of the ECHR as necessary tool, but also as a problematic one when the supranational system really challenges national provisions and practices.

## **D. Assessing implementation. The adverse judgments against Germany**

### **I. The judgments of the ECtHR. Innovative judgments against Germany and the assessment of the implementation**

To begin with, it shall be reiterated how the notion innovative judgments is utilized in this report. The notion covers judgments which diverge from national laws and practices and challenges them. Even though the ECtHR does not urge the governments to change their practice or legislation, some cases that triggered an effective momentum to alter the existing practice or to ignite a legal discussion resulting in a broader understanding will be analysed. Moreover, judgments will be described that did not match with the expectations of affected professional groups (like in the *Caroline* case) because they were received highly controversial. Some of the chosen cases do not fall in the scope of the cases analysed for this project. Notwithstanding, they will be described here as they exemplify some contentious subjects relating to the question of implementation.

#### **1. Immigration Law**

##### **a) The case law**

###### *Judgment in the case Keles v. Germany*<sup>65</sup>

The case concerns an unlawfully interception in the applicant's right to respect his family life in virtue of an expulsion order with an unlimited exclusion to re-enter Germany. The applicant, a Turkish national, had been lawfully living in Germany for 27 years, he is married and has four children. The whole family lived at the time of the order in Germany. The applicant was convicted for several crimes including insulting behaviour, negligent drunken driving, reckless driving, driving without a driving license, and inflicting bodily harm. The responsible regional administration ordered the applicant's expulsion to Turkey. Taking the facts into consideration the ECtHR concluded that there had been a violation of Art. 8 ECHR.

###### *Judgment in the case Yilmaz v. Germany*<sup>66</sup>

The case concerns the same subject as the case *Keles v. Germany*. The applicant, a Turkish national, lived in Germany lawfully with a permanent residence permit. After he had committed several crimes, he received an unlimited expulsion order despite his family bounds in Germany. By the time of the judgment, he lived in a relationship and was father of one child. The applicant himself was born in Germany in 1976 and left the country in 2000 after he had received the expulsion order. The ECtHR decided that the German authorities did not

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<sup>64</sup> See: *Straßburger Urteil zählt. Verfassungsgericht klärt Rang von Richtersprüchen*, Frankfurter Rundschau, 20 October 2004, p. 1.

<sup>65</sup> ECtHR, *Keles v. Germany*, judgment of 27 October 2006, no. 32231/02.

<sup>66</sup> ECtHR, *Yilmaz v. Germany*, judgment of 17 April 2003, no. 52853/99.

take all relevant circumstances into consideration, especially with regard to the unlimited order. Therefore, the Court found a violation of Article 8 ECHR.

*Judgments in the cases Okpisz v. Germany and Niedzwiecki v. Germany*<sup>67</sup>

The applicants claimed a breach of Art. 8 in conjunction with Art. 14 ECHR because the German domestic law differentiated between the legal residence permissions with regard to the payment of public child benefits.<sup>68</sup> The applications referred mainly to the child benefit provision applicable between 1994-1995. The intention of the law was to grant foreigners public child benefits when they stay in Germany might be permanent. In 2004, the Federal Constitutional Court decided that the preceding national regulation violated Art. 3 Basic Law (equal treatment).<sup>69</sup> The ECtHR concluded afterwards (in 2005) that there was a violation of Article 8 in conjunction with Article 14 ECHR, because it could not discern any reasons justifying the different treatment. The ECtHR referred to the decision of the Federal Constitutional Court and decided that the government had to pay 1.400 Euros respectively 2.500 Euros pecuniary damage.

**b) Assessment against the background of the execution procedure of the Committee of Ministers**

*The case Keles v. Germany*

In the Keles case, the authorities informed the applicant that “(...) a term to the expulsion order had been set.”<sup>70</sup> Thus, allowing the applicant to apply for a visa to enter Germany. The general measures included, inter alia, the dissemination of the judgment to the domestic courts, the Federal Ministry of Interior and the Ministry of Justice of Baden-Württemberg and are regarded sufficient by the Committee of Ministers to close the examination of the case.<sup>71</sup>

*The case Yilmaz v. Germany*

The responsible authority informed the applicant that the unlimited expulsion order was altered into a limited one expiring in 2007.<sup>72</sup> The judgment in the Yilmaz case was disseminated by letter of the Federal Ministry of Justice in 2004 to all justice and interior authorities. The Keles case, which was decided after Yilmaz, had been lodged at the ECtHR in 2002 and thus before the judgment in the Yilmaz case was disseminated.<sup>73</sup> Therefore, the state authorities could not have taken the jurisdiction into consideration.

*The cases Okpisz v. Germany and Niedzwiecki v. Germany*

The drafts of final resolutions are under consideration at the Committee of Ministers.<sup>74</sup> Furthermore, the Federal Parliament has changed its legislation after the judgment of the Federal Constitutional Court and the ECtHR judgments on the very same issue. The bill was introduced in 2006.<sup>75</sup> It has to be mentioned that the Federal Constitutional Court obliged the

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<sup>67</sup> ECtHR, *Okpisz v. Germany*, judgment of 25 October 2005, no. 59140/00; ECtHR, *Niedzwiecki v. Germany*, judgment of 25 October 2003, no. 58453/00.

<sup>68</sup> It has to be mentioned that the current law still distinguishes between different residence permissions with regard to their duration, seemingly taking the judgments into consideration. See § 1 para 3 in conjunction with § 20 para 3 of the Federal Child Benefit Act (*Bundeskindergeldgesetz*). We cannot, however, deepen this topic within this report.

<sup>69</sup> Federal Constitutional Court, decision of 6 July 2004, 1 BvL 4/97, 1 BvL 5/97 and 1 BvL 6/97.

<sup>70</sup> Council of Europe, Committee of Ministers, Resolution CM/ResDH(2007)121.

<sup>71</sup> *Ibid.*

<sup>72</sup> Council of Europe, Committee of Ministers, Resolution CM/ResDH(2007)125.

<sup>73</sup> Council of Europe, Committee of Ministers, Resolution CM/ResDH(2007)125.

<sup>74</sup> Committee of Ministers, Annotated Agenda, 1007th meeting (DH) 15-17 October 2007.

<sup>75</sup> Council of Europe, Committee of Ministers, 982nd meeting, Cases pending supervision of execution.

federal lawmaker to rectify the situation by 1 January 2006. It is very likely, therefore, that the bill was introduced in 2006 mainly because of the Constitutional Court decision. It stated, furthermore, that after that date the preceding legal situation, which was advantageous for the applicants, would become automatically applicable if the law had not been amended.

## **2. Respect for private life and freedom of press**

### **a) The case law**

#### *Judgment in the case v. Hannover v. Germany*<sup>76</sup>

The case concerns the requirement to find a balance between the right to respect for private life and the freedom of press. In the case concerned, the applicant alleged a violation of Art. 8 ECHR because the German courts circumvented her right to respect for private life. In the contested court proceedings, the German courts, including the Federal Constitutional Court, could not discern a breach of her fundamental rights. The ECtHR, however, balanced the dichotomous interests differently and concluded that there had been a violation of Art. 8 ECHR. Consequently, it had a direct effect on the position of the Federal Constitution Court regarding the freedom of media and the respect for private life. The Constitutional Court had to alter its own position and so had the other domestic courts if they wanted to avert another judgment.

### **b) Assessment against the background of the execution procedure of the Committee of Ministers**

The Committee of Ministers adopted a final resolution of the case in 2007 and decided to close the examination.<sup>77</sup> It concluded that the individual measures and general measures adopted by Germany had been sufficient. The non-pecuniary damage of 10.000 Euros and the costs and expenses of 105.000 Euros, as agreed on in a friendly settlement,<sup>78</sup> were paid in time by the German government within the period of three month.<sup>79</sup> Furthermore, the measures consist of the following aspects: The Committee took notice that the photographs at issue had not been reprinted in Germany. Concerning the dissemination it noted (as general measure) that the judgment had been widely published and discussed and that - in the wake of the judgment - the domestic case law had been changed, taking it into consideration. This applied namely to cases before the civil Berlin Court of Appeal, the Hamburg district Court, and the Federal Civil Court of Justice.<sup>80</sup> In February 2008, The Federal Constitutional Court decided in a case in which Caroline von Hannover again alleged the breach of the right to respect for her private life.<sup>81</sup> Taking the decisive requirements of the ECtHR into consideration, it can arguably be observed that the Federal Constitutional Court's conclusions are premised on the ECtHR's reasoning.

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<sup>76</sup> ECtHR, *Hannover v. Germany*, judgment of 24 June 2004, no. 59320/00.

<sup>77</sup> Council of Ministers, Resolution CM/ResDH(2007)124.

<sup>78</sup> ECtHR, judgment (Just Satisfaction - Friendly Settlement) of 28 July 2005, no. 59320/00.

<sup>79</sup> Council of Ministers, Resolution CM/ResDH(2007)124.

<sup>80</sup> *Ibid.*

<sup>81</sup> Federal Constitutional Court, decision of 26 February 2008, 1 BvR 1602/07; 1606/07; 1626/07.

### 3. Civil service and freedom of expression

#### a) The case law

##### *Judgment in the case Vogt v. Germany*<sup>82</sup>

The case concerns the right of freedom of expression of civil servants. The applicant was a teacher and appointed as a permanent civil servant of the state of Lower-Saxony. She taught German and French and her work abilities were described entirely satisfactory. Because the applicant had been engaged in various activities on behalf of the *German Communist Party (DKP)* she was suspended from her duties and finally dismissed. The reasoning was that she had failed “(...) to comply with the duty of loyalty to the Constitution (...)”<sup>83</sup> The decision was based on a state provision adopted to implement the decree on employment of extremists in the civil service and the Lower Saxony Civil Service Act.<sup>84</sup> The Court concluded that the dismissal of the applicant was disproportionate and violated Article 10 ECHR.<sup>85</sup>

#### b) Assessment against the background of the execution procedure of the Committee of Ministers

In the case *Vogt v. Germany* the Committee of Ministers adopted the final resolution concerning the implementation already one year after the judgment in the case.<sup>86</sup> The German government submitted the following information to the Committee, which were deemed sufficient to close the examination. As individual measure, the government paid within the time limit on the basis of a friendly settlement<sup>87</sup> the total sum of 222.639 Deutsche Mark, approximately 113.835 Euros as compensation for the loss of her salary, non-pecuniary damage and costs. The German Federal Ministry of the Interior noted, however, “(...) that it would not be possible to reopen old dismissal procedures on the basis of the judgments of the European Court of Human Rights.”<sup>88</sup> As for the applicant herself, the state of Lower Saxony reinstated her as a teacher already in 1991, after the state government had repealed the decree on the employment of extremists.<sup>89</sup> As for the general measure, the Federal Ministry for the Interior indicated in a letter to all state (Länder) authorities that “(...) the authorities would have to examine all future cases in this kind in detail, in the light of the Court’s judgment, in order to prevent the repetition of violations similar to those found in the present case.”<sup>90</sup> The translation of the full judgment was published in the legal law journal *Europäische Grundrechtezeitschrift*.

### 4. Protection mechanisms for mentally ill people in psychiatric clinics

#### a) The case law

##### *Judgment in the case Storck v. Germany*<sup>91</sup>

The ECtHR decided in *Storck v. Germany* that there had been a violation of Article 5 ECHR (unlawful detention) and of Article 8 ECHR (medical treatment against the will of the

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<sup>82</sup> ECtHR, *Vogt v. Germany*, judgment of 26 September 1995, no. 17851/91.

<sup>83</sup> *Ibid.*, para. 11.

<sup>84</sup> *Ibid.*, paras. 28, 30, 31

<sup>85</sup> *Ibid.*, para. 61.

<sup>86</sup> Council of Europe, Committee of Ministers, Resolution DH (97) 12.

<sup>87</sup> Judgment (Friendly Settlement) of 2 September 1996, no. 17851/91.

<sup>88</sup> Council of Europe, Committee of Ministers, Resolution DH (97) 12.

<sup>89</sup> See ECtHR, *Vogt v. Germany*, judgment of 26 September 1995, no. 17851/91, para. 24.

<sup>90</sup> *Ibid.*

<sup>91</sup> ECtHR, *Storck v. Germany*, judgment of 16 June 2005, no. 61603/00.

applicant). From 1977 till 1979, the applicant was unlawfully deprived of her liberty while locked in a private psychiatric clinic at her father's request. Additionally, a medical treatment was administered against her will. The applicant, who attained her majority in 1977, was never placed under guardianship, she had never signed a declaration that she agrees with the placement in the clinic nor had there been a judicial decision which could have authorized the detention.<sup>92</sup> The applicant escaped from the private clinic in 1979 and was forcefully brought back by the police. The claim for financial compensation against the private clinic was dismissed by the Bremen Court of Appeal in 2000 with the reasoning that the claim had been time-barred. Additionally, the court said, she had not sufficiently proved that she had expressly objected to her stay in the psychiatric hospital.<sup>93</sup> The ECtHR concluded that the lack of a sufficient state control is imputable and constituted a breach of Article 5 ECHR. „(...) the respondent State has breached its existing positive obligation to protect the applicant against interferences with her liberty by private persons (...).“<sup>94</sup> The medical treatment in the private clinic constituted a violation of Art. 8 ECHR as well. It has to be highlighted that the ECtHR found a failure of the Bremen Court of Appeal to interpret the national law in the spirit of Article 5 ECHR.<sup>95</sup> Thus, this case concerns the amendment of the legislation and practice in establishing a sufficient control mechanisms and, moreover, the failure to interpret the domestic law in the spirit of the ECHR. The latter has direct repercussions for the question whether the case can be reopened in a civil court procedure after an adverse judgment of the ECtHR.

#### **b) Assessment against the background of the execution procedure of the Committee of Ministers**

The main aspects of the execution in the case *Storck v. Germany* consist of three different measures which shall be outlined. Firstly, the Committee of Ministers notes in the final resolution that the government paid the just satisfaction within the time limit of three months.<sup>96</sup> Secondly, it refers to the amendment of the German Civil Code of Procedure, in which a reopening-provision with regard to adverse judgments was introduced in 2006. However, this provision had no retroactive effect. The Committee concludes that the applicant might not benefit from the provision.<sup>97</sup> Finally, the Committee lists the general measures mainly enforced before the applicant lodged the complaint but after her confinement in the private clinic including an independent commission to visit psychiatric hospitals and private clinics with their consent.<sup>98</sup> Since 2000, this has been altered and the commission's mandates covers private clinics. In addition, the federal legislator adopted a law providing a court control system in cases of the placement of a minor or if an adult has a guardian. The Committee mentions the draft legislation of the reopening of civil procedures and the effect given to the judgment as it had been widely disseminated to the domestic authorities concerned and covered by the media.<sup>99</sup>

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<sup>92</sup> Ibid., paras. 14-15.

<sup>93</sup> Ibid., paras. 36-37.

<sup>94</sup> Ibid., para. 108.

<sup>95</sup> Ibid., para. 99.

<sup>96</sup> Council of Europe, Committee of Ministers, Resolution CM/ResDH(2007)123.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid. See for a critical appraisal: M. Eink, *Psychiatrische Besuchskommissionen als Modell für die Prävention von Gewalt und Menschenrechtsverletzungen?*, in: Deutsches Institut für Menschenrechte (Hg.), *Prävention von Folter und Misshandlung in Deutschland*, Baden-Baden 2007, pp. 133-147. See for an overview: H. Pollähne, *Besuchskommissionen: Dezentrale Präventionsmechanismen im Psychiatrierecht - OPCAT-konform?*, in: Deutsches Institut für Menschenrechte (Hg.), *Prävention von Folter und Misshandlungen*, pp. 149-174.

<sup>99</sup> Council of Europe, Committee of Ministers, Resolution CM/ResDH(2007)123.



## 5. Prohibition to gain evidences through emetics

The judgment in the case *Jalloh v. Germany*<sup>100</sup> concerns the administration of emetics as a mean to investigate assumed drug trafficking. The applicant was observed by the police while he was taking two plastic bags out of his mouth and sold them. As he was advanced by the police, he swallowed another plastic bag. He was arrested on suspicion of drug-trafficking and was brought to a hospital where he was restrained by police officers while a doctor forcibly administered a salt solution and emetic syrup through a tube introduced into his stomach.<sup>101</sup> The applicant regurgitated a small bag containing 0.2182 g of cocaine.<sup>102</sup> The legal basis is found in § 81 a) of the Criminal Code of Procedure, which was interpreted as sufficient legal basis although the administration of emetics is not explicitly mentioned in it.<sup>103</sup> The court concluded that the domestic practice violated Art. 3 ECHR. It said, “(...) the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3.”<sup>104</sup> This case is interesting because it is the first and only<sup>105</sup> judgment against Germany regarding a violation of Article 3 ECHR and because it challenges a contentious practice.<sup>106</sup> With regard to the suspension of the administration of emetics, it can be noted that the state authorities complied with the judgment of the ECtHR. Moreover, in the two interviews that were conducted with practitioners on the state level, it was stated that the judgment in the case *Jalloh v. Germany* had been disseminated and discussed in the appropriate police departments.

## 6. Interim Conclusion

Drawing from the available public resolutions of the Committee of Ministers, the implementation and the execution of judgments only raise some concerns. In general, the Committee of Minister decided to close the examination of the cases after it had ascertained the measures adopted. As for the individual measures it can be summarized that the just satisfaction has been paid in the time limits set out in the judgments. The judgments have always been translated and sent to the responsible Ministries to guarantee a sufficient implementation and to prevent further infringements. And, as outlined, the general measures comprising a change in the adjudication or in the administrative practice have been adopted. However, it has to be highlighted that a systematic dearth concerning the reopening procedures was redeemed only in 2006. This lead to the situation that in the case *Storck v. Germany* the applicant had not the opportunity to file a motion to reopen her case.<sup>107</sup>

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<sup>100</sup> ECtHR, *Jalloh v. Germany*, judgment of 11 July 2006, no. 54810/00.

<sup>101</sup> *Ibid.*, para. 13.

<sup>102</sup> *Ibid.*

<sup>103</sup> § 81 a) Criminal Code of Procedure reads: “A physical examination of the accused may be ordered for the purpose of establishing facts of relevance to the proceedings. To this end, blood samples may be taken and other bodily intrusions effected by a doctor in accordance with the rules of medical science for the purpose of examination without the accused’s consent, provided that there is no risk of damage to his health.” Translated by the ECtHR.

<sup>104</sup> ECtHR, *Jalloh v. Germany*, para. 82.

<sup>105</sup> Worth mentioning is the case *Gäfgen v. Germany*. In this case, the Court declared in accordance with Art. 34 ECHR that the applicant can not claim to be the victim of a violation of Article 3. Thus, founding no violation of Art. 3 ECHR. See ECtHR, *Gäfgen v. Germany*, judgment of 30 June 2008, no. 22978/05.

<sup>106</sup> The Committee of Minister reports that the practice of administering emetics in order to obtain evidences was suspended by the competent Ministries (Council of Europe, Committee of Ministers, Annotated Agenda, 992nd meeting (DH), 3-4 April 2007, Section 4.2.). This practice had been enforced in five states (Länder) according to the Committee of Ministers, namely: Berlin, Bremen, Hamburg, Hesse and North-Rhine Westphalia. As a result, the general measure has been sufficiently adopted.

<sup>107</sup> It is mentioned in the final resolution of the case *Storck v. Germany* that the applicant has initiated a reopening procedure despite the clear wording of the provision in the Civil Code of Procedure. See Council of Europe, Committee of Ministers, Resolution CM/ResDH(2007)123.

## II. Problematic cases of implementation

### 1. Non compliance by a domestic court

In *Görgülü v. Germany*<sup>108</sup> the ECtHR found a violation of Art. 8 ECHR regarding the applicant's right to respect his family life. The applicant is the father of a child born out of wedlock. By the time the father had lodged the complaint the child was already living with its foster family. The child still lives with his foster parents. The ECtHR decided that the preceding decision by the Naumburg Higher Regional Court to suspend the applicant's visiting rights was insufficiently reasoned and constituted a breach of Art. 8 ECHR. The ECtHR argued that the Naumburg Higher Regional Court "(...) only focussed on the imminent effects which a separation from his foster parents would have on the child, but failed to consider the long-term effects which a permanent separation from his natural father might have on (...) [the child]."<sup>109</sup> The case itself does not seem to contain a major or insolvable legal or practical problem. Nevertheless, it triggered the most recalcitrant response from a German court and is still under supervision of the Committee of Ministers.

In the wake of the judgment, the Higher Regional Court had to decide again in the same issue. The case concerning the visiting rights shall be depicted here. The Higher Regional Court decided, nevertheless, *not* to change its jurisdiction. It argued that the judgment of the ECtHR was not binding. „However, the judgment [*Görgülü v. Germany*, sic] directly obligates only Germany as a body under international law and not the bodies or state institutions within Germany and namely not the courts as independent organs of jurisdiction in accordance with Art. 97 para. 1 Basic Law.“<sup>110</sup> As already explicated in great detail, the Federal Constitutional Court quashed this decision stating that all state bodies within Germany are generally obliged to abide to judgments of the ECtHR. But even after the Federal Constitutional Court had quashed the impugned decision of the Higher Regional Court, the latter decided in the same case again.<sup>111</sup> It repeatedly suspended the visiting rights granted by the lower court in an interim measure, despite the clear statement of the ECtHR and the Federal Constitutional Court.<sup>112</sup> The Constitutional Court suspended the decision with an interim measure<sup>113</sup> and, finally, quashed the decision of the Higher Regional Court for a second time.<sup>114</sup> Thus, the visiting rights could be carried out on the basis of the already adopted interim measure of the lower court. In the end of 2006, the Higher Regional Court, notably another chamber, formulated a clear time frame for the visiting rights.<sup>115</sup> In 2007, the Federal Constitutional Court deemed this decision in accordance with the Basic Law and declared a complaint of the father in this regard inadmissible.<sup>116</sup>

This is a very exceptional example of non-compliance that can be found in the wake of the *Görgülü* case stemming from the Naumburg Higher Regional Court. In this case the Higher Regional Court consciously ignored the judgment of the ECtHR and even the judgment of the Federal Constitutional Court. This is an outstanding example in two ways: Firstly, it is the only example in the history since the ECHR has been incorporated into the German legal

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<sup>108</sup> ECtHR, *Görgülü v. Germany*, judgment of 26 February 2004, no. 74969/01.

<sup>109</sup> *Ibid.*, para. 46.

<sup>110</sup> OLG Naumburg, decision of 30 June 2004, 14 WF 64/04. Published in *FamRZ* 2004, pp. 1510-1512.

<sup>111</sup> OLG Naumburg, decision of 20 December 2004, 14 WF 234/04.

<sup>112</sup> *Ibid.*

<sup>113</sup> Federal Constitutional Court, decision of 28 December 2004, 1 BvR 2790/04.

<sup>114</sup> Federal Constitutional Court, decision of 10 June 2005, 1 BvR 2790/04.

<sup>115</sup> OLG Naumburg, decision of 15 December 2006, 8 UF 84/05.

<sup>116</sup> Federal Constitutional Court, decision of 9 February 2007, 1 BvR 217/07, 1 BvQ 2/07, para. 32.

order in 1955. Secondly, the blatant ignorance is unprecedented. Even though the legal questions have been redressed to a certain extent, the personal strains as repercussions of the litigation will certainly have some effects on all persons concerned.

## **2. Reluctant implementation by the German Federal Parliament**

The case *Sürmeli v. Germany*<sup>117</sup> concerns the length of a civil proceeding with regard to damages and a monthly pension for injuries sustained in an accident. The ECtHR notes that the judicial procedure in question lasted for more than 16 years.<sup>118</sup> It ascertained whether the applicant could have reduced the length himself utilizing domestic mechanisms. The Court concluded, however, that the “(...) applicant did not have an effective remedy within the meaning of Article 13 of the Convention which could have expedited the proceedings in the Regional Court or provided adequate redress for delays that had already occurred.”<sup>119</sup> Insofar, a violation of Art. 13 ECHR was found by the ECtHR.<sup>120</sup> With regard to Art. 46 ECHR the Court enunciates that states have the legal obligation to select appropriate general measures to adopt in their domestic legal order.<sup>121</sup> The German government stated that after the *Kudla* case it introduced a bill with a new remedy in respect of inaction.<sup>122</sup> According to this bill, complaints on the length of procedures have to be submitted to the court in question or to an appellate court. The ECtHR encourages the German government to adopt that measure.<sup>123</sup> However, the bill is still pending.

It was stated in some interviews that the introduction of such a remedy, providing a procedure before the court where the case is pending and where an excessive length can be ascertained, were perceived as a very controversial issue. This is also reported in the public agendas of the Committee of Ministers’ meeting on pending cases.<sup>124</sup> In the meeting of the Committee that took place in March 2008 it summarized the ongoing developments as follows.<sup>125</sup> The draft proposal had caused a very controversial debate among legal practitioners. Therefore, the Federal Ministry of Justice had organized a discussion among legal experts on that issue in October 2007. It is reported, furthermore, that the Ministry was currently working on a new draft taking the results of the discussion into consideration. It can be arguably discussed which positive effect such a remedy might have. However, the judgment detects clearly a dearth in the German domestic system in referring to Article 13 ECHR which leaves not much room for deviant interpretations. Interestingly, it was stated that - with regard to the remedy at issue - the binding quality of the ECtHR’s judgments were questioned among some politicians, at least to a certain extent. It might not be unlikely that this attitude decelerates the legislative procedure, which, admittedly, requires in any case some time. The Federal Government declared, on the other hand, that it acknowledged the necessity to introduce a domestic remedy.<sup>126</sup>

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<sup>117</sup> ECtHR, *Sürmeli v. Germany*, judgment of 8 June 2006, no. 75529/01.

<sup>118</sup> *Ibid.*, para. 119.

<sup>119</sup> *Ibid.*, para. 116.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, para. 137.

<sup>122</sup> *Ibid.*, para. 138,

<sup>123</sup> *Ibid.*

<sup>124</sup> Council of Europe, Committee of Ministers, Annotated Agenda, 1020th meeting (DH), 4-6 March 2008, Section 4.2.

<sup>125</sup> *Ibid.*

<sup>126</sup> See the response of the Federal Government on a written question of the Federal Democratic Party in the German Parliament. Deutscher Bundestag, Drucksache 16/7655, para. 2.

### **3. Interim conclusion**

It is worth mentioning that these subjects concern two sensitive issues. The ideal of the family, mainly supported by the mother, and the systemic dearth in the legal system, as it was found by the ECtHR. With regard to the family bounds, it can only be assumed that the overtly non compliance may root in a conservative understanding of the role of the mother who is supporting the family and who is responsible for the goodwill of a child. This view endorses even the opinion to maintain the links to the foster family, as it was the case in *Görgülü*, than to the biological father. As the ECtHR touches a societal sensitive issue, divergences between the protection by the Basic Law and the ECHR occurred. The same applies to the acceleration remedy. This refers to the whole judicial system as it openly questions the efficiency of the German judicial order. It can be asserted that these cases exemplifies the problems faced in implementation if the judgments stemming from Strasbourg do not fit easily into the German legal order.

#### **E. From implementation to legislative and policy change**

This paragraph is dedicated to explain some decisive issues that refer to the broader perspective of implementation. Additionally, this chapter summarizes the political effect the judgments of the ECtHR and the ECHR have in Germany. In which way are judgments utilized to underpin political claims, how does the political opposition argue with the ECtHR and raise questions against the background of the case law, and which stance take the civil society and the media are topics which shall be outlined in this chapter.

#### **I. General awareness of human rights issues in Germany**

In general, human rights and the protection of human rights are perceived as the predominant factor of a functioning modern democratic society. Despite some minor, negligible currents in the political arena and in some social quarters, it is a common concept that human rights and the values transported with them have to be upheld because the respect of human rights guarantees a balance between the existing political and state powers and the individual. Therefore, as stated in most of the interviews, non-governmental organizations that transmit and promote ethical values and a deeper understanding of human rights play a decisive role in German society.

However, real human rights issues are considered to appear abroad and not in Germany, albeit the situation of immigrants, *sans-papiers*, the development concerning state surveillance, social issues, the activities of German forces abroad with regard to the comparability with human rights standards, and the role in the European Union concerning sensitive human rights issues in areas like asylum, immigration, and the transference of personnel data within the EU are some examples in which Germany itself is affected. Nevertheless, the high number of complaints lodged with the Federal Constitutional Court and, subsequently, the ECtHR allows the assertion that a general awareness of human rights issues exists in Germany, even though specific areas or possible infringements can not be named.

#### **II. Public awareness of the ECHR and the judgments of the ECtHR**

The public awareness of the ECtHR and the judgments can be seen as an important issue because it is that public awareness that may trigger a broader societal movement leading to political pressure. However, the ECHR and the ECtHR are not acknowledged as the main actors in promoting and protecting human rights in Germany. Even though this attitude has

changed incrementally over the last years, especially after the judgments in the land reform cases, with the case *Hannover v. Germany* and with regard to other cases relating to the German reunification, it can arguably be assumed that the impact on the national legal order has not been fully acknowledged. Although, and this has to be stated positively, the consciousness has grown towards the mutual influences. As mentioned in other passages of the report, the predominant role of the Basic Law and the Federal Constitutional Court in promoting the respect for human rights and protecting them in the complaint procedure (*Individualbeschwerde*) influence the public perception.

This can be evidenced, additionally, with regard to the media coverage. Most of the cases judged in Strasbourg, which pertain to all member states of the Council of Europe, do not find an adequate coverage in the national media at all. This even counts to some of the adverse judgments against Germany that are hardly or not mentioned at all in the press.<sup>127</sup> Admittedly, most of the important cases are covered by the German press. There was an extensive coverage of the case *Hannover* against Germany.<sup>128</sup> The judgments of the ECtHR in *Hannover* and *Görgülü* even triggered a comprehensive discussion in the public media with regard to the relationship of the Federal Constitutional Court and the ECtHR and the binding effects of ECtHR's judgments.<sup>129</sup> However, the low number of cases finding a violation outside of the scope of the more technical questions pertaining to Art. 6 ECHR seems not to have the potential to change the general awareness towards the ECHR.

### **III. The civil society. How do non-governmental organizations and other actors in Germany take the ECHR and the ECtHR into account?**

The civil society in Germany can be deemed vibrant and specialised in many different human rights areas. 50 non-governmental organizations based in Germany have established a network with its own office in Berlin called the *Forum Menschenrechte (Forum of Human Rights)*.<sup>130</sup> The organizations that are members of the network are rooted in very different societal backgrounds including church organizations, political foundations, journalists' organizations, human rights organizations specialized in immigration law, asylum law, and questions of inner security and anti terrorism measures, anti-racist organizations, and organizations promoting the rights of homosexuals. Their activities to promote a more comprehensive protection of human rights are carried out worldwide, within specific regions or within Germany, depending on the objectives of each institution.

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<sup>127</sup> This applies to the case *Sürmeli v. Germany* (ECtHR, judgment of 8 June 2006, no. 75529/01) and *Jalloh v. Germany* (judgment of 11 July 2006, no. 54810/00), which were covered by the newspaper "die tageszeitung" and the weekly magazin "Die Zeit". See: *Mustafa Sürmeli*, *Die Zeit*, Nr. 25, 2006; *Zu spät für die Toten*, die tageszeitung, taz Nord of 13 July 2006, p. 21; *Kotzen ist Menschenrecht*, die tageszeitung of 12 July 2006, p. 3. The case *Keles v. Germany* (ECtHR, judgment of 27 October 2005, no. 32231/02), which triggered a discussion among legal practitioners, found no reflection of this in the public media.

<sup>128</sup> See, inter alia, *Das blaue Blut*, die tageszeitung of 1 September 2004, p. 17; *Ein unbehaglicher Zustand*, Frankfurter Rundschau of 3 September 2004, p. 21; *Noch nicht in das deutsche Bewusstsein gedrungen*, Frankfurter Allgemeine Zeitung of 13 September 2005, p. 4; *Schwarzer Mittwoch*, Frankfurter Allgemeine Zeitung of 2 September 2004, p. 38; *Das Caroline-Komplott*, *Die Zeit*, Nr. 37, 2004.

<sup>129</sup> *Straßburg ist kein oberstes Rechtsmittelgericht*, Frankfurter Allgemeine Zeitung of 9 December 2004, p. 5; *Über das nationale Recht neu nachdenken*, Frankfurter Allgemeine Zeitung of 4 February 2006, p. 4; *Bundesverfassungsgericht. Präsident Papier mahnt Straßburger Richter*, Frankfurter Rundschau of 18 February 2005, p. 4; *Straßburger Urteil zählt. Verfassungsgericht klärt Rang von Richtersprüchen*, Frankfurter Rundschau of 20 October 2004, p. 1; *Straßburger Urteile nicht bindend*, *Die Welt* of 20 October 2004, p. 4.

<sup>130</sup> According to their website, the Forum Menschenrechte is composed of 50 organizations. [http://forum-menschenrechte.de/cms/front\\_content.php?idart=225](http://forum-menschenrechte.de/cms/front_content.php?idart=225), accessed in April 2008.

With regard to Germany, however, no non-governmental organization works mainly in the field of promoting and assisting the implementation of ECtHR's judgments. No systematic mechanism is provided or supported by non-governmental organizations that could monitor the implementation of judgments, neither for adverse judgments against Germany nor against other countries that might have an effect on the national legal order. The same applies to counselling individual litigants who want to assess the potential success of a litigation if they brought their case before the Strasbourg Court. The latter statement has to be seen as a corollary of the national legal advice system, which does generally not allow legal counselling outside the frame of legal professionals.

As for the political debate, only few of them refer to the ECHR and the ECtHR in their political statements or in their lobbying activities. It can be observed that in the political debate and in the way non-governmental human rights organizations work in Germany, the ECHR and the jurisprudence of the ECtHR is not deemed as the main source of reference to underpin an argument. This counts for the process in the wake of contentious draft legislations, the lobbying process or in broader sense to ignite effectively a public debate or even a societal change. In some very controversial human rights topics, like the right to respect for private life v. state surveillance, the ECHR is not taken into consideration.

One exception can be observed regarding the role of non-governmental organizations concerning asylum law and immigration law. Some organizations seek to promote and enhance the compliance of court decisions, the legislation and the administrative practice with the ECHR. Namely *amnesty international*, *German section* and *Pro Asyl* monitor regularly the development of the case law stemming from the ECtHR and the implementation within the German legal order. This includes talks with the Federal Ministry of Justice, the support of individual litigants with financial aid, informational campaigns, and the publishing of statements drawing from the analysis of the case law and the existing legal practice.<sup>131</sup>

#### **IV. The German Federal Parliament (Deutscher Bundestag). Political processes in the Federal Parliament. Some general remarks**

##### **1. How does the German Parliament comply with judgments?**

A general topic raised during the interviews concerned the question whether the judgments of the ECtHR are acknowledged and, in cases against Germany, executed by the Federal Parliament if the judgment suggests to initiate a legislative process. With regard to the already existing examples of legislative initiatives, it could be observed that the Federal Parliament generally complies with the ECtHR's judgments. In addition, it was congruently stated that the Federal Parliament would react in cases of an adverse judgment against Germany. This was evidenced after the judgment *Luedicke and others v. Germany*<sup>132</sup> in which the ECtHR found a breach of Art. 6 ECHR because the defendant had to pay the costs for the interpreter

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<sup>131</sup> A good example of how the expertise of a non-governmental organization is incorporated into a court decision can be seen in the decision of the administrative court in Gießen that adjudged whether the Greek asylum system complies with European norms and human rights standards. The factual background on the situation in Greece was partly submitted by *Pro Asyl*. See Verwaltungsgericht Gießen, Beschluss vom 25. April 2008, Az: 2 L 201/08.Gl.A Siehe auch Pressemitteilung von *Pro Asyl*, VG Gießen setzt Überstellung einer afghanischen Flüchtlingsfamilie nach Griechenland aus. 29 April 2008, [http://www.proasyl.de/de/archiv/presseerklarungen/presse-detail/news////vg\\_giessen\\_setzt\\_ueberstellung\\_einer\\_afghanischen\\_fluechtlingsfamilie\\_nach\\_griechenland\\_aus/back/105/chash/b97d0e6758/index.html](http://www.proasyl.de/de/archiv/presseerklarungen/presse-detail/news////vg_giessen_setzt_ueberstellung_einer_afghanischen_fluechtlingsfamilie_nach_griechenland_aus/back/105/chash/b97d0e6758/index.html), accessed 29 April 2008.

<sup>132</sup> ECtHR, judgment of 28 November 1978, no. 6210/73.

in a criminal court proceeding after being found guilty. When the judgment was delivered in 1978, the impugned cost provision was amended by the Federal Parliament in 1980.<sup>133</sup>

However, the existing controversial debate about the introduction of a forced acceleration remedy in court proceedings with an excessive length and the duration it took to alter the provisions for the costs for interpreters in regulatory offence proceedings (Ordnungswidrigkeitsverfahren) could indicate that the implementation process is implicitly procrastinated. In the latter example of the costs for the interpreters in the regulatory offence procedures, the German lawmaker needed five years to amend the impugned law with regard to the judgment in 1984 in the case *Öztürk v. Germany*.<sup>134</sup> This process does not necessarily emanate from a concerted action. One aspect might be the deviating legal view in this issue common in Germany that prolonged the implementation in the *Öztürk* case.<sup>135</sup> It is also possible that the workload of the Members of Parliament, the predominant role of the Federal Constitutional Court and the fact that only some Members of Parliament regularly monitor the judgments of the ECtHR obfuscate the clear obligation to comply with judgments within the scope of the domestic legal order. In conclusion, the hypothesis may deem justifiable that it is generally accepted to comply with ECtHR's judgments, albeit some of the circumstances that are inherent to a political process may procrastinate the prompt implementation to a certain extent.

## 2. The process to establish reopening procedures

As already mentioned earlier, the reopening provisions in the German legal order were introduced in 1998 concerning the Criminal Code of Procedure and in 2006 concerning the Civil Code of Procedure. The existing four other branches of judicial procedures - administrative, labour, social, and financial - entail respectively an article declaring the reopening procedure applicable in cases in which the ECtHR found a violation. Taking into consideration that Germany agreed in 1955 on the individual petition system of the ECHR, the question arguably arises why the federal legislator needed 43 years respectively 51 years to adopt reopening provisions.<sup>136</sup> Admittedly, in the first years the ECtHR did not decide many cases in which Germany was found violating the ECHR. The first judgment against Germany was pronounced in 1968 in which the ECtHR could not discern any infringements.<sup>137</sup> The first judgments that concluded that Germany had violated the ECHR were submitted in 1978.<sup>138</sup> Starting from that date, Germany was found violating the ECHR regularly, although the number of cases remained low. The next adverse judgments were decided by the ECtHR in 1982 and 1983 respectively.<sup>139</sup> The latest developments between

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<sup>133</sup> BGBl. 1980 I, S. 1506-1507. See: O. Kieschke, *Die Praxis des Europäischen Gerichtshofs für Menschenrechte und ihre Auswirkungen auf das deutsche Strafverfahrensrecht*, Berlin 2003, pp. 72-94.

<sup>134</sup> Following *Luedicke* the ECtHR decided in *Öztürk v. Germany* in 1984 that the costs provision regarding regulatory offence procedures violates the ECHR as well. ECtHR, judgment of 21 February 1984, no. 8544/79. Subsequently, the German lawmaker amended the relevant legislation in accordance with the Court's findings. The legislator rectified the law in 1989 (Gesetz vom 15. Juni 1989, BGBl. 1989 I, S. 1083) and amended the relevant provisions in the Court Costs Act and the Code of Criminal Procedure respectively. See: Kieschke, pp. 94-115 and D. Rzepka, *Zur Fairness im deutschen Strafverfahren*, Frankfurt a.M. 2000, pp. 80-82. See also Council of Europe, *General measures adopted to prevent new violations of the European Convention on Human Rights*, H/Exec (2006)1, updated June 2005, p. 56.

<sup>135</sup> Kieschke, p. 115.

<sup>136</sup> 43 years concerning the Criminal Code of Procedure and 51 years concerning all other Code of Procedures.

<sup>137</sup> ECtHR, *Wemhoff v. Germany*, judgment of 27 June 1968, no. 2122/64.

<sup>138</sup> ECtHR, *König v. Germany*, judgment of 28 June 1978, no. 6232/73; ECtHR, *Luedicke and others*, judgment of 28 November 1978, no. 6210/73; 6877/75; 7132/75. Both cases concerned an infringement of Art. 6 ECHR.

<sup>139</sup> ECtHR, *Eckle v. Germany*, judgment of 15 July 1982, no. 8130/78; ECtHR, *Pakelli v. Germany*, judgment of 25 April 1983, no. 8398/78.

1999 and 2006 regarding the number of cases can be summarized as follows: Germany was found violating the ECHR in 53 cases<sup>140</sup> which can be considered as an incrementally increase of the number of cases compared to 1978.<sup>141</sup> It can only be assumed - with regard to the number of adverse judgments against Germany - that it was not deemed necessary to introduce reopening procedures. And it may also indicate a reluctant attitude towards the full implementation of the ECHR.

### **3. The importance in political debates**

It can be observed, drawing from the analysis of the 14th, the 15th and the recent election period,<sup>142</sup> that the importance of the ECHR in the political debate increases - in small terms - incrementally. Notably the opposition parties submit written and oral questions to the federal government with reference to the ECHR and the judgments of the ECtHR or with the question how a certain judgment was executed. This is a positive development, as it reveals the acceptance of the political actors and the importance of the ECHR. It exemplifies also the growing awareness of the Members of Parliament to monitor the execution of the judgments.

Compared to all debates held in Parliament, however, the number of instances in which a *political claim* is underpinned with the case law of the ECtHR can be deemed almost negligible. This is even enforced by the fact that debates about structural or contractual questions of the ECHR and the Court, namely the controversial debates concerning the 12th Protocol,<sup>143</sup> the adoption of the 14th Protocol,<sup>144</sup> the enforcement of the judicial system of the ECtHR and the execution of the judgments (not concerning a specific judgment),<sup>145</sup> the relationship to the Charta of Fundamental Rights,<sup>146</sup> and budgetary issues<sup>147</sup> play a comparable role. The same can be observed concerning the question how to contextualize the protection system of the ECtHR within the system of the EU and the OSCE.<sup>148</sup> Against the background of motions finally adopted by the Federal Parliament, the actual effect of the ECHR and the judgments seem to be even less important.

## **V. Assessment of the broader political and legal impact of the ECHR in specific issue areas**

### **1. Immigration law**

#### *ECHR and residence status*

The ECtHR decided in a number of cases (not against Germany) whether Article 8 ECHR was taken into full consideration by state authorities with regard to the applicable immigration

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<sup>140</sup> Greer, *The European Convention on Human Rights*, p.77.

<sup>141</sup> It has to be noted that Germany was found violating the ECHR in the following number of cases: 2006 in 6 cases, 2005 in 10 cases, 2004 in 6 cases, 2003 in 10 cases, 2002 in 6 cases, 2001 in 13 cases, and 2000 in 2 cases. No case in 1999. Sources: Greer, *ibid.*; Federal Ministry of Justice, *Bericht über die Rechtsprechung des Europäischen Gerichtshof für Menschenrechte in Verfahren gegen die Bundesrepublik Deutschland im Jahr 2006*, Berlin 2007, p. 1.

<sup>142</sup> The election periods mentioned cover the years from 1998 until today (June 2008).

<sup>143</sup> Germany has not yet adopted the 12th Protocol. See Deutscher Bundestag, Drucksache 16/4647 and Deutscher Bundestag, Plenarprotokoll 15/166, p. 15548ff.

<sup>144</sup> BGBl. 2006, Teil II, vom 28. Februar 2006, p. 138.

<sup>145</sup> Deutscher Bundestag, Drucksache 16/5734, Drucksache 16/5735, and Drucksache 16/5738.

<sup>146</sup> See, inter alia, Deutscher Bundestag, Drucksache 14/3322 and Drucksache 16/3607.

<sup>147</sup> See, inter alia, Deutscher Bundestag, Drucksache 14/7710, pp. 2-3.

<sup>148</sup> Deutscher Bundestag, Ausschuss für Menschenrechte und humanitäre Hilfe. Wortprotokoll 13. Sitzung. Protokoll Nr. 16/13, vom 31.5.2006.



or alien law.<sup>149</sup> Mostly, the question arises whether the decision of the state authorities were proportionate with regard to family bounds of the applicants. These cases have triggered a legal discussion among scholars and practitioners in Germany, under which circumstances foreigners are entitled to receive a legal residence status.<sup>150</sup> Namely § 25 para. 5 of the domestic Residence Act (Aufenthaltsgesetz) in conjunction with Article 8 ECHR stipulates the option to receive a legal residence status because of humanitarian reasons. In a decision from 2006, the Federal Administrative Court clarified that circumstances concerning the ambit of Art. 8 ECHR can result into a legal residence status in accordance with § 25 para. 5 Residence Act (Aufenthaltsgesetz).<sup>151</sup> The Federal Constitutional Court complements this development declaring the criteria of the ECtHR with regard to the ambit of Art. 8 ECHR applicable, particularly pertaining to the proportionate exercise.<sup>152</sup> The decisions made by the Federal Constitutional Court clearly indicate that cases concerning the legal residence status have to be decided in accordance with Article 8 ECHR, even though the Constitutional Court referred to another factual background concerning expulsion.<sup>153</sup> In conclusion, this development exemplifies how the adverse judgments against other states are implemented in the domestic legal order, despite the discussions and controversial decisions by the national courts preceding this development. This has to be highlighted as it is one of the rare areas (within the scope of this project) in which the ECHR alters the judicial and administrative practice concerning immigrants. It can be said that the lacuna existing in the domestic protection system has been closed by the judgments of the ECtHR.

#### *Expulsion of immigrants and the ECHR*

Regarding expulsion orders, the interpretation of Art. 3 ECHR in the light of the ECtHR's jurisdiction is taken into consideration by the courts and the administration. The same applies for the interpretation and applicability of Art. 8 ECHR, which can be evidenced with a recent development of the Federal Constitutional Court. It states in this regard as follows: „The right to respect for private life encompasses the sum of all personal, social and economic relationships that are constitutive for every person's private life (...) and which - with regard to the central meaning those relationships have for the development of a person's personality - can be deemed incrementally important.“<sup>154</sup> This development, to take the jurisdiction into consideration, has to do with the work of several legal scholars and practitioners to promote the case law in that area. Once it is common knowledge among the courts and the administration, it will be taken into consideration. Even though this is another example of a good practice, the transformation of the ECtHR case law did not happen automatically. It needed interested and skilled individuals to accomplish this.

Another interesting example of interrelationship of the domestic legal order, the EU-legal order and the ECHR can be seen in the new Immigration Act. In 2007, the Federal Parliament

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<sup>149</sup> See, inter alia, ECtHR, Sisojeva v. Latvia, judgment of 15 January 2007, no. 60654/00; ECtHR, Slivenko v. Latvia, judgment of 9 October 2003, no. 48321/99; ECtHR, Aristimuno Mendizabal v. France, judgment of 17 January 2006, no. 51431/99; ECtHR, Rodrigues da Silva and Hoogkamer v. Netherlands, judgment of 31 January 2006, no. 50435/99.

<sup>150</sup> See J. Bergmann, Aufenthaltserlaubnis auf Grund von "Verwurzelung", in: Zeitschrift für Ausländerrecht (ZAR) 2007, pp. 128ff.; M. Eckertz-Höfer, Neuere Entwicklungen in Gesetzgebung und Rechtsprechung zum Schutz des Privatlebens, in: Zeitschrift für Ausländerrecht (ZAR) 2008, pp. 41ff.

<sup>151</sup> Federal Administrative Court (BVerwG), judgment of 27 June 2006, no. 1 C 14/05.

<sup>152</sup> See Federal Constitutional Court, decision of 10 August 2007, no. 2 BvR 535/06, para. 19; Federal Constitutional Court, decision of 10 May 2007, no. 2 BvR 304/07, para. 35.

<sup>153</sup> See Eckertz-Höfer, Neuere Entwicklungen in Gesetzgebung und Rechtsprechung zum Schutz des Privatlebens, p. 46.

<sup>154</sup> Non official translation. Federal Constitutional Court, decision of 10 May 2007, no. 2 BvR 304/07, para. 33.

adopted a new legislation revising its existing Immigration Act.<sup>155</sup> The bill was necessary to implement the requirements laid down in the respective EU directives.<sup>156</sup> This process amended comprehensively the legislation and was under scrutiny of several non-governmental human rights organization. Notably, the debates accompanying the adoption of the revised Immigration Act evidences some references to the ECHR. Particularly Article 3, Article 5 and Article 8 ECHR were quoted in various statements in the course of the legislation process.<sup>157</sup> The same applies for the National Human Rights Institute, which published a comprehensive statement on the draft legislation.<sup>158</sup> However, it can be arguably questioned whether the expert statements of the organizations had an impact on the bill.

### *Asylum procedures and ECHR*

In general, the Federal Administrative court complies with the jurisdiction of the ECtHR concerning legal ascertainment of expulsion cases. However, until the new legislation of the Residence Act (Aufenthaltsgesetz) came into force in 2004, the Federal Administrative Court had not acknowledged non state actors inflicting harm.<sup>159</sup> The court argued that degrading or inhuman treatment in the meaning of Article 3 ECHR had to be the repercussion of state actors or organizations.<sup>160</sup> Consequently, the ECtHR notes in *T.I. v. United Kingdom* that the German legal system contains “(...) an apparent gap in protection resulting from the German approach to non-State agent (...)” risks, although the Court concluded that this risk had been diminished to a certain extend.<sup>161</sup> This situation has been rectified by the new legislation stemming from the incorporation of an EU-directive.<sup>162</sup>

A development worth mentioning can be seen in the activities of a human rights organization with regard to the circumstances of asylum seekers in Greece. *Pro Asyl*, a national human rights organization specialised in the protection of asylum seekers and immigrants, submitted a petition with the Federal Parliament requesting to suspend extraditions of asylum seekers to Greece. The organization asserts that the Greek authorities violated the principle of non-refoulement according to the Geneva Convention for Refugees. In this petition, the organization refers to the decision of the ECtHR in the case *T.I. v. United Kingdom* in which the ECtHR ascertains the obligations stemming from Art. 3 ECHR.<sup>163</sup> As there is no final decision made by the petition committee, the outcome can only predicted. It has to be stated,

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<sup>155</sup> Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union vom 19. August 2007, BGBl. 2007, Teil I Nr. 42, S. 1970-2115.

<sup>156</sup> Directive 2002/90/EC, Directive 2003/86/EC, Directive 2003/110/EC, Directive 2003/109/EC, Directive 2004/38/EC, Directive 2004/81/EC, Directive 2003/9/EC, Directive 2004/83/EC, Directive 2004/114/EC, Directive 2005/71/EC, and Directive 2005/85/EC.

<sup>157</sup> See: *Jesuiten-Flüchtlingsdienst*, Stellungnahme des Jesuiten-Flüchtlingsdienstes Deutschland für die Sachverständigen-Anhörung des Innenausschusses des Deutschen Bundestages über das “EU-Richtlinienumsetzungsgesetz” und anderen Vorlagen, Deutscher Bundestag, Innenausschuss A-Drs. 16(4)209E; *amnesty international*, Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, Deutscher Bundestag, Innenausschuss, A-Drs. 16(4)216.

<sup>158</sup> *Deutsches Institut für Menschenrechte*, Stellungnahme für die Anhörung “EU-Richtlinienumsetzungsgesetz” des Innenausschusses des Deutschen Bundestages am 21. Mai 2007, Berlin 2007. Innenausschuss A-Drs. 16(4)2009 J.

<sup>159</sup> See, inter alia, Federal Administrative Court, judgment of 2 September 1997, no. 9 C 40/96, published in: NVwZ 1999, p. 311.

<sup>160</sup> See the summary in: J. Meyer-Ladewig, Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Handkommentar, 2. Auflage, Baden-Baden 2006 Art. 3, paras. 25 and 25 b).

<sup>161</sup> ECtHR, *T.I v. United Kingdom*, decision of 7 March 2000, no. 43844/98.

<sup>162</sup> See Article 6 c), Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

<sup>163</sup> *Pro Asyl*, Petition an den Deutschen Bundestag. Abschiebung von Flüchtlingen nach Griechenland aussetzen, vom 21. Februar 2008.

unfortunately, that petitions seldom alter the administrative practice. On the other hand, an administrative court decided in favour of an asylum seeker not to be extradited because of the circumstances described by *Pro Asyl*.<sup>164</sup>

The recent considerations of the *German Institute for Human Rights* to analyse the obligations of EU Member States to respect the ECHR while organizing the border management of the EU and to underline the commitment they have deriving from the ECHR fall in this context as well.<sup>165</sup> This applies especially to the border management at the sea. This issue has been introduced in the German Parliament by the opposition party *Bündnis 90/Die Grünen*. The party filed a motion to gain information of the Federal Government, *inter alia*, how the government intend to comply with ECHR obligations regarding border management.<sup>166</sup>

The popularity of the ECHR and especially of Art. 3 ECHR in this context can be seen in the extraordinary case law of the ECtHR. The interpretation of Art. 3 ECHR holds the Member States of the Council of Europe accountable for the violation of this provision if the applicant faces a treatment breaching his rights out of Article 3 ECHR in the country in which he or she shall be extradited.<sup>167</sup> As a consequence, the state sovereignty is derogated by an international human rights system, if the country wants to comply with Art. 3 ECHR. The wording of Art. 3 ECHR has been incorporated into the domestic Residence Law. The relevant provision refers to the ECHR and declares that an extradition of a foreigner is prohibited should the extradition not comply with the requirements of the ECHR.<sup>168</sup> It has to be mentioned, additionally, that the Basic Law does not foresee a comparable provision in the light of the interpretation of the ECtHR. This might explain the practical importance for foreigners if they try to avert their extradition.<sup>169</sup>

Human rights organizations can, therefore, refer to Art. 3 ECHR if they want to challenge the domestic legal order or, as it is the case with the European border management, the policy towards the European Union. This powerful lever explains to a certain degree the motion introduced by the conservatives parties being in opposition during the last term.<sup>170</sup> With regard to potential extremists they urged the Federal Government to take the necessary measure on supranational level to allow German authorities to execute expulsion orders.<sup>171</sup> This can only mean to support other governments in cases that can alter the interpretation of Art. 3 ECHR by the Court.<sup>172</sup>

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<sup>164</sup> See Verwaltungsgericht Gießen, Beschluss vom 25. April 2008, Az: 2 L 201/08.Gl.A. See also the press release by *Pro Asyl*, VG Gießen setzt Überstellung einer afghanischen Flüchtlingsfamilie nach Griechenland aus. 29 April 2008, [http://www.proasyl.de/de/archiv/presseerklarungen/presse-detail/news/vg\\_giessen\\_setzt\\_ueberstellung\\_einer\\_afghanischen\\_fluechtlingsfamilie\\_nach\\_griechenland\\_aus/bck/105/chash/b97d0e6758/index.html](http://www.proasyl.de/de/archiv/presseerklarungen/presse-detail/news/vg_giessen_setzt_ueberstellung_einer_afghanischen_fluechtlingsfamilie_nach_griechenland_aus/bck/105/chash/b97d0e6758/index.html), accessed 29 April 2008.

<sup>165</sup> U. Lisson und R. Weinzierl, *Border Management and Human Rights. A study of EU Law and the Law of the Sea*, Berlin 2007, p. 42-70.

<sup>166</sup> Deutscher Bundestag, Drucksache 16/8974. The written question is dated of 24 April 2008. See for the answer of the Federal Government Deutscher Bundestag, Drucksache 16/9204.

<sup>167</sup> ECtHR, *Chahal v. United Kingdom*, judgment of 15 November 1996, no. 22414/93.

<sup>168</sup> See § 60 para 5 Residence Law.

<sup>169</sup> Please note that the German law distinguishes between the residence status a person can receive as a refugee and the residence status because the person can not be extradited.

<sup>170</sup> See Deutscher Bundestag, Drucksache 15/1239.

<sup>171</sup> *Ibid.*

<sup>172</sup> See the pending case *Ramzy v. Netherlands* in which the UK government tried to alter the interpretation of Art. 3 ECHR. Source: Thematic report by *amnesty international*, *German section* of March 2006, <http://www2.amnesty.de/internet/deall.nsf/51a43250d61caccfc1256aa1003d7d38/b849d4f29f29d482c125714200327475?OpenDocument>, accessed 22 May 2008.

## 2. Prohibition of emetics to obtain evidence for criminal court procedures

As stated early, the ECtHR declared the practice to use emetics to receive evidence for a possible criminal court procedure breached Art. 3 ECHR.<sup>173</sup> Even though all institutions suspended the practice directly after the publication of the judgment, some debates occurred in the course of the litigation. The state of Hamburg, which was not the acting state in the case, raised some concerns and questioned whether it had to abide to the judgment. It argued that the ECtHR only decided concerning the single case with no further implications.<sup>174</sup> The Hamburg authorities announced in a first reaction that they wanted to continue with the practice. Shortly afterwards, it declared to terminate the forceful administration of emetics.<sup>175</sup> Drawing from the statements made by official representatives of the Hamburg government in the newspaper, it can be concluded that a recalcitrant attitude was expressed before the practice was fully determined.

## 3. Protection of private data

The opposition party *FDP*, the liberal *Free Democratic Party*, filed a motion in the Federal Parliament concerning the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR).<sup>176</sup> The proposal contains a framework decision on the storage and usage of the PNRs, which comprise the personal data received by the passenger while booking a flight, for the purpose to prevent terrorist offences and organized crime.<sup>177</sup> The proposal foresees the storage of the PNRs of all international flights, i.e. flights from the EU in a third country or to the EU from a third country, for 13 years, although the requirements to lawfully access the respective data alters after five years.<sup>178</sup> The Members of Parliament question the constitutionality of the draft legislation as well as the conformity with Art. 8 ECHR stating that the “(...) systematic and legally not restricted gathering of information (...)”<sup>179</sup> violated Art. 8 ECHR in the light of the case *Rotaru v. Romania*.<sup>180</sup> The same subject was covered by a motion filed by the opposition party *Bündnis 90/Die Grünen* with reference to Article 8 ECHR.<sup>181</sup>

It has to be stated that these motions are rare examples in the Federal Parliament in which the conformity of a draft legislation is questioned against the background of the jurisdiction of the ECtHR. And, as it is common in the Parliament with activities by opposition parties, the motions can be expected to be rejected by the Parliament. The recommendation of the responsible parliamentary Committee proposes to do so.<sup>182</sup>

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<sup>173</sup> These were: Berlin, Bremen, Hamburg, Hesse, and North-Rhine Westphalia according to the Committee of Ministers. See Committee of Ministers, Annotated Agenda, 992nd meeting (DH), 3-4 April 2007, Section 4.2.

<sup>174</sup> See *Zu spät für die Toten*, die tageszeitung, taz Nord, 13 July 2006, p. 21; *Späte Sühne verlangt*, die tageszeitung, taz Nord, 28 July 2006, p. 24.

<sup>175</sup> *Endgültiger Verzicht auf Brechmittel*, Hamburger Abendblatt, 2 August 2006.

<sup>176</sup> See Deutscher Bundestag, Drucksache 16/8115. See for the EU proposal: Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes. 2007/0237 (CNS).

<sup>177</sup> See Art. 1 Proposal 2007/0237 (CNS).

<sup>178</sup> See Art. 9 Proposal 2007/0237 (CNS). Different requirements apply after a first period of five years.

<sup>179</sup> Deutscher Bundestag, Drucksache 16/8115, Nr. 3 d).

<sup>180</sup> ECtHR, *Rotaru v. Romania*, judgment of 4 May 2004, no. 28341/95. See also Deutscher Bundestag, Drucksache 16/8115, Nr. 3.

<sup>181</sup> Deutscher Bundestag, 16/8199.

<sup>182</sup> Deutscher Bundestag, Drucksache 16/9112.

Furthermore, the opposition party *Bündnis 90/Die Grünen* submitted a written question in the Parliament concerning the domestic legislation of intelligence agencies.<sup>183</sup> The party requested to know from the Federal Government, how the government plans to adapt the domestic legislation with regard to the jurisdiction of ECtHR on collection, storage and processing of data collected by the secret service. This case of the ECtHR concerns the collection of information about, inter alia, members of the Swedish Parliament.<sup>184</sup> This is another case in which a political party utilizes the jurisdiction of the ECtHR, although without a political effect as it can be seen in the response of the government. It says that the current legislation already corresponds to the requirements laid down in the judgment.<sup>185</sup>

#### 4. Rights of homosexuals

Another issue area, worth mentioning with regard to the scope of this project, concerns the rights of homosexuals in Germany. The opposition party *Die Linke* requested from the Federal Government some information whether it plans to alter the existing family law regarding the right of homosexuals to adopt children in view of the jurisdiction of the ECtHR.<sup>186</sup> In Germany, homosexual couples can not adopt a child as a couple, which is foreseen in the Civil Code only for heterosexual couples. However, the adoption by one of the partner living in a homosexual relationship is possible. The party referred to a case against France, in which the authorities denied the adoption by one person living in a homosexual relationship.<sup>187</sup> The government answered, thus, that the case did not concern the question of an adoption by a homosexual couple.<sup>188</sup> A more general and a much more comprehensive written request was submitted by the opposition party *Bündnis 90/Die Grünen* in that issue area.<sup>189</sup> The party asked for some information from the government, inter alia, how provisions to guarantee equal treatment of homosexual couples are incorporated and how unequal treatment will be advanced. The reasoning of the request refers to the jurisprudence of the ECtHR in this regard as well.<sup>190</sup> The written question has not yet been answered by the Federal Government.<sup>191</sup>

#### 5. Freedom of press

The judgment in the case *Hannover v. Germany* triggered a written question filed by the *Federal Democratic Party (FDP)*.<sup>192</sup> They requested further information of the Federal Government on the question whether the judgment effects the freedom of press in Germany. The Members of Parliament were mainly interested in the direct legal repercussions the judgment might have in the view of the government. The government stated that comparable cases had to be decided against the background of the judgment of the ECtHR.<sup>193</sup> It contextualized the questions in reiterating the decision of the Federal Constitutional Court concerning the binding quality of judgments (decision of 14 October 2004, no. 2 BvR

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<sup>183</sup> Deutscher Bundestag, Drucksache 16/1808. This concerns the gathering and transmission of information about Members of Parliament.

<sup>184</sup> ECtHR, *Segerstedt-Wiberg and others v. Sweden*, judgment of 6 June 2006, no. 62332/00.

<sup>185</sup> See Deutscher Bundestag, Drucksache 16/2098.

<sup>186</sup> See Deutscher Bundestag, Drucksache 16/8260.

<sup>187</sup> ECtHR, *E.B. v. France*, judgment of 22 January 2008, no. 43546/02.

<sup>188</sup> Deutscher Bundestag, Drucksache 16/8465.

<sup>189</sup> Deutscher Bundestag, Drucksache 16/7550.

<sup>190</sup> Namely ECtHR, *Karner v. Austria*, judgment of 24 July 2003, no. 40016/98 and ECtHR, *Da Silva Mouta*, judgment of 21 December 1999, no. 33290/96.

<sup>191</sup> By 22 May 2008.

<sup>192</sup> Deutscher Bundestag, Drucksache 15/4079.

<sup>193</sup> Deutscher Bundestag, Drucksache 15/4210.

1481/04, Görgülü case).<sup>194</sup> Thus, it enforces the understanding of the importance within the domestic legal order.

Besides the activities in the Parliament, representatives of the press media launched a campaign to lobby the German government.<sup>195</sup> The campaign aimed - without success - to persuade the government that it should request a referral to the Grand Chamber of the ECtHR. The press media hoped that the Grand Chamber might overrule the judgment in the Caroline case.

## 6. Civil service and freedom of expression

The opposition party *Die Linke* ascertained the execution of the judgment *Vogt v. Germany* and claimed the necessity of a broader implementation. In 2002, the party filed a motion in Parliament in which the Federal Government was requested to initiate a legislative procedure.<sup>196</sup> This legislation should concern the cases of dismissals due to the administrative practice with regard to civil servants. It was stated in the motion that at least in 265 cases persons were dismissed from civil service. This number was rectified by the party itself, stating that 130 persons were concerned.<sup>197</sup> Namely, the former decisions of the administrative authorities should be revoked through legislation, damage paid, and the remaining regulations annulled.<sup>198</sup> But the motion was not adopted by the Federal Parliament.<sup>199</sup> In 2007, the party *Die Linke* submitted a written question - concerning the same issue - to the Federal Government, requesting information which general measures the government sought to implement after the judgment *Vogt v. Germany*.<sup>200</sup> The government responded that since the ECtHR's judgment the case has been and is taken into consideration in individual cases.<sup>201</sup> Moreover, the ECtHR had decided in that specific case and thus the judgment did not justify general measures.<sup>202</sup> Even though this initiative can be regarded as an interesting case, it exemplifies the limited political effect the jurisdiction of the ECtHR has, especially when used in written questions and motions from opposition parties.

## 7. Implementation mechanisms and questions of the efficiency of the ECtHR

The currently (2008) governing parties, the *Christian Democratic Union/Christian Social Union* and the *Social Democratic Party of Germany*, adopted a resolution in the Parliament concerning the effective implementation of judgments and the efficiency of the ECtHR.<sup>203</sup> The resolution "Reform of the European Court of Human Rights and enforcement of its judgments through consequent implementation" was adopted in June 2007.<sup>204</sup> The resolution summarizes

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<sup>194</sup> Ibid.

<sup>195</sup> Verband Deutscher Zeitschriftenverleger, Anrufung der Großen Kammer des Europäischen Gerichtshofs für Menschenrechte, 2004, <http://www.kanzlei-prof-schweizer.de/bibliothek/content/02647/index.html>, accessed on 22 January 2007. See also *Schwarzer Mittwoch. Das Bundeskabinett schließt sich dem „Caroline-Urteil“ an*, Frankfurter Allgemeine Zeitung, 2 September 2004, p. 38.

<sup>196</sup> Deutscher Bundestag, Drucksache 14/8083.

<sup>197</sup> Deutscher Bundestag, Drucksache 16/6128.

<sup>198</sup> Deutscher Bundestag, Drucksache 14/8083.

<sup>199</sup> Deutscher Bundestag, Drucksache 14/8967.

<sup>200</sup> Deutscher Bundestag, Drucksache 16/6128.

<sup>201</sup> Deutscher Bundestag, Drucksache 16/6210.

<sup>202</sup> Ibid.

<sup>203</sup> Deutscher Bundestag, Drucksache 16/5734. The question of execution was also raised in a public hearing of the Committee on Human Rights and Humanitarian Aid, however not comprehensively. See Deutscher Bundestag, Ausschuss für Menschenrechte und humanitäre Hilfe. Wortprotokoll 13. Sitzung. Protokoll Nr. 16/13, vom 31.5.2006, pp. 20ff.

<sup>204</sup> Deutscher Bundestag, Plenarprotokoll 16/105, S. 10794ff.

the current circumstances regarding the pending cases, the reform of the ECtHR as it can be seen in the 14th Protocol, the need to increase the staff at the registrar, and the recommendations made by the Group of Wise persons with regard to the ECtHR. Two brief statements concern the implementation mechanisms in Germany. Firstly, the Federal Parliament declares its willingness to establish a monitoring mechanism in the Parliament to enhance the implementation of adverse judgments. Secondly, it urges, therefore, the Federal Government to inform the appropriate committee in the Parliament annually about the status of execution.<sup>205</sup>

## **F. Conclusion**

The empirical research has clearly shown that the impact in the domestic legal order and in the political debate of the ECHR and judgments of ECtHR against Germany in the scope of this project can be deemed limited. The vast majority of human rights violations are redressed through the existing domestic mechanisms. The predominant role of the domestic mechanisms are mirrored in the low number of adverse judgments against Germany, the relatively low public awareness of the work done by the ECtHR, the low political importance of ECtHR's judgments in the Federal Parliament, the low importance of ECtHR's judgments among most of the non governmental organization, and - if it comes to a conflict between the different legal orders - in the debate after an adverse judgment about the binding forces of it. When it comes to the judiciary, it can be assumed that they comply in general with the judgments of the ECtHR, although the dissemination seems to be improvable. The sole exception was found in the area of immigration law concerning the rights of foreigners stemming from Art. 3 and Art. 8 ECHR.

On the other hand the study also evidenced that the ECtHR and the ECHR have altered or had an impact in some specific areas. This counts for the administration, jurisdiction or the legislation in the following areas under study: Immigration law concerning residence status stemming from the respect for family life and non-refoulement, the notion of a public person and the domestic jurisdiction to prohibit the publication of photos, the prohibition of emetics to gain evidences in criminal procedures, and the transference of the costs for an interpreter in criminal procedures. The development in the wake of the judgment in the Görgülü case enhanced the overall importance of the ECHR. Moreover, it is likely that a remedy in cases of excessive length of procedure (a forced acceleration remedy) will be adopted in future. The impact has also been noteworthy in the whole criminal procedure, which was not under study but should be mentioned nevertheless. In some areas, like in the case von Hannover, the case Vogt, and in the cases concerning the secret state surveillance, some elements of a broader impact or broader societal aim can be observed.

When it comes to implementation of the analysed case law, it can be observed that the execution system functions well and the reception of judgments seems to be common, although some aspects might be enhanced. The systematic collection and translation of the ECtHR jurisprudence, as it is initiated by the Federal Ministry of Justice, will surely facilitate the access to the case law for lawyers and judges respectively. Looking at the execution of single judgments, the case of the conscious disregard of the ECtHR in the wake of the Görgülü judgment by a Higher Regional Court can be regarded as an exception, although it depicts in an outstanding way the sometimes ambiguous attitude towards international standards not uncommon in Germany.

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<sup>205</sup> Ibid.

This leads to the conclusion that human rights protection in Germany still focuses on domestic mechanisms. Admittedly, they function effectively. But they obfuscate in the same time the European developments and hinder the understanding of the interrelated nature of both protection systems. Secondly, the ECHR and the ECtHR play an important role in cases challenging the sovereignty of the state (as for immigration cases) and when the ECtHR can rectify single aspects. In this regard it serves as an subsidiary institution. Finally, the ECtHR provides with its case law the prerequisite for a broader understanding of a common European human rights legal order.



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## Annex Sources of empirical research

### I. List of legal experts, authority representatives and parliamentary representatives interviewed for this report<sup>206</sup>

#### *Legal experts*

Council of Europe's Group of Wise Persons  
Former German Member of the Group of Wise Persons

Max Planck Institute for Comparative Public Law and International Law  
Former Director  
Former German member of the European Commission of Human Rights, Council of Europe

University of Bremen  
Former German judge at the ECtHR

University Robert Schuman of Strasbourg  
Director of the Research Institute Carré de Malberg on public law

Legal policy correspondent of *die tageszeitung* and other print-media

Bündnis 90/Die Grünen  
Section human rights at the federal section of the party  
Scientific Researcher

#### *Officials of the Council of Europe*

European Court of Human Rights  
German judge at the ECtHR

European Court of Human Rights  
Former Chancellor (Registrar) of the ECtHR

European Court of Human Rights  
Section Registrar

Department for the Execution of Judgments of the European Court of Human Rights  
Deputy Head of the Department

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<sup>206</sup> In this report, only the affiliated institutions and the positions of the interviewees are listed.

### ***Members of the Federal German Parliament***

Members of the German Federal Parliament from the following parties were interviewed:

The *Sozialdemokratische Partei Deutschlands (SPD)*

The *Freie Demokratische Partei (FDP)*

The *Christlich Demokratische Union Deutschlands (CDU)/Christlich-Soziale Union (CSU)*

*Die Linke*

Most of the interviewed MPs are members of the Committee on Human Rights and Humanitarian Aid and/or of the German delegation at the Parliamentary Assembly of the Council of Europe

### ***Judges from domestic courts***

Federal Constitutional Court  
Judge at the Court

Federal Administrative Court  
President of the Court

Federal Court of Justice  
Chief judge at the Court  
Criminal Division

Higher Regional Administrative Court of North-Rhine Westphalia (Nordrhein-Westfalen)  
President of the Court

### ***Officials from the Federal Government***

Federal Foreign Office  
Permanent Mission of Germany to the Council of Europe  
Ambassador and First Secretary

Federal Ministry of Justice  
Federal Government Commissioner for Human Rights Matters at the Ministry of Justice  
Representative (Agent) of the German Federal Government before the ECtHR

### ***Representatives of state administrations***

State Ministry of the Interior and Sports  
State of Rhineland-Palatinate (Rheinland-Pfalz)

Police Director at the Land North-Rhine Westphalia (Nordrhein-Westfalen)

***Representatives of human rights organizations (National Human Rights Institution and NGOs)***

amnesty international, section Germany  
Junior researcher for asylum law

German Institute for Human Rights  
Director

Humanistische Union (Civil Rights Union)  
President and Vice president

Pro Asyl  
Legal Officer

## **II. Data and documentation**

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- DH(89)31
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#### **b) Interim Resolution**

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- Council of Europe, Committee of Ministers, Annotated Agenda, 1007th meeting, (DH), 15-17 October 2007, section 4.2 and section 4.3
- Council of Europe, Committee of Ministers, Annotated Agenda, 992nd meeting (DH), 3-4 April 2007, Section 4.2
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#### **b) ECtHR-judgments against other countries than Germany**

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- ECtHR, Rodrigues da Silva and Hoogkamer v. Netherlands, judgment of 31 January 2006, no. 50435/99
- ECtHR, Aristimuno Mendizabal v. France, judgment of 17 January 2006, no. 51431/99
- ECtHR, Rotaru v. Romania, judgment of 4 May 2004, no. 28341/95
- ECtHR, Slivenko v. Latvia, judgment of 9 October 2003, no. 48321/99

- ECtHR, Karner v. Austria, judgment of 24 July 2003, no. 40016/98
- ECtHR, T.I v. United Kingdom, decision of 7 March 2000, no. 43844/98
- ECtHR, Chahal v. United Kingdom, judgment of 15 November 1996, no. 22414/93

### **c) EU-law**

- Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes. 2007/0237 (CNS)
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

### **d) Domestic law**

Basic Law  
 Immigration Act  
 Federal Child Benefit Act (Bundeskindergeldgesetz)  
 Rechtsdienstleistungsgesetz  
 Civil Code of Procedure  
 Criminal Code of Procedure  
 Administrative Court Code of Procedure  
 Social Court Code of Procedure  
 Labour Court Code of Procedure  
 Financial Court Code of Procedure

### **e) Domestic case law**

#### *Federal Constitutional Court*

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- Federal Constitutional Court, decision of 10 August 2007, no. 2 BvR 535/06
- Federal Constitutional Court, decision of 10 May 2007, no. 2 BvR 304/07
- Federal Constitutional Court, decision of 9 February 2007, 1 BvR 217/07, 1 BvQ 2/07
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*Administrative Court*

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- Deutscher Bundestag, Drucksache 16/8199
- Deutscher Bundestag, Drucksache 16/8115
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- *Zu spät für die Toten*, die tageszeitung, taz Nord, 13 July 2006, p. 21
- *Kotzen ist Menschenrecht*, die tageszeitung, 12 July 2006, p. 3.
- *Das blaue Blut*, die tageszeitung, 1 September 2004, p. 17
  
- *Das Caroline-Komplott*, Die Zeit, Nr. 37, 2004
- *Mustafa Sürmeli*, Die Zeit, Nr. 25, 2006
  
- *Endgültiger Verzicht auf Brechmittel*, Hamburger Abendblatt, 2 August 2006

**Annex**  
**Table of judgments and decisions in the German case study<sup>207</sup>**

**Article 3 ECHR cases**

| No. | Application No. | Name of case      | Applicant/Nationality  | Date              | Type of Decision        | Article raised  | Violation of ECHR | Facts, Field of domestic law/policy area  | Reasoning of the ECtHR <sup>208</sup>   | Final Res.    |
|-----|-----------------|-------------------|--|-------------------|-------------------------|-----------------|-------------------|---|---|---------------|
| 1   | 54810/00        | Jalloh v. Germany | Male applicant/Sierra Leonean national                       | 11 July 2006      | Judgment, Grand Chamber | Art. 3, Art. 6  | Art. 3, Art. 6    | In 1993, the police saw the applicant how he took two tiny plastic bags out of his mouth and gave them to someone else for money. They arrested the applicant on suspicion of drug-dealing whereupon he swallowed another bag that he had in his mouth. No drugs were found on the applicant's person, the prosecutor ordered the administration of an emetic under Section 81a of the German Code of Criminal Procedure. This provision is interpreted by many German courts and writers as a sufficient legal basis to secure evidence through an interference with the suspect's physical integrity without his or her consent. The applicant was taken to hospital where he refused to take medication to induce vomiting. He was then restrained by four policemen while a doctor forcibly administered emetics by nasogastric tube and by injection. The applicant then regurgitated a small bag containing 0.2182g of cocaine. (2)<br><br>Police law | The European Court held that by administering emetics by force verging on brutality for the mere purpose of securing evidence of an offence, the authorities had gravely interfered with the applicant's physical and mental integrity. It also noted that the authorities fully realised that the applicant was selling drugs in small quantities, as is reflected in the subsequent sentence. Thus recourse to an emetic was not indispensable, as the evidence might have been obtained by less invasive means (elimination by the normal process of nature) (§§77-79) (violation of Article 3). (2) | Pending       |
| 2   | 28526/05        | Kaldik v. Germany | Female applicant/Turkish national with Kurdish ethnic origin | 22 September 2005 | Decision                | Art. 3, Art. 13 | No                | Expulsion of Turkish national with Kurdish background after dismissal of political asylum application.<br><br>Asylum law  | Manifestly ill-founded. Inadmissible  | Not necessary |

<sup>207</sup> Cases are listed pertaining to the scope of the Juristras project and the German case study. Judgments and decisions delivered until June 28, 2008 are covered.

<sup>208</sup> Facts and reasonings marked with (1) are quotations of the ECtHR adapted to the table. Reasonings marked with (2) are quotations of the Committee of Ministers, Council of Europe adapted to the table.

|    |          |                               |  |                 |                                  |                |                        |  |  |                 |
|----|----------|-------------------------------|--|-----------------|----------------------------------|----------------|------------------------|--|--|-----------------|
| 3  | 72032/01 | Aronica v. Germany            | Male applicant/Italian national                    | 18 April 2002   | Decision                         | Art. 2, Art. 3 | No                     | An Italian national faced extradition to Italy after he had been convicted by an Italian criminal court.<br><br>Residence Law  | Manifestly ill-founded. Inadmissible   | Not necessary   |
| 4  | 51342/99 | Kalantari v. Germany          | Male applicant/Iranian national                    | 11 October 2001 | Judgment; struck out of the list | Art. 3         | Struck out of the list | Iranian applying for political refugee status in Germany.<br><br>Asylum Law  | Struck out of the list after the Federal Office for Refugees had declared a bar of expulsion. No decision about residence permit | ResDH (2002)154 |
| 5  | 61479/00 | Damla and others v. Germany   | Family/Turkish nationals                           | 26 October 2000 | Decision                         | Art. 3         | No                     | Turkish nationals belonging to the Yezidis community applied for political asylum because of the situation for them in Turkey.<br><br>Asylum Law   | Manifestly ill-founded. Inadmissible   | Not necessary   |
| 6  | 47547/99 | Ebrahimzadeh v. Germany       | Male applicant/Iranian national                    | 29 June 1999    | Decision                         | Art. 3         | No                     | An Iranian national applied for political asylum.<br><br>Asylum Law  | Manifestly ill-founded. Inadmissible   | Not necessary   |
| 7  | 44911/98 | Allaoui and others v. Germany | Family/Lebanese national                           | 19 January 1999 | Decision                         | Art. 3         | No                     | A Lebanese Family faced expulsion to Lebanon after staying in Germany for 8 years.<br><br>Residence Law  | Manifestly ill-founded. Inadmissible   | Not necessary   |
| 8  | 44667/98 | Loganathan v. Germany         | Male applicant/Tamil from Sri Lanka                | 8 December 1998 | Decision                         | Art. 3         | No                     | A Tamil from Sri Lanka applied for political asylum because of the civil war in Sri Lanka.<br><br>Asylum Law   | Manifestly ill-founded. Inadmissible   | Not necessary   |
| 9  | 37669/97 | Ariz and others v. Germany    | Family/Turkish national with Kurdish ethnic origin | 30 October 1998 | Decision                         | Art. 2, Art. 3 | No                     | A Kurdish family from Turkey applied for political asylum because of links to the PKK.<br><br>Asylum Law   | Manifestly ill-founded. Inadmissible   | Not necessary   |
| 10 | 43891/98 | Bezabi v. Germany             | Male applicant/Ethiopian national                  | 29 October 1998 | Decision                         | Art. 3         | No                     | The applicant alleged a violation of Art. 3 ECHR in virtue of his forthcoming expulsion after his application for political asylum on the grounds of belonging to the Oromo minority had been dismissed.<br><br>Asylum Law | Manifestly ill-founded. Inadmissible   | Not necessary   |
| 11 | 47638/99 | Basika-Nkinsa v. Germany      | Male applicant/Angolan national                    | 31 August 1999  | Decision                         | Art. 3         | No                     | The applicant applied for political asylum on the grounds of political activities in Angola.<br><br>Asylum Law   | Manifestly ill-founded. Inadmissible   | Not necessary   |

|    |          |                                  |  |                                    |                                 |                |             |   |   |               |
|----|----------|----------------------------------|--|------------------------------------|---------------------------------|----------------|-------------|---|---|---------------|
| 12 | 41088/98 | Amirthalingam v. Germany         | Male applicant/Tamil ethnic origin                 | 18 September 1998                  | Decision                        | Art. 3         | No          | A Tamil from Sri Lanka applied for political asylum because of the civil war in Sri Lanka.<br><br>Asylum Law  | Manifestly ill-founded. Inadmissible    | Not necessary |
| 13 | 40866/98 | Atak and others v. Germany       | Family/Turkish national with Kurdish ethnic origin | 18 September 1998                  | Decision                        | Art. 3         | No          | The applicants are Turkish citizens of Kurdish origin and applied for political asylum on the grounds of state persecution in Turkey.<br><br>Asylum Law   | Manifestly ill-founded. Inadmissible    | Not necessary |
| 14 | 39683/98 | Asadi v. Germany                 | Female applicant/Iranian national                  | 10 September 1998                  | Decision                        | Art. 3         | No          | Iranian national applied for political asylum on the grounds of state prosecution in Iran.<br><br>Asylum Law  | Manifestly ill-founded. Inadmissible    | Not necessary |
| 15 | 41356/98 | Sewa and Poovi Wilson v. Germany | Family/Togo national                               | 29 May 1998                        | Decision                        | Art. 3         | No          | Citizens from Togo applied for political asylum.<br><br>Asylum Law  | Manifestly ill-founded. Inadmissible    | Not necessary |
| 16 | 14312/88 | El-Makhour v. Germany            | Female Applicant/Lebanese or Palestine national    | 10 July 1989 (Friendly Settlement) | Friendly Settlement, Commission | Art. 3, Art. 8 | Not decided | Citizen from Lebanon or Palestine (nationality is disputed between the parties) faced expulsion and thus a separation from her family. After the Commission declared the application admissible (Decision of 3 March 1989), the Berlin Senator for the Interior granted a provisional residence permit on probation.<br><br>Residence Law | Parties agreed on a friendly settlement | Not necessary |

#### Article 5 ECHR case

| No. | Application No. | Name of case      | Applicant/ Nationality           | Date         | Type of Decision  | Article raised         | Violation of ECHR | Facts, Field of domestic law/policy area   | Reasoning of the ECtHR  | Final Res.           |
|-----|-----------------|-------------------|----------------------------------|--------------|-------------------|------------------------|-------------------|--|---|----------------------|
| 17  | 61603/00        | Storck v. Germany | Female Applicant/German national | 16 June 2005 | Judgment, Chamber | Art. 5, Art. 6, Art. 8 | Art. 5, Art. 8    | The case concerns the unlawfulness of the applicant's detention in a locked ward of a private psychiatric clinic for 20 months in 1977-1979 at her father's request following family conflicts, as well as medical treatment administered to her against her will.<br><br>The applicant, who had attained her majority at the time, was not subject to a declaration of incapacity and had | The ECtHR decided that there had been a violation of Article 5 ECHR (unlawfully detention) and of Article 8 ECHR (medical treatment against the will of the applicant). | CM/Res DH (2007) 123 |

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|  |  |  |  |  |  |  |  | <p>never signed any form of declaration consenting to her detention, which was moreover not authorised by judicial decision. The cost of her internment and treatment were borne by the state health insurance.</p> <p>She made repeated attempts to escape from the clinic and was forcibly brought back by the police in March 1979. After medical treatment in the clinic for what was thought to be schizophrenia, she developed post-poliomyelitis syndrome and is today 100% disabled. Between 1980 and 1992 she was unable to speak. Two reports, in 1994 and 1999, confirmed that the applicant had never suffered from schizophrenia. (2)</p> <p>Domestic civil reimbursement law<br/>Public Law of psychiatric clinics</p> |  |  |
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#### Article 6 ECHR cases

| No. | Application No.                 | Name of case                          | Applicant/<br>Nationality                             | Date             | Type of Decision  | Article raised              | Violation of ECHR | Facts,<br>Field of domestic law/policy area   | Reasoning of the ECtHR   | Final Res. |
|-----|---------------------------------|---------------------------------------|---|------------------|-------------------|-----------------------------|-------------------|---|--|------------|
| 18  | 6210/73;<br>6877/75;<br>7132/75 | Luedicke, Belkacem and Koc v. Germany | Male applicants/Algerian, Briton and Turkish national | 28 November 1978 | Judgment, Chamber | Art. 6, Art. 6 with Art. 14 | Art. 6            | <p>The applicants were charged with the costs for the interpreter in a German criminal procedure.</p> <p>Criminal Code of Procedure Law</p>                                 | The Court concludes that the right protected by Article 6 para. 3 (e) (art. 6-3-e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred. (1) | DH(83)4    |
| 19  | 8544/79                         | Öztürk v. Germany                     | Male applicant/Turkish national                       | 21 February 1984 | Judgment, Plenary | Art. 6, Art. 6 with Art. 14 | Art. 6            | <p>The applicant was charged with the costs for the interpreter in a "regulatory offence" (Ordnungswidrigkeit) procedure.</p> <p>Cost Regulation Law/Regulatory Offence</p> | The Court finds that the impugned decision of the Heilbronn District Court violated the Convention: "the right protected by Article 6 § 3 (e) (art. 6-3-e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the   | DH(89)31   |

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|  |  |  |  |  |  |  |  |  | free assistance of an interpreter, without subsequently having claimed back from him the payment of the costs thereby incurred". (1) |  |
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## Article 8 cases

### *Respect for family life*

| No. | Application No. | Name of case                 | Applicant/Nationality           | Date              | Type of Decision                             | Article raised             | Violation of ECHR | Facts, Field of domestic law/policy area  | Reasoning of the ECtHR   | Final Res.           |
|-----|-----------------|------------------------------|---------------------------------|-------------------|--|----------------------------|-------------------|---|--|----------------------|
| 20  | 35504/03        | Konrad and others v. Germany | Family/German national          | 11 September 2006 | Decision                                     | Art. 8, Art. 9, Art. 2, P1 | No                | Parents, belonging to a Christian community, alleged a violation of the Convention regarding their children's education. They wanted to educate their children privately.<br><br>School Law<br>Civil Family Law   | Manifestly ill-founded; the obligation for the children to attend a school does not violate the Convention.  | Not necessary        |
| 21  | 31753/02        | Kaya v. Germany              | Male applicant/Turkish national | 28 June 2007      | Judgment, Chamber                            | Art. 8                     | No                | A Turkish national, born in Germany, was expelled to Turkey after he had been convicted for several crimes in Germany.<br><br>Residence Law   | In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion was proportionate to the aims pursued and therefore necessary in a democratic society. (1)  | Not necessary        |
| 22  | 32231/02        | Keles v. Germany             | Male applicant/Turkish national | 27 October 2005   | Judgment, Chamber, repetitive case to Yilmaz | Art. 8                     | Art. 8            | This case concerns a violation of the right to respect for the family life of the applicant a Turkish national, on account an administrative decision given on 22 January 1999 expelling him to Turkey and excluding him indefinitely from German territory. (2)<br><br>Residence Law | The European Court found that the administrative authorities had failed to take sufficient account of the following points: he had lived in Germany since he was 10 and had been lawfully residing in Germany for 27 years; he had been married in Germany and was the father of four children and he had not committed serious offences (violation of Article 8). (2) | CM/Res DH (2007) 121 |
| 23  | 74969/01        | Görgülü v. Germany           | Male applicant/Turkish national | 26 February 2004  | Judgment, Chamber                            | Art. 8                     | Art. 8            | The case concerns the violation in 2001 by the Naumburg Higher Regional Court of the applicant's right to respect for his family life, in proceedings relating to the applicant's custody of and access to his child born out of wedlock in 1999 and living                           | With regard to the suspension of the applicant's visitation rights, for which States have a narrower margin of appreciation, the European Court found that the Higher Regional Court's   | Pending              |

|    |          |                   |                                     |                 |                      |                   |        |   |  |                               |
|----|----------|-------------------|-------------------------------------|-----------------|----------------------|-------------------|--------|---|--|-------------------------------|
|    |          |                   |                                     |                 |                      |                   |        | with a foster-family. The European Court considered that the Higher Regional Court's decision not to give custody to the applicant failed to take into consideration the long-term effects on the child of a permanent separation from his biological father. (2)<br>Civil Family Law | decision was insufficiently reasoned and rendered any form of family reunion impossible, thus not fulfilling the positive obligation imposed by Article 8 to unite biological father and son (violations of Article 8). (2)  |                               |
| 24 | 52853/99 | Yilmaz v. Germany | Male applicant/<br>Turkish national | 17 April 2003   | Judgment,<br>Chamber | Art. 8            | Art. 8 | The applicant received an expulsion order with an unlimited prohibition to re-enter Germany despite existing family bounds.<br>Residence Law  | Au vu de ce qui précède, la Cour est d'avis que l'expulsion du requérant combiné avec l'interdiction illimitée du territoire allemand constituait une mesure disproportionnée aux buts légitimes poursuivis. (1)   | CM/Res<br>DH<br>(2007)<br>125 |
| 25 | 62444/00 | Caglar v. Germany | Male applicant/<br>Turkish national | 7 December 2000 | Decision             | Art. 6,<br>Art. 8 | No     | A Turkish national with family ties in Germany faced expulsion after living in Germany for some 30 years because of a seven year prison detention (illegal drug trafficking).<br>Residence Law  | Although the applicant's removal from Germany would involve considerable hardship, the Court considers, in the light of the foregoing, and taking into account the margin of appreciation left to the Contracting States in such circumstances that the decision to expel the applicant was not disproportionate to the legitimate aims pursued. There is therefore no appearance of a violation of Article 8. (1) | Not<br>necessary              |

*Respect for private life*

|    |          |                             |                           |              |                      |                                |        |   |  |                               |
|----|----------|-----------------------------|---------------------------|--------------|----------------------|--------------------------------|--------|---|--|-------------------------------|
| 26 | 54934/00 | Weber and Sarvia v. Germany | Female and Male applicant | 29 June 2006 | Decision             | Art. 8,<br>Art. 10,<br>Art. 13 | No     | The applicants, from whom one was as a journalist, alleged a breach of Article 8 and Article 10 ECHR as regards the German secret surveillance legislation with its implied control mechanisms.<br>Inner Security Law | Manifestly ill-founded. See the long reasoning in the judgment for more information.   | Not<br>necessary              |
| 27 | 59320/00 | v. Hannover v. Germany      | Female applicant          | 24 June 2004 | Judgment,<br>Chamber | Art. 8                         | Art. 8 | In a judgment of 15 December 1999 the Federal Constitutional Court partially granted the applicant's injunction regarding the photographs in which she appeared with her children on the ground that their need       | The European Court considered that the German courts' interpretation of the notion of "public figure" was too restrictive in that the photographs at issue aimed | CM/Res<br>DH<br>(2007)<br>124 |

|    |          |                             |                        |                  |                   |  |                |  |   |               |
|----|----------|-----------------------------|------------------------|------------------|-------------------|--|----------------|--|---|---------------|
|    |          |                             |                        |                  |                   |  |                | for protection of their intimacy was greater than that of adults. However, it considered that the applicant, who was undeniably a contemporary “public figure”, had to tolerate the publication of photographs of herself in a public place, even if they showed her in scenes from her daily life rather than engaged in her official duties. (2)   | solely at revealing details of the applicant's private life without her knowledge or consent, and did not contribute to any form of debate in the general interest of society - the more so since the applicant has no official position. (2)   |               |
|    |          |                             |                        |                  |                   |  |                | Media Law<br>Civil Law (Protection of private life)  |   |               |
| 28 | 35968/97 | Van Kück v. Germany         | Female applicant       | 12 June 2003     | Judgment, Chamber | Art. 6, Art. 8, Art. 6, 8 with Art. 14 | Art. 6, Art. 8 | The applicant was born with a male sex and underwent a gender reassignment surgery. She was able to change her name into a female name. In 1992 the applicant, represented by counsel, brought an action with the Berlin Regional Court against a German health insurance company. Having been affiliated to this company since 1975, she claimed reimbursement of pharmaceutical expenses for hormone treatment. The Regional Court dismissed the applicant's claims. It considered that under the relevant provisions of the General Insurance Conditions (Allgemeine Versicherungsbedingungen) governing the contractual relations between the applicant and her private health insurance company, the applicant was not entitled to reimbursement of medical treatment regarding her transsexuality. (1) | Having regard to the determination of the medical necessity of gender reassignment measures in the applicant's case and also of the cause of the applicant's transsexuality, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair hearing (Art. 6).<br><br>In the light of these various factors, the Court reaches the conclusion that no fair balance was struck between the interests of the private health insurance company on the one side and the interests of the individual on the other (Art. 8). (1) | Pending       |
| 29 | 5029/71  | Klass and others v. Germany | Male applicants (five) | 6 September 1978 | Judgment, Plenary | Art. 6, Art. 8, Art. 13                | No             | Public prosecutor and others claimed violation of their right regarding the secret communication surveillances and their parliamentary control.<br><br>Inner Security Law  | In the light of these considerations and of the detailed examination of the contested legislation, the Court concludes that the German legislature was justified to consider the interference resulting from that legislation with the exercise of the right guaranteed by Article 8 para. 1 (art. 8-1) as being necessary in   | Not necessary |



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|  |  |  |  |  |  |  |  |  |  | a democratic society in the interests of national security and for the prevention of disorder or crime (Article 8 para. 2) (art. 8-2). Accordingly, the Court finds no breach of Article 8 (art. 8) of the Convention. The Court considers that, in the particular circumstances of this case, the aggregate of remedies provided for under German law satisfies the requirements of Article 13 (art. 13). (1) |  |
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*Respect for his home*

|    |          |                     |                |                  |                   |                       |        |   |   |            |
|----|----------|---------------------|----------------|------------------|-------------------|-----------------------|--------|---|---|------------|
| 30 | 13710/88 | Niemietz v. Germany | Male applicant | 16 December 1992 | Judgment, Chamber | Art. 8, Article 1, P1 | Art. 8 | Search warrant for business premises of a lawyer who was member of a local political party.<br><br>Criminal Code of Procedure Law | The search warrant was issued because of a threat against a judge in a running court case. It is true that the offence in connection with which the search was effected, involving as it did not only an insult to but also an attempt to bring pressure on a judge, cannot be classified as no more than minor. On the other hand, the warrant was drawn in broad terms, in that it ordered a search for and seizure of "documents", without any limitation, revealing the identity of the author of the offensive letter; this point is of special significance where, as in Germany, the search of a lawyer's office is not accompanied by any special procedural safeguards, such as the presence of an independent observer. (1) | DH (93) 24 |
|----|----------|---------------------|----------------|------------------|-------------------|-----------------------|--------|---|---|------------|

## Article 9 cases

| No. | Application No. | Name of case                                | Applicant/Nationality                            | Date            | Type of Decision     | Article raised                              | Violation of ECHR | Facts, Field of domestic law/policy area  | Reasoning of the ECtHR   | Final Res.    |
|-----|-----------------|---|--|-----------------|----------------------|---|-------------------|---|--|---------------|
| 31  | 53871/00        | Islamische Religionsgemeinschaft v. Germany | Organization                                     | 5 December 2002 | Decision             | Art. 9, Art. 1, P1, Art. 1, P1 with Art. 14 | No                | <p>The applicant was formed in the German Democratic Republic in 1990 by citizens of Muslim faith. Subsequently, the Presidium of the Party of Democratic Socialism made a donation of 75,000,000 GDR marks to the applicant. In a decision of 14 January 1992 the Federal Office for Special Tasks relating to German Reunification (<i>Bundesanstalt für vereinigungsbedingte Sonderaufgaben</i>) ruled that the sum of money – converted into 37,500,000 German marks (DEM) – in the applicant association’s bank account constituted an asset subject to the administration of the Trust Agency and could not be disposed of without the Agency’s consent.</p> <p>German Reunification Issues</p> | Manifestly ill-founded   | Not necessary |
| 32  | 41754/98        | Johannische Kirche and Peters v. Germany    | Organization and male applicant; German national | 10 July 2001    | Decision             | Art. 9                                      | No                | <p>The organization claimed a violation of Article 9 ECHR concerning a refusal of a permission to build a chapel and a cemetery in a protected wildlife area. This would also interfere with the applicant’s right to freedom of religion.</p> <p>Public Construction Law<br/>Freedom of Religion</p>   | Manifestly ill-founded   | Not necessary |
| 33  | 43696/98        | Beshara and others v. Germany               | Family/<br>Egyptian national                     | 30 October 1998 | Decision, Commission | Art. 2, Art. 3, Art. 5, Art. 6, Art. 9      | No                | <p>The applicants complain that, if returned to Egypt, they would face a real risk of being killed, subjected to inhuman and degrading treatment and to arbitrary detention on account of their religious beliefs.</p> <p>The applicants also complain that they were not granted a fair hearing in accordance with Article 6 para. 1 of the Convention. They complain in particular of the assessment of</p>   | Non exhaustion of domestic remedies (Federal Constitutional Complaint).<br>Declared inadmissible | Not necessary |

|    |          |  |                            |                  |                         |  |    |  |  |               |
|----|----------|--|----------------------------|------------------|-------------------------|--|----|--|--|---------------|
|    |          |  |                            |                  |                         |  |    | evidence by the Ansbach Administrative Court.<br><br>Freedom of Religion<br>Residence Law<br>Asylum Law  |  |               |
| 34 | 36283/97 | Keller v. Germany                              | Family/<br>German national | 4 March 1998     | Decision,<br>Commission | Art. 9,<br>Art. 2,<br>P1,<br>Art. 13                             | No | Applicants claimed a violation of the ECHR concerning an information brochure about Scientology issued by the Bavarian Ministry of Education.<br><br>Civil Family Law  | Incompatible ratione personae and ratione materiae. Declared inadmissible.   | Not necessary |
| 35 | 34614/97 | Scientology Kirche Deutschland e.V. v. Germany | Organization               | 7 April 1997     | Decision,<br>Commission | Art. 8,<br>Art. 9,<br>Art. 10,<br>Art. 11,<br>Art. 13 and others | No | Scientology considered the political debate about their work as an infringement on their rights. Especially the following events: Members of the Federal Parliament (Bundestag) in Bonn and of the Parliaments of the Länder discussed repeatedly the question of Scientology. They warned that Scientology was particularly dangerous and considered that it did not constitute a church but instead was much more like a commercial enterprise with political claims for the absolute truth without regard for the constitutionally guaranteed rights of the individual. (1) | Non exhaustion of domestic remedies; existing remedies raise no concern regarding Art. 13  | Not necessary |
| 36 | 29745/96 | Universelles Leben e.v. v. Germany             | Organization               | 27 November 1996 | Decision,<br>Commission | Art. 9   | No | The Federal Government made a reference to the applicant association in a publication on "So-called youth sects and psycho-groups in the Federal Republic of Germany" because, inter alia, of their stance to replace medical treatment by religious belief.<br><br>Freedom of Religion  | In the present case, the Commission considers that the reference to the applicant association in the intended publication does not have any direct repercussions on the religious freedom of the association or its members.<br><br>Manifestly ill-founded | Not necessary |

## Article 10 cases

| No. | Application No. | Name of case      | Applicant/<br>Nationality            | Date              | Type of Decision             | Article raised                                  | Violation of ECHR   | Facts,<br>Field of domestic law/policy area   | Reasoning of the ECtHR  | Final Res.    |
|-----|-----------------|-------------------|--------------------------------------|-------------------|------------------------------|---|---------------------|---|---|---------------|
| 37  | 17851/91        | Vogt v. Germany   | Female Applicant/<br>German national | 26 September 1995 | Judgment,<br>Grand Chamber   | Art. 10,<br>Art. 11;<br>Art. 10 with<br>Art. 14 | Art. 10,<br>Art. 11 | <p>The case concerns the right of freedom of expression of civil servants. The applicant was a teacher and appointed as a permanent civil servant of the state of Lower-Saxony. She taught German and French and her work abilities were described entirely satisfactory. Because the applicant had been engaged in various activities on behalf of the German Communist Party (DKP) she was suspended from her duties and finally dismissed. The reasoning was that she had failed "(...) to comply with the duty of loyalty to the Constitution (...)." The decision was based on a state provision adopted to implement the decree on employment of extremists in the civil service and the Lower Saxony Civil Service Act.</p> <p>Civil Servant Law</p> | <p>Even allowing for a certain margin of appreciation, the conclusion must be that to dismiss Mrs Vogt by way of disciplinary sanction from her post as secondary-school teacher was disproportionate to the legitimate aim pursued. There has accordingly been a violation of Article 10. However, even if teachers are to be regarded as being part of the "administration of the State" for the purposes of Article 11 para. 2, Mrs Vogt's dismissal was disproportionate to the legitimate aim pursued. (1)</p> | DH(97)<br>12  |
| 38  | 9704/82         | Kosiek v. Germany | Male applicant/<br>German national   | 28 August 1986    | Judgment,<br>Plenary Session | Art. 10   | No                  | <p>Denial of employment in the civil service because political activities in the National Democratic Party of Germany (NPD).</p> <p>Civil Servant Law</p>   | <p>It follows from the foregoing that access to the civil service lies at the heart of the issue submitted to the Court. In refusing Mr. Kosiek such access - belated though the decision was -, the responsible Ministry of the Land took account of his opinions and activities merely in order to determine whether he had proved himself during his probationary period and whether he possessed one of the necessary personal qualifications for the post in question. No breach of Art. 10 ECHR. (1)</p>      | Not necessary |
| 39  | 9228/80         | Glaser v. Germany | Female applicant/<br>German national | 28 August 1986    | Judgment,<br>Plenary Session | Art. 10   | No                  | <p>Denial of employment in the civil service because the applicant refused to dissociate her from the policies of</p>   | <p>It follows from the foregoing that access to the civil service lies at the heart of the issue</p>  | Not necessary |

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|  |  |  |  |  |  |  |  | the German Communist Party (KPD); this is not the same organization prohibited 1956.<br><br>Civil Servant Law | submitted to the Court. In refusing Mrs. Glasenapp such access, the Land authority took account of her opinions and attitude merely in order to satisfy itself as to whether she possessed one of the necessary personal qualifications for the post in question. No breach of Art. 10 ECHR. (1) |  |
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#### Article 11 case

| No. | Application No.                 | Name of case      | Applicant/<br>Nationality | Date         | Type of Decision        | Article raised | Violation of ECHR | Facts,<br>Field of domestic law/policy area   | Reasoning of the ECtHR | Final Res.    |
|-----|---------------------------------|-------------------|---------------------------|--------------|-------------------------|----------------|-------------------|---|------------------------|---------------|
| 40  | 250/57,<br>YB 1, pp.<br>222-225 | KPD v.<br>Germany | Organization              | 20 July 1957 | Decision,<br>Commission | Art. 11        | No                | Prohibition of the communist political party KPD in Germany<br><br>Law on Political Parties |                        | Not necessary |

#### Article 13 case

| No. | Application No. | Name of case          | Applicant/<br>Nationality           | Date        | Type of Decision           | Article raised     | Violation of ECHR  | Facts,<br>Field of domestic law/policy area   | Reasoning of the ECtHR   | Final Res. |
|-----|-----------------|-----------------------|-------------------------------------|-------------|----------------------------|--------------------|--------------------|---|--|------------|
| 41  | 75529/01        | Sürmeli v.<br>Germany | Male applicant/<br>Turkish national | 8 June 2006 | Judgment,<br>Grand Chamber | Art. 6,<br>Art. 13 | Art. 6,<br>Art. 13 | The case concerns the length of civil court proceedings. The ECtHR notes that the judicial procedure in question lasted for more than 16 years and that no acceleration remedy exists in the domestic legal order.<br><br>Civil Code of Procedure | The applicant did not have an effective remedy within the meaning of Article 13 of the Convention which could have expedited the proceedings in the Regional Court or provided adequate redress for delays that had already occurred. There has therefore been a violation of this Article and the Government's objection of failure to exhaust domestic remedies must be dismissed. (1) | Pending    |

### Article 8 in conjunction with Article 14

| No. | Application No. | Name of case           | Applicant/ Nationality          | Date            | Type of Decision  | Article raised   | Violation of ECHR | Facts, Field of domestic law/policy area   | Reasoning of the ECtHR   | Final Res. |
|-----|-----------------|------------------------|---------------------------------|-----------------|-------------------|------------------|-------------------|--|--|------------|
| 42  | 59140/00        | Okpisz v. Germany      | Family/ Polish national         | 25 October 2005 | Judgment, Chamber | Art. 8 + Art. 14 | Art. 8, Art. 14   | Denial of public child benefits because of legal resident status. Only foreigners with a stable (permanent) residence permit were entitled to such benefits.<br><br>Social Law | The European Court found that there was insufficient justification for this difference of treatment. (2) | Pending    |
| 43  | 58453/00        | Niedzwiecki v. Germany | Male applicant/ Polish national | 25 October 2005 | Judgment, Chamber | Art. 8 + Art. 14 | Art. 8, Art. 14   | Denial of public child benefits because of legal resident status. Only foreigners with a stable (permanent) residence permit were entitled to such benefits.<br><br>Social Law | The European Court found that there was insufficient justification for this difference of treatment. (2) | Pending    |

### Art. 3, Protocol 1

| No. | Application No. | Name of case             | Applicant/ Nationality                      | Date        | Type of Decision     | Article raised                       | Violation of ECHR | Facts, Field of domestic law/policy area  | Reasoning of the ECtHR  | Final Res.    |
|-----|-----------------|--------------------------|---|-------------|----------------------|--------------------------------------|-------------------|---|---|---------------|
| 44  | 6850/74         | X. and others v. Germany | Association, personal applicant (anonymous) | 18 May 1976 | Decision, Commission | Art. 9, Art. 10, Art. 11, Art. 3, P1 | No                | The applicants claim a violation of the ECHR because firstly of the domestic regulation to subsidy parties' election campaigns through state means and secondly of the denial of the Hamburg authorities to admit a proposal of candidates for the City Council of Hamburg thirdly the association was not acknowledged as political party due to legislation on political parties (which foresaw a minimum of 100 respectively 500 signatures and a programme missing in the case to decide).<br><br>Domestic legislation on political parties | Inadmissible, manifestly ill-founded concerning Art.3, P1. The restrictions are justified to ensure a functioning political life. | Not necessary |

**Annex**  
**Implementation of judgments against Germany<sup>209</sup>**

| No. | Application No. | Name of case          | Date of judgment | Friendly Settlement/<br>Struck out of the list | Isolated v. repeated violation | Months since Judgment <sup>210</sup> (until 31 May 2008) | Case implemented or pending execution | Months to implementation (date of final resolution) <sup>211</sup> | Interim resolution | Implementation of individual measures  |
|-----|-----------------|-----------------------|------------------|--|--------------------------------|--|---------------------------------------|--|--------------------|--|
| 1   | 54810/00        | Jalloh v. Germany     | 11 July 2006     | No   | Isolated case                  | 22   | Open                                  | Case waiting for the presentation of a draft final resolution      | No                 | Yes<br><br>The applicant may apply for a reopening of the criminal proceedings under Article 359 para 6 of the Code of Criminal Procedure. In such reopened proceedings, the use of the evidence obtained by force would be re-assessed in the light of the European Court's judgment. In addition the European Court awarded the applicant just satisfaction in the sum of 10. 000 Euros in respect of non-pecuniary damage. Thus no further individual measure seems necessary. (1) <sup>212</sup> |
| 2   | 51342/99        | Kalantari v. Germany  | 11 October 2001  | Struck out                                     | Isolated case                  | 79   | Closed                                | 14 months. Final resolution issued: 17 December 2002               | No                 | Yes<br><br>Payment of costs and expenses (16.000 German Marks) paid within three months.   |
| 3   | 14312/88        | El-Makhour v. Germany | 10 July 1989     | Friendly Settlement                            | Isolated case                  | 226  | Closed                                | No information available   | No                 | Yes<br><br>The Government issued the applicant a provisional residence permit on probation, which could be prolonged for a period of six months. At the end of the probation the applicant could be granted residence permit, if she had not committed any further criminal offences. (1)  |
| 4   | 61603/00        | Storck v. Germany     | 16 June 2005     | No   | Isolated case                  | 35   | Closed                                | 28 months. Final resolution issued: 31 October 2007                | No                 | Yes<br><br>Payment of non-pecuniary damage (75.000 Euros) and costs and expenses (18.315 Euros) paid within three months.<br><br>Until the end of 2006 there was no reopening procedure in the Code of Civil Procedure. As the new regulation does not have retroactive effect the applicant might not benefit from it. (1)  |

<sup>209</sup> This covers the judgments in the scope of the case study. The information refers to judgments, in which a violation was found or a friendly settlement was reached

<sup>210</sup> The month in which the judgment was delivered is not included in the calculation.

<sup>211</sup> The month in which the judgment was delivered is not included, and the month in which the final resolution was adopted is included as full month in the calculation.

<sup>212</sup> Paragraphs marked with (1) are quotations from the Committee of Ministers' resolutions adapted to the table.

| No. | Application No.                 | Name of case                          | Date of judgment | Friendly Settlement/ Struck out of the list | Isolated v. repeated violation   | Months since Judgment (until 31 May 2008) | Case implemented or pending execution | Months to implementation (date of final resolution)     | Interim resolution              | Implementation of individual measures  |
|-----|---------------------------------|---------------------------------------|------------------|---|--|---|---------------------------------------|---|---------------------------------|--|
| 5   | 6210/73;<br>6877/75;<br>7132/75 | Luedicke, Belkacem and Koc v. Germany | 28 November 1978 | No  | Isolated case  | 354                                       | Closed                                | 52 months.<br>Final resolution issued: 23 March 1983    | No                              | Yes<br><br>Payment was made (Luedicke: 201,40 German Marks; Koc 2.064,30 German Marks; Belkacem benefited from legal aid).<br>Luedicke and Koc regarded the issue as settled. In the case of Belkacem, the relevant Berlin authority cancelled the recovery of the interpretation costs. |
| 6   | 8544/79                         | Öztürk v. Germany                     | 21 February 1984 | No  | Similarities with Luedicke and others  | 291                                       | Closed                                | 69 months.<br>Final resolution issued: 10 November 1989 | Yes.<br>Adopted on 2 March 1989 | The Court rejected the claim for just satisfaction.  |
| 7   | 32231/02                        | Keles v. Germany                      | 27 October 2005  | No  | Similarities with Yilmaz v. Germany, although not fully repetitive because domestic decisions had been taken before Yilmaz was pronounced. | 31  | Closed                                | 24 months.<br>Final resolution issued 31 October 2007   | No                              | Yes<br><br>No claim for just satisfaction.<br>Applicant was informed by the German authorities that a term to the expulsion order had been set. The applicant may, as a consequence, apply for a visa to return to Germany.  |
| 8   | 74969/01                        | Görgülü v. Germany                    | 26 February 2004 | No  | Isolated case  | 51  | Open                                  | Pending   | No                              | Yes<br><br>Payment of non-pecuniary damage (15.000 Euros) and costs and expenses (1.500 Euros) paid within three months.<br><br>Visitation rights: Still under supervision of the Committee of Ministers.  |



| No. | Application No. | Name of case           | Date of judgment | Friendly Settlement/ Struck out of the list | Isolated v. repeated violation | Months since Judgment (until 31 May 2008) | Case implemented or pending execution | Months to implementation (date of final resolution)           | Interim resolution | Implementation of individual measures   |
|-----|-----------------|------------------------|------------------|---|--------------------------------|---|---------------------------------------|---|--------------------|---|
| 9   | 52853/99        | Yilmaz v. Germany      | 17 April 2003    | No  | Isolated case                  | 61  | Closed                                | 54 months. Final resolution issued: 31 October 2007           | No                 | Yes<br><br>Payment of non-pecuniary damage (3.000 Euros) was paid within the period of three months.<br><br>The respondent state indicated that the competent administrative authorities have set a term to the expulsion order, which will expire on 7 March 2007. Since the applicant has not appealed against this decision, it has become final. Article 9, paragraph 3, of the Law on aliens – now replaced by Article 11, paragraph 2 of the Residence Act - provides that before the expiration of the term set to the expulsion order, an alien's entry into the Federal Republic of Germany may exceptionally be allowed for a short period of time, when his presence is reasonably necessary or when the refusal of such a permit would be disproportionately harsh (unbillige Härte). Thus, the applicant may obtain a short-term residence permit in order to visit his minor child. (1) |
| 10  | 59320/00        | v. Hannover v. Germany | 24 June 2004     | No  | Isolated case                  | 47  | Closed                                | 40 months. Final resolution issued: 31 October 2007           | No                 | Yes<br><br>Payment of non-pecuniary damage (10.000 Euros) and costs and expenses (105.000 Euros) paid within three months.<br><br>Photographs at issue have not been reprinted by the German press.   |
| 11  | 35968/97        | Van Kück v. Germany    | 12 June 2003     | No  | Isolated case                  | 59  | Open                                  | Case waiting for the presentation of a draft final resolution | No                 | Yes<br><br>Payment of non-pecuniary damage (15.000 Euros) and costs and expenses (2.500 Euros).   |
| 12  | 13710/88        | Niemietz v. Germany    | 16 December 1992 | No  | Isolated case                  | 185                                       | Closed                                | 6 months. Final resolution issued: 11 June 1993               | No                 | Claim for just satisfaction was dismissed by the Court.<br>The applicable domestic law has not been respected in the present case. No individual measures were required.  |

| No. | Application No. | Name of case           | Date of judgment  | Friendly Settlement/ Struck out of the list | Isolated v. repeated violation   | Months since Judgment (until 31 May 2008) | Case implemented or pending execution | Months to implementation (date of final resolution)           | Interim resolution | Implementation of individual measures   |
|-----|-----------------|------------------------|-------------------|---|--|---|---------------------------------------|---|--------------------|---|
| 13  | 17851/91        | Vogt v. Germany        | 26 September 1995 | No  | Isolated case  | 152                                       | Closed                                | 16 months.<br><br>Final resolution issued: 28 January 1997    | No                 | Yes<br><br>The sums agreed upon in the friendly settlement were all paid before the Court's judgment of 2 September 1996, with the exception of the compensation of 117 639.55 Deutschmarks, which was paid on 10 October 1996. As agreed, Ms Vogt has also been deemed by the Land of Lower-Saxony to have reached the fourteenth and final step in the salary grade of A 13 in November 1996. In addition, the Land has recognised the period between 31 October 1989 and 31 January 1991 as a period of pensionable service by her as civil servant. (1) |
| 14  | 75529/01        | Sürmeli v. Germany     | 8 June 2006       | No  | Isolated case concerning the violation of Art. 13 ECHR. <sup>213</sup> | 23  | Open                                  | Pending   | No                 | Yes<br><br>Payment of non-pecuniary damage (10.000 Euros) and costs and expenses (4.672,89 Euros) paid within three months.<br><br>According to the European Court's judgment, on 31/10/2005 the Hanover Regional Court gave a decision in the applicant's case (§50). This decision became final as his subsequent requests for appeal and revision were dismissed. (1)  |
| 15  | 59140/00        | Okpisz v. Germany      | 25 October 2005   | No  | Repetitive case. Same factual background like Niedzwiecki.             | 31  | Open                                  | Case waiting for the presentation of a draft final resolution | No                 | Yes<br><br>Pecuniary damage (2.500 Euros) paid.<br><br>The Court held that the finding of a violation constituted in itself sufficient just satisfaction with regard to non-pecuniary damage and awarded just satisfaction in respect of pecuniary damages for the child benefits in question.  |
| 16  | 58453/00        | Niedzwiecki v. Germany | 25 October 2005   | No  | See above, Okpisz v. Germany   | 31  | Open                                  | Case waiting for the presentation of a draft final resolution | No                 | Yes<br><br>Pecuniary damage (1.500 Euros) paid.<br><br>Finding of a violation is sufficient in itself.  |

<sup>213</sup> See *Kirsten v. Germany*, application no. 19124/02, judgment of 15 February 2002 as repetitive case. This is just for further information because this case does not fall into the scope of this project.