Germany

Criminal Code (1998)

Section 86 a Use of the symbols of inconstitutionnal organisations

Section 130 Agitation of the People

1) Whoever, in a manner that is capable of disturbing the public peace:

a). incites hatred against segments of the population or calls for violent or arbitrary measures against them; or

b) assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population,
shall be punished with imprisonment from three months to five years.

2) Whoever:

a). with respect to writings (Section 11 subsection (3)), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group:

i) disseminates them;
ii) publicly displays, posts, presents, or otherwise makes them accessible;
iii) offers, gives or makes accessible to a person under eighteen years; or
iv) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers a through c or facilitate such use by another; or

b) disseminates a presentation of the content indicated in number 1 by radio, shall be punished with imprisonment for not more than three years or a fine.

3) Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 220a subsection (1), in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.

4) Whoever publicly or in a meeting, violating the dignity of the victims, approves of the National Socialist rule by force and arbitrariness in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than three years or a fine.

5) Subsection (2) shall also apply to writings (Section 11 subsection (3)) with content such as is indicated in subsections (3) and (4).

6) In cases under subsection (2), also in conjunction with subsection (5), and in cases of subsections (3) and (4), Section 86 subsection (3), shall apply correspondingly.

Criminal Code (1998), Section 166 - Insulting of Faiths, Religious Societies and Organizations Dedicated to a Philosophy of Life

1) Whoever publicly or through dissemination of writings (Section 11 subsection (3)) insults the content of others' religious faith or faith related to a philosophy of life in a manner that is capable of disturbing the public peace, shall be punished with imprisonment for not more than three years or a fine.

2 Whoever publicly or through dissemination of writings (Section 11 subsection (3)) insults a church, other religious society, or organization dedicated to a philosophy of life located in Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall be similarly punished.

Case Law

BUNDESGERICHTSHOF

BESCHLUSS

2 BJs 53/04-4
StB 5/04

vom

28. Oktober 2004

in dem Ermittlungsverfahren

gegen

1.

2.

3.

wegen Verdachts der Werbung um Mitglieder und Unterstützer einer ausländischen terroristischen Vereinigung u. a.

Der 3. Strafsenat des Bundesgerichtshofs hat am 28. Oktober 2004 gemäß § 304 Abs. 5 StPO beschlossen:

Die Beschwerde des Generalbundesanwalts gegen den Beschluß des Ermittlungsrichters des Bundesgerichtshofs vom 21. September 2004 - 2 BGs 126/04 - wird verworfen.

Gründe:

I.

Der Generalbundesanwalt führt gegen die Beschuldigten ein Ermittlungsverfahren wegen des Verdachts der Werbung um Mitglieder und Unterstützer einer ausländischen terroristischen Vereinigung (§ 129 a Abs. 5 Satz 2, § 129 b Abs. 1 StGB) bzw. der Aufforderung zur Unterstützung einer ausländischen terroristischen Vereinigung (§ 111 StGB). Die Tathandlung sieht er in der Veröffentlichung eines Aufrufs im Internet zur Teilnahme am "1. Islamischen Kongreß in Europa" vom 1. bis 3. Oktober 2004 in Berlin. Den Tatverdacht gegen die Beschuldigten leitet er daraus ab, daß diese in dem Aufruf als "Koordinatoren" des Kongresses genannt sind.

Der Aufruf hat in deutscher Übersetzung folgenden Wortlaut:

"Menschheit an die Macht

Der Erste arabische, islamische Kongress in Europa

Die Rundreise der gesegneten Al-Aqsa & Intifada

Alle guten Wünsche den Helden der Opposition des Imperialismus in Assissi/Italien

Das wichtigste Dokument der Erklärung zum Berliner Aufruf 2004

Stehe auf und leiste Widerstand

Wenn du selbst nicht frei bist, aus einer freien Nation, dann ist die Freiheit der Nationen eine Schande für dich.

Die Titel des Dokuments

1. Die tatsächliche Lage der Nation und die Notwendigkeit des Widerstands.

Die arabische und islamische Welt sowie die Mehrheit der gesamten Menschheit leiden unter dem Hass, unter den Katastrophen, unter blutigen Massakern und unter der Besatzung und Unterdrückung seit der Verletzung des ersten Quadratmeters der Erde von Palästina durch die zionistisch-terroristischen Banden Ende des 19. Jahrhunderts.
Seit jener Zeit (…) der Kampf der verschiedenen Kräfte des Guten und Rechten innerhalb der arabischen Welt, die ihre legitimen Rechte verteidigt, zu aller erst die Widerstandsarmeen des arabischen Volkes gegen die Verletzung und den Besatzungsfeind in Palästina, in Syrien, im Libanon und im Irak, und die Kräfte der Ungerechtigkeit, der Besatzung und Aggression, die in der Verletzung und Besatzung der zionistischen Einheit innewohnt und die einen globalen Krieg der Ausweisung und der Vertreibung und der physischen Liquidation von Menschen betreibt, ein Krieg der Vernichtung von Häusern und Territorien, und ein Krieg der kollektiven Ausrottung, mit Hilfe aller materieller, personeller, finanzieller und politischer Mittel, die den imperialistischen Streitkräften zur Verfügung stehen, vor allen den USA, ohne Rücksicht auf die Gefühle und Rechte der Menschen, unter Missachtung des internationalen Rechts und seiner Normen, und in dem Versuch, die Besatzung zu diktieren und den Status-quo umzusetzen mit Hilfe von Gewalt und Unterdrückung und unter Entrechtung der legitimen Landbesitzer, durch Unterdrückung und Ausweisung des Volkes, und durch Entehrung seiner himmlischen Zufluchtstätten und durch Entfernung seiner Kulturstätten und Verfälschung seiner Geschichte und Kultur.

2. Die gegenwärtige Lage und die Herausforderungen unserer Zeit

Die Feinde verbinden noch die letzten Ketten ihres infernalischen Plans und barbarischen Projekts. Ihr Ziel ist die Vernichtung der Widerstandsbewegung, die das legitime und veritable Recht ihrer bestehenden Völker verteidigt, Freiheit und Souveränität. Ihr Ziel ist es, jede Art von Widerstand innerhalb des Landes und im Ausland auszulöschen und zu beenden; ihre Beleidigung, Aggression und Ziele wurden ausgedehnt, um die arabischen und islamischen Gemeinden in den Einwanderungsländern zu erreichen. Die Feinde geben sich nicht zufrieden mit der Unterdrückung und Diskriminierungskampagnen gegen sie, sie arbeiten darauf hin, sie einzukesseln, zu teilen und zu isolieren, selbst ihnen die Stimme zu verbieten, damit sie nicht gegen Aggression und Ungerechtigkeit aufschreien. Sie stören und attackieren jeden Versuch, sie in Würde und Frieden auf Ebene gleicher Menschen- und politischen Rechte leben zu lassen, zusammen mit den Menschen in der Welt, die für Unabhängigkeit kämpfen, für Recht auf Selbstbestimmung und für die Souveränität über ihre Ressourcen.
Angesichts dieser Tatsache ist es eine historische und wichtige Verantwortung der ganzen Welt, gegen Okkupation, Verletzung zu opponieren und sich der Ungerechtigkeit und Unterdrückung zu stellen.

3. Die allgemeinen Ziele und die festen Prinzipien

Die festen Prinzipien, die die Grundlage und den Geist des geplanten Ersten Arabischen, Islamischen Kongresses in Europa bilden, lauten wie folgt:

a) Beseitigung des Schwerts des amerikanischen und zionistischen Terrors, das über dem Hals unseres Volkes und unserer Familien in allen Ländern unserer Nation und in den Einwanderungsländern erhoben ist.

b) Herstellen und Festigen der Schicksalsbindung und Bruderschaft zwischen den Kindern der selben und einen Nation in den Einwanderungsländern und das Aufzeigen von Wegen zur Verbesserung der Rahmenbedingungen des Aufbaus von Einheit und Unterstützung für unsere unterdrückten Menschen in unserem Heimatland.

c) Einsetzen des ersten populären arabisch, islamisch und europäischen Dialogs, getragen von der breiten Volkspartnerschaft auf Grundlage gegenseitigen Respekts und Verbundenheit, um die Rechte der arabischen und muslimischen Gemeinden in Europa zu sichern und zu konsolidieren und Unterstützung des Aufbaus gleichwertiger Partnerschaften und eines gerechten

Friedens in der Welt und Errichtung eines arabisch-islamischen Zirkels innerhalb der weltweit vereinigten Front, um sich der terroristischen amerikanisch-zionistischen Allianz und Hegemonie entgegenzustellen.

d) Aussenden der deutlichen Botschaft an alle, dass die arabisch-islamistischen Gemeinden in Europa tief verwandt sind mit ihren Herkunftsländern und dass sie wohl belastet sind mit dem täglichen Leid des Volkes und seinem Flehen und seinen missachteten Rechten, zu aller erst in Palästina und im Irak, und dass sie sich direkt befassen mit der Unterstützung ihrer Leute, um wieder ihre Unabhängigkeit, Freiheit und volle und umfassende Souveränität über ihre Länder und ihre Ressourcen zu erlangen.

4. Prinzipien und Ansprüche

Wir sagen deutlich und klar NEIN:

Zum Kolonialismus, zur Sklaverei, zum Zionismus und Rassismus, zum Imperialismus, zur amerikanischen Hegemonie, zum Forstgesetz, zur Globalisierung von Tod und Aggression, zur Vernichtung von Moral und Tugend, zum Handel mit Sklaven und Ländern, zum amerikanisch-zionistischem Terror, zu der Politik des Tötens und Aushungerns, zu der Wegnahme der Rechte von Menschen, zur Übertretung von Ländern und ihrer Souveränität, zur Okkupation, zum Propagandakrieg gegen die Kräfte des Friedens, zu der Isolierungskampagne gegen die himmlische Religion des Islams und gegen die muslimischen Gemeinden.

Wir sagen deutlich und klar JA:

Zur Bildung einer breiten, weltweiten Widerstandsbewegung des Volkes für Freiheit, Unabhängigkeit und gerechten Frieden,
und zu der Befreiung aller besetzten Territorien und Länder im Kampf gegen die amerikanisch-zionistische Hegemonie und Besatzung.
Zu einer patriotischen, nationalen, arabischen und islamischen Befreiungsbewegung.
Zur Bildung einer vereinigten arabisch-islamischen Gemeinde in den Auswanderungsländern, sodass unsere Kultur, Tradition und Religion gerettet wird und der Wohlstand und die Ehre unserer Menschen und kommender Generationen gesichert wird.

Unsere Arbeit ist zum Wohle von:

Palästina und Irak - zum Wohle des Widerstands und der Intifada
Bis zum Aufgang der Sonne der Freiheit und Unabhängigkeit
Und für das Projekt der Union der arabischen und islamischen Institutionen und Gemeinden

5. Aufruf zur Teilnahme

Auf Grundlage der obigen Prinzipien rufen wir auf zur Teilnahme am Ersten Arabisch Islamischen Kongress in Europa, um die unbestreitbare Volkslegitimität auszuüben und um erfolgreich eine Union der arabisch, islamischen und befreundeten Institutionen und Gemeinden in Europa zu errichten: Jede Person, jede Persönlichkeit, jede Vereinigung, jede Institution und Gruppe, jede politische, kulturelle und parlamentarische Kraft und Gruppierung, jeder, der den Kongress bereichern kann.

Die Hand Gottes ist bei der Union

'Yadu-l Lahi Ma'as-l Jama'as'

Unser Treffen in Berlin mit den Zielen und festen Prinzipien wird eine neue Herausforderung schaffen, um den Weg zu korrigieren und um die Regression unserer Nation und unseres Volkes zu stoppen und um die praktischen Werkzeuge zu schaffen, um seine Existenz und seine Rechte zu verteidigen.

Es ist der erste, ernsthafte Schritt in der Praxis, den Araber und Muslime in Europa unternehmen, um für die folgenden Ansprüche zu arbeiten:

a) Stärkung der arabisch-islamischen Präsenz in Europa, Vereinigung ihrer Institutionen und Sicherung ihrer Rechte;

b) Unterstützung der Widerstandsbewegung gegen Aggression und Okkupation in Palästina und dem Irak und Unterstützung der Standhaftigkeit des Volkes, dass alle Arten von Unterdrückung und Schikanen und Folter erleidet unter der Politik der eisernen Faust und das für seine Freiheit und Souveränität in allen arabischen und islamischen Ländern kämpft.

c) Einrichtung eines ehrenvollen und fairen arabisch-islamisch-europäischen Volksdialogs, um eine Plattform gemeinsamer Werte und Prinzipien zu schaffen, die sich auf das Recht der Unterstützung und des Widerstands

gegen Unterdrückung und Ungerechtigkeit stützen, und die Unterstützung der Welt fordert auf dem Weg zu Gleichheit und Frieden.

d) Schaffung einer arabisch-islamischen Kette innerhalb der vereinigten Weltfront zur Opposition gegen Hegemonie.

Wir sind alle eingeladen, das palästinensische und irakische Volk zu treffen und zu unterstützen.

Ort: Deutsche Hauptstadt, Berlin
Datum: Freitag, Samstag und Sonntag, 1., 2. und 3. Oktober 2004

Beachten: Angaben zu Sitzungen, Zeiten und Orten und weitere Einzelheiten werden auf folgender Internet Domain veröffentlicht: www. ……..
sowie über direkte elektronische Mail an alle interessierten Teilnehmer und an die regionalen und internationalen Massenmedien.

6. Programm des Kongresses

a) Im Folgenden geben wir die Termine der vorbereitenden Ausschüsse bekannt, an denen jeder teilnehmen darf bis zur Eröffnung des eigentlichen Kongresses:

b)

- Allgemeiner Vorbereitungsausschuss. Dabei sind politische Parteien, Volks- und Gemeindeinstitutionen, Organisationen, Gruppierungen, Vereinigungen. Er tritt zusammen, um die letzte Planung im Programmablauf des Kongresses vorzunehmen.
  Samstag, 4. September in Berlin

- Organisationskomitee. Dabei sind arabische und islamische Vereine in Berlin und dem Umland. Es nimmt die täglichen Anträge und Beiträge bis zum Ende des Kongresses entgegen. Ein letztes Planungstreffen findet statt, um den Organisationsplan der Sitzungen und des Kongresses festzulegen.
  Sonntag, 5. September in Berlin.

- Kommunikations- und Public Relation Ausschuss. Dabei sind Vertreter der arabischen und islamischen Persönlichkeiten und Kräfte im Heimatland und im Ausland. Letzte Planungssitzung zur Koordination der Arbeit der eingeladenen Massenmedien, Betreuung der VIPs, Planung von Veranstaltungen.

Samstag, 11. September in Berlin

- Informations- & Kulturausschuss. Dabei sind Schriftsteller, Denker, Literaten, Journalisten und Medienleute. Es findet eine Planungssitzung statt, auf der die Dokumentation und die Themenfelder festgelegt werden, die dem Kongress vorgetragen werden. Er plant auch die Pressebekanntgaben zum Kongress und koordiniert die Arbeit der anwesenden Medien.
  Sonntag, 12. September in Berlin

- Finanzausschuss: Dabei sind Vertreter der beitragenden Institutionen, Organisationen und Vereinen. Er sammelt Beiträge ein und erstellt einen Ausgabenplan.
  Sonnabend, 28. August in Berlin.

7. Die Arbeitssitzungen des Kongresses

Der Kongress legt besonderen Wert auf Arbeitssitzungen. Sie werden vor Beginn des Kongresses eingerichtet, sind offen für die Teilnehmer während des Kongresses und tagen nach dem Kongress weiter. Diese Sitzungen sind als Offene Sonderausschüsse konzipiert und sollen weiter bestehen als Ständige Ausschüsse:

1. Ausschuss der Selbstkritik
2. Ausschuss zur Unterstützung des Widerstands
3. Politischer Ausschuss
4. Ausschuss zum Verstoß gegen Zionismus und Globalisierung
5. Ausschuss zum Urteil über Kriegsverbrecher
6. Ausschuss für Information und Kultur
7. Ausschuss für Menschenrechte, Festgenommene und Gefangene
8. Ausschuss für Flüchtlinge und Ausgestoßene
9. Ausschuss für auswärtige Beziehungen
10. Ausschuss für die Annäherung an Ideologien und Ideen
11. Wirtschaftsausschuss
12. Jugend- und Studentenausschuss
13. Ausschuss für weibliche Kreise
14. Ausschuss für Dokumentation, Statistik und Datenbank
15. Ausschuss für Verfassungs- und Justizangelegenheiten

8. Teilnahmebedingungen

Jeder arabische, muslimische und europäische Bürger kann teilnehmen und die Sitzungen und Veranstaltungen des Kongresses besuchen, wenn er sich verpflichtet, die folgenden Prinzipien einzuhalten:

1. Nichtanerkennung jeglicher Okkupation oder Verletzung des Landes in Palästina, dem Irak, Syrien, dem Libanon oder irgend eines anderen Territoriums in der gesamten arabischen Welt.

2. Verweigerung jeglicher Kollaboration oder Kooperation mit den amerikanisch-britisch-zionistischen Kräften der Besatzung und Verletzung und ihren entsprechenden militärischen, politischen und institutionellen Organisationen und Einrichtungen.

3. Die irakische Widerstandsbewegung ist der wahre Vertreter des irakischen Volkes. Sie hat die Legitimität, sich aller legitimen Mittel zu bedienen, um gegen die erobernden und besetzenden amerikanischen Streitkräfte und ihre Alliierten und ihren kriecherisch kollaborierenden 'Regierungsrat' vorzugehen, der nicht den Willen des irakischen Volkes repräsentiert.

4. Der palästinensische und irakische Widerstand sowie auch die gegen die Besetzung opponierenden Kräfte erfüllen nur ihre legitime, heilige und grundsätzliche Pflicht.

5. Der Teilnehmer muss mindestens an einer der Arbeitsausschüsse teilnehmen.

6. Ablehnung einer Unterscheidung auf Grund eines religiösen Bekenntnisses; Ablehnung der Infiltration politischer oder ideologischer Linien, die das Diktat ausländischer Hegemonialinteressen einführen wollen unter dem Vorwand von Frieden, Zusammenleben, demokratischer Reformen und ausländischer Kultur.

7. Ablehnung der Trennung zwischen der Widerstandsbewegung in Palästina und dem Irak oder jeglichem anderen arabischen Land. Unser Land ist eins, unsere Besatzer sind eins, und unser Widerstand ist eins.

8. Totale Unterstützung für die Einheit der arabischen und islamischen Vereinigungen und Institutionen in Europa. Dieses Ziel hat Vorrang vor allen anderen Interessen.

9. Teilnahmegebühren:
   a. Arabische und islamische Länder: 75 €

b. Europäische Länder:	50 €
c. Deutschland:	15 €
d. Andere Länder:	25 €

Alle Gebühren sind im Voraus zu entrichten auf das Sonderkonto des Kongresses ab dem 1. September 2004.

9. Diskussionsthemen

Zur allgemeinen Diskussion stehen die folgenden Themenbereiche:

a) patriotische und nationale Angelegenheiten
b) Einwanderungsangelegenheiten und die so genannten Anti-Terror-Gesetze

c) Rolle der internationalen und humanen Institutionen und Organisationen zur Unterstützung des pakistanischen und irakischen Volks.

Darüber hinaus gibt es Sondersitzungen für Experten und Fachleute zu folgenden Themen:

a) Historisches Gedächtnis und der Kern des Kampfes gegen Landbesetzung und Rechtsverletzung.

b) Rolle von Information und den Medien zur Unterstützung des Widerstands und in der Opposition gegen die Propaganda der Globalisierung und bei der Feststellung des wahren Terrors.

c) Zionistische Repressionen, die Konturen des Antisemitismus und die wahren Opfer.

10. Wichtige Hinweise

- Zur Eröffnung des Kongresses gibt es einen Empfang, auf dem alle Teilnehmer des Kongresses willkommen geheißen werden. Wir wollen einige hochrangige internationale Gäste vorstellen und planen folkloristische Vorführungen.

- Der Teilnehmerempfang bei den Sitzungen und Ausschüssen beginnt zu den entsprechenden Sitzungszeiten, vor und während des Kongresses.

- Wir verhandeln mit einigen Hotels über gute und herabgesetzte Unterkünfte für die Teilnehmer. Darüber hinaus können wir einige Teilnehmer privat bei Familien der arabischen und islamischen Gemeinde unterbringen, sollte das erwünscht sein. Wenn ja, ist das Organisationskomitee bis zum 20. September 2004 zu unterrichten.

- Über unsere Homepage www.anamogawem.org. informieren wir über herabgesetzte Flugpreise.

- Teilnehmer, die nicht aus Deutschland kommen, zahlen weder Eintritt noch Teilnahmegebühren.

- Weitere Vorschläge sind bis zum 10. September 04 willkommen.

- Jeder Teilnehmer ist selbst verantwortlich für ein Einreisevisum, falls erforderlich. Das Organisationskomitee leistet auf Anforderung soweit wie möglich Hilfestellung dabei. Ein Visum sollte vor dem 15. September 2004 ausgestellt sein.

Elektronische Mail ist an den Ersten Koordinator zu richten:
Kämpfer, Bruder M.
M. @l. .com

Koordinator für Kommunikations & Public Relations Ausschuss:
D.

Koordinator für Finanzausschuss:
Bruder K.

Vorbereitungsbüros:
…

Email Kontaktadressen:
…

Ab dem 1. September 2004 erscheint ein Informationsbulletin für die teilnehmenden Organisationen und Institutionen.

Der Kongress ist ein Ergebnis der gemeinsamen arabisch-islamischen Kampfmühen; er ist das Eigentum unserer Eltern und Menschen. Dein Beitrag, deine Unterstützung und nicht zuletzt dein finanzieller Beitrag zur Deckung der hohen Kongresskosten sind Ausdruck deines Engagements für das Recht auf Kampf und Fortschritt. Siehe obige Anschriften wegen finanzieller Beiträge.

Erstellt von dem Allgemeinen Vorbereitungsausschuss des Widerstandskongresses in Berlin.

Das ist das Engagement des treuen, kämpfenden Volks.
Unser Widerstand und Intifada geht weiter gegen alle Arten von Unterdrükkung, Ungerechtigkeit und Aggression. Lasst uns eine einheitliche Richtung aufbauen und einen einheitlichen Blick voll treuem Heldentum, der von der richtigen Idee getragen wird, um einer würdevollen Nation ein Leben in Würde

und Wohlstand zu ermöglichen, die stolz ist auf ihre loyalen Söhne und Töchter und Märtyrer, die von Wert sind, der gegenwärtigen Generation und der noch ungeborenen nächsten Generation ein würdevolles Leben zu ermöglichen.
Wenn du zu den Menschen gehörst, die sich in den Widerstand und die Intifada verliebt haben, wenn du dich intensiv an den Diskussionen und Aktivitäten der weltweiten Widerstandsbewegung gegen das amerikanische und zionistische Nazitum beteiligen willst, wenn du die Neuigkeiten der Widerstandsbewegung in allen Teilen der Welt folgen willst, in allen Sprachen, für die Freiheit und Unabhängigkeit des palästinensischen und irakischen Volks und der anderen Völker, ihre Freiheit von Kolonialismus und von amerikanisch-zionistischer Sklaverei, dann beachte: das ist der geringste der Kämpfe.
Denke daran: Du bist verantwortlich vor Gott, vor der Nation und vor der Geschichte."

Zur weiteren Aufklärung des Sachverhalts hat der Generalbundesanwalt beim Ermittlungsrichter des Bundesgerichtshofs die Durchsuchung der Wohnungen der Beschuldigten beantragt. Er erwartet hierdurch unter anderem Erkenntnisse darüber, ob allein der Beschuldigte M. für die Internetveröffentlichung verantwortlich war oder ob auch die beiden anderen Beschuldigten daran beteiligt waren und für welche konkreten gewaltbereiten Organisationen die Beschuldigten Mitglieder oder Unterstützer werben wollten.

Der Ermittlungsrichter hat den Erlaß des beantragten Beschlusses abgelehnt, weil es "an dem für die beantragte Durchsuchungsanordnung erforderlichen Anfangsverdacht" fehle. Der hiergegen vom Generalbundesanwalt eingelegten Beschwerde hat er nicht abgeholfen.

II.

Die zulässige Beschwerde (§ 304 Abs. 5 StP O) bleibt ohne Erfolg. Der Ermittlungsrichter hat den Erlaß der Durchsuchungsanordnung zutreffend abgelehnt, denn es besteht kein Verdacht im Sinne des § 102 StPO.

1. Das Vorliegen des für die Anordnung der Durchsuchung vorausgesetzten Tatverdachts hatte der Ermittlungsrichter eigenständig zu prüfen; denn bei dieser Untersuchungshandlung handelt es sich um einen Eingriff in verfassungsrechtlich geschützte Rechtspositionen der von der Maßnahme Betroffenen, deren Gestattung grundsätzlich dem Richter vorbehalten ist. Es versteht sich daher von selbst, daß dieser die gesetzlichen Voraussetzungen des Eingriffs ohne Bindung an die Beurteilung der Verdachtslage durch die ermittelnde Staatsanwaltschaft zu prüfen hat (BVerfG NJW 2004, 3171; Wache in KK 5. Aufl. § 162 Rdn. 19). Die Beurteilung des Tatverdachts unterliegt demgemäß auch der Überprüfung durch den Senat in der Beschwerdeinstanz.

Soweit der Ermittlungsrichter den erforderlichen Verdacht mit "Anfangsverdacht" bezeichnet hat, steht dies in Übereinstimmung mit den Begriffsbestimmungen in der Kommentarliteratur (vgl. Schäfer in LR, 25. Aufl. § 102 Rdn. 5; inhaltlich auch Meyer-Goßner, StPO 47. Aufl. § 102 Rdn. 2 und Lemke in HK-StPO 3. Aufl. § 102 Rdn. 3). Die Verneinung dieses Verdachts im angefochtenen Beschluß sollte - entgegen der in der Beschwerdeschrift des Generalbundesanwalts geäußerten Besorgnis - erkennbar nicht dessen Berechtigung zur Einleitung des Ermittlungsverfahrens in Zweifel ziehen.

2. Die Beschuldigten sind nicht im Sinne des § 102 StPO als Täter oder Teilnehmer einer Straftat nach § 129 a Abs. 5 Satz 2, § 129 b Abs. 1 StGB bzw. nach § 111 StGB verdächtig. Der Internetaufruf beinhaltet weder ein Werben für Mitglieder und Unterstützer einer ausländischen terroristischen Vereinigung noch eine öffentliche Aufforderung zur Unterstützung einer ausländischen terroristischen Vereinigung. Dies steht ohne weitere

terroristischen Vereinigung. Dies steht ohne weitere Ermittlungen bereits jetzt fest, da sich das Vorliegen dieser Äußerungsdelikte allein aus dem Inhalt der Veröffentlichung ergeben könnte.

Im Hinblick auf § 129 a Abs. 5 Satz 2, § 129 b Abs. 1 StGB erscheint bereits zweifelhaft, ob der Aufruf in einzelnen Passagen oder nach seiner Gesamtaussage dahin verstanden werden kann, der Leser solle terroristische Bewegungen im Nahen Osten unterstützen bzw. sich als Mitglied an ihnen beteiligen, oder ob er sich in der Aufforderung zur Teilnahme an dem geplanten Kongreß, verbunden mit einer nicht mehr von § 129 a Abs. 5 Satz 2 StGB erfaßten Sympathiewerbung, erschöpft. Dies bedarf indessen keiner abschließenden Beurteilung. Jedenfalls fehlt es - wie der Ermittlungsrichter zutreffend dargelegt hat - an dem erforderlichen Bezug zu einer konkreten - oder zumindest anhand der Umstände konkretisierbaren - terroristischen Vereinigung. Der Aufruf läßt in keiner Weise erkennen, welcher Organisation der Angesprochene gegebenenfalls beitreten oder Unterstützung leisten soll. Ein solcher konkreter Organisationsbezug ist indes materiellrechtliche Voraussetzung der Strafbarkeit nach § 129 a Abs. 5 Satz 2, § 129 b Abs. 1 Satz 1 StGB; nur wenn er gegeben ist, kann im übrigen geprüft werden, ob die durch die Werbung unterstützte Organisation die Voraussetzungen des § 129 a StGB erfüllt und ob im Falle einer ausländischen Vereinigung nach § 129 b Abs. 1 Satz 3 StGB die erforderliche Ermächtigung vorliegt oder (bei Entscheidungen über strafprozessuale Eingriffsmaßnahmen, soweit dies erforderlich ist; vgl. einerseits Wache aaO; andererseits Nack in KK 5. Aufl. § 102 Rdn. 1) zumindest zu erwarten ist. Entscheidend kommt hinzu, daß ansonsten der bereits weit im Vorfeld der möglichen Verletzung eines Individualrechtsguts eingreifende Tatbestand in einer

unter dem Aspekt des Rechtsgüterschutzes nicht mehr zu legitimierenden Weise ausgedehnt würde.

Der erforderliche Organisationsbezug kann zwar - je nach den Umständen - auch dann gegeben sein, wenn die werbende Äußerung nicht nur eine Vereinigung benennt, sondern auf die Förderung von mehreren (bestimmten oder bestimmbaren) terroristischen Vereinigungen abzielt und dem Adressaten anheimstellt, welcher von ihnen er sich als Mitglied anschließt bzw. welche er unterstützt. Eine Werbung, die hinsichtlich der zu fördernden Organisation aber keinerlei Festlegungen enthält ("irgendeine Vereinigung, die gegen die Unfreiheit in der Welt mit Bomben kämpft") oder durch eine vage Beschreibung eine Vielzahl von terroristischen Vereinigungen als förderungswürdig anspricht, ohne deren Kreis durch weitere Empfehlungen oder Hinweise an den Adressaten einzuschränken, kann indes aus den genannten Gründen nicht genügen. Dementsprechend wäre hier ein Werben um Mitglieder oder Unterstützer einer ausländischen terroristischen Vereinigung selbst dann zu verneinen, wenn der Aufruf dahin verstanden werden könnte, daß sich der Leser irgendeiner der zahlreichen, in den verschiedenen Ländern des Nahen Ostens aktiven militanten terroristischen Organisationen als Mitglied anschließen oder ihr Unterstützung leisten soll.

Aus denselben Gründen entfällt auch eine Strafbarkeit nach § 111 StGB (durch Aufforderung, sich an einer terroristischen Vereinigung als Mitglied zu beteiligen oder sie zu unterstützen).

3. Die beantragte Durchsuchungsanordnung darf daher nicht erlassen werden.

Tolksdorf Miebach Becker

2. Article 5 (Freedom of Expression)

2.1 Related case-law: BVerfG, 13 April 1994, NJW 1994, 1779-1781.

In this case the complainant organised an assembly. The main speaker of the assembly was a revisionist historian propagating the theory of the Auschwitz Hoax. The competent authorities required the complainant to take appropriate measures to ensure that no criminal offences would be committed at the assembly, in particular those contained in §§ 130, 185, 189 and 194 StGB. The legal basis for the imposition of these measures is § 5 n° 4 of the Assembly Act. The appellant claimed that this decision violated his rights to freedom of expression under Art. 5 (1) of the Constitution. The court held that this was not the case.

First, statements of fact are not protected to the same extent as expressions of opinion. In fact, where these statements are deliberately or demonstrably untrue, they fall outside the scope of the guarantee of freedom of expression.

Where a factual statement and an expression of an opinion are so closely linked that no clear separation can be made, it should in principle enjoy protection under Art. 5 (1) of the Constitution. However, freedom of expression is not guaranteed without limitation, as is made clear by Art. 5 (2).

§ 5 n° 4 of the Assembly Act contains such a limitation. It is constitutionally valid because it is not directed against certain expressions of opinion but rather complements the limitations contained in the Criminal Code. Accordingly, measures under § 5 n° 4 of the Assembly Act can only be taken when it is likely that offences which are punishable in any case will be committed.

Judicial interpretation and application of § 5 n° 4 of the Assembly Act, read in conjunction with § 185 of the Criminal Code, did not violate the complainant's rights either. In this context, the court confirmed the position consistently taken by the courts, that denial of the persecution of Jews under the National Socialist regime constitutes an insult to Jews living in Germany.

The complainant's right of freedom of expression had to be balanced against the potential injury to their right to protection of their honour. Given the weight of the insult, the authorities were right in ranking the protection of personality before the freedom of expression.

Since this was sufficient to reject the complainant's submission, the court did not treat any issues in the context of paragraphs 189 or 130 of the Criminal Code.

The Court pointed out that the same principles hold true for the relationship between the freedom of assembly and the rights of personality.

[ECRI, Germany – General overview, "Legal measures to combat racism and intolerance in the member Sates of the Council of Europe", Situation as of 31 December 2002, pp. 14-15]

BGH
Urteil vom 12.12.2000

1 StR 184/00

"Auschwitzlüge" im Internet

JurPC Web-Dok. 38/2001, Abs. 1 - 70

StGB §§ 9 Abs. 1 3. Alt., 130

Leitsatz

Stellt ein Ausländer von ihm verfaßte Äußerungen, die den Tatbestand der Volksverhetzung im Sinne des § 130 Abs. 1 oder des § 130 Abs. 3 StGB erfüllen ("Auschwitzlüge"), auf einem ausländischen Server in das Internet, der Internetnutzern in Deutschland zugänglich ist, so tritt ein zum Tatbestand gehörender Erfolg (§ 9 Abs. 1 3. Alternative StGB) im Inland ein, wenn diese Äußerungen konkret zur Friedensstörung im Inland geeignet sind.

Gründe

Das Landgericht hat den Angeklagten wegen Beleidigung in Tateinheit mit Verunglimpfung des Andenkens Verstorbener in drei Fällen, in einem Fall (II.2) zudem in weiterer Tateinheit mit Volksverhetzung, zu einer Gesamtfreiheitsstrafe von zehn Monaten verurteilt. *(JurPC Web-Dok. - 38/2001, Abs. 1)*

Die Staatsanwaltschaft greift mit ihrer zuungunsten des Angeklagten eingelegten Revision den Schuldspruch in den Internet-Fällen II.1 und II.3 mit der Begründung an, der Angeklagte hätte auch in diesen Fällen wegen Volksverhetzung verurteilt werden müssen. Zudem beanstandet sie die Strafzumessung. Der Angeklagte erhebt eine Verfahrensrüge und die allgemeine Sachrüge. Die Revision der Staatsanwaltschaft hat insoweit Erfolg, als die Verurteilung auch wegen Volksverhetzung erstrebt wird; die Revision des Angeklagten hat mit einer Verfahrensrüge Erfolg. *(Abs. 2)*

A.

I. Der 1944 in Deutschland geborene Angeklagte ist australischer Staatsbürger. Er emigrierte 1954 mit seinen Eltern nach Australien. Nachdem er dort Philosophie, Deutsch und Englisch studiert hatte, kam er 1970/1971 nach Deutschland, wo er als Lehrer an einer Werkschule tätig war. Anschließend studierte er in Deutschland. 1977 begab er sich nach Afrika, 1980 kehrte er nach Australien zurück und war dort als Lehrer tätig. *(Abs. 3)*

1996 schloß sich der Angeklagte mit Gleichgesinnten in Australien zum "Adelaide Institute" zusammen, dessen Direktor er ist. Seit 1992 befaßte er sich mit dem Holocaust. Er verfaßte Rundbriefe und Artikel, die er über das Internet zugänglich machte, in denen er "revisionistische" Thesen vertrat. Darin wurde unter dem Vorwand wissenschaftlicher Forschung die unter der Herrschaft des Nationalsozialismus begangene Ermordung der Juden bestritten und als Erfindung "jüdischer Kreise" dargestellt, die damit finanzielle Forderungen durchsetzen und Deutsche politisch diffamieren wollten. *(Abs. 4)*

II. Drei Publikationen des Angeklagten sind Gegenstand der Verurteilung: *(Abs. 5)*

1. Internet-Fall II.1: Zwischen April 1997 und März 1999 - der genaue Zeitpunkt ist nicht festgestellt - speicherte der Angeklagte Webseiten auf einem australischen Server, die von der homepage des Adelaide Institutes über dessen Internetadresse abgerufen werden konnten. Diese Seiten enthielten drei englischsprachige Artikel des Angeklagten mit den Überschriften "Über das Adelaide Institut", "Eindrücke von Auschwitz" und "Mehr Eindrücke von Auschwitz". Darin heißt es unter anderem: "In der Zwischenzeit haben wir festgestellt, daß die ursprüngliche Zahl von vier Millionen Toten von Auschwitz ... auf höchstens 800.000 gesenkt wurde. Dies allein ist schon eine gute Nachricht, bedeutet es doch, daß ca. 3,2 Millionen Menschen nicht in Auschwitz gestorben sind - ein Grund zum Feiern." "Wir erklären stolz, daß es bis heute keinen Beweis dafür gibt, daß Millionen von Menschen in Menschengaskammern umgebracht wurden." "Keine dieser Behauptungen ist je durch irgendwelche Tatsachen oder schriftliche Unterlagen belegt worden, mit Ausnahme der fragwürdigen Zeugenaussagen, welche häufig fiebrigen Gehirnen entsprungen sind, die es auf eine Rente vom deutschen Staat abgesehen haben." *(Abs. 6)*

2. Fall II.2: Im August 1998 verurteilte eine Amtsrichterin Günter Deckert, weil dieser Max Mannheimer, einen Überlebenden von Auschwitz, beleidigt hatte. Darauf schrieb der Angeklagte aus Australien einen "offenen Brief" an die Richterin und versandte diesen zugleich an zahlreiche weitere Adressaten, auch in Deutschland, unter anderem an die Berliner Zeitschrift "Sleipnir". Den englischsprachigen Text des Briefes stellte er in die homepage des Adelaide Institutes ein. In dem Brief warf er Mannheimer vor, Lügen über Auschwitz zu erzählen, und er schrieb unter anderem: "Ich habe Auschwitz im April 1997 besucht und bin aufgrund meiner eigenen Nachforschungen jetzt zu der Schlußfolgerung gelangt, daß das Lager in den Kriegsjahren niemals Menschengaskammern in Betrieb hatte". *(Abs. 7)*

3. Internet-Fall II.3: Ende Dezember 1998/Anfang Januar 1999 stellte der Angeklagte eine weitere Webseite in die homepage des Adelaide Institutes ein. Diese Seite enthielt einen englischsprachigen Artikel des Angeklagten mit der Überschrift "Fredrick Töbens Neujahrsgedanken 1999". Darin heißt es unter anderem: "In diesem ersten Monat des vorletzten Jahres der Jahrtausendwende können wir auf eine fünfjährige Arbeit zurückblicken und mit Sicherheit feststellen: die Deutschen haben niemals europäische Juden in todbringenden Gaskammern im Konzentrationslager Auschwitz oder an anderen Orten vernichtet. Daher können alle Deutschen und Deutschstämmigen ohne den aufgezwungenen Schuldkomplex leben, mit dem sie eine bösartige Denkweise ein halbes

Jahrhundert lang versklavt hat." "Auch wenn die Deutschen jetzt aufatmen können, müssen sie sich doch darauf gefaßt machen, daß sie weiterhin diffamiert werden, da Leute wie Jeremy Jones von den organisierten Juden Australiens sich nicht über Nacht grundlegend ändern. Ihre Auschwitz-Keule war ein gutes Instrument für sie, das sie gegen alle diejenigen geschwungen haben, die mit ihrer politischen Überzeugung nicht einverstanden sind, um sie ‚funktionsfähig zu machen', wie Jones sich äußerte." *(Abs. 8)*

Das Landgericht konnte bei den Internet-Fällen weder feststellen, daß der Angeklagte von sich aus Online-Anschlußinhaber in Deutschland oder anderswo angewählt hätte, um ihnen die genannten Webseiten zu übermitteln (zu "pushen"), noch daß - außer dem ermittelnden Polizeibeamten - Internetnutzer in Deutschland die homepage des Adelaide Institutes angewählt hatten. *(Abs. 9)*

III. Die Publikationen des Angeklagten hat das Landgericht wie folgt rechtlich gewürdigt: *(Abs. 10)*

1. In allen drei Fällen hat das Landgericht den Angeklagten wegen Beleidigung (der überlebenden Juden) in Tateinheit mit Verunglimpfung des Andenkens Verstorbener verurteilt. *(Abs. 11)*

2. In allen drei Fällen habe der Angeklagte das Verfolgungsschicksal der ermordeten und überlebenden Insassen des Konzentrationslagers Auschwitz geleugnet. In den Fällen II.1 und II.3 habe er den Holocaust als erfundenes Druckmittel zur Erlangung politischer Vorteile und im Fall II.3 zusätzlich auch zur Erlangung finanzieller Vorteile bezeichnet. *(Abs. 12)*

Durch das von vornherein beabsichtigte öffentliche Zugänglichmachen dieser die Menschenwürde verletzenden Beleidigungen und Verunglimpfungen habe der Angeklagte zugleich auch die Gefahr begründet, daß dadurch der öffentliche Friede gestört würde. Seine ins Internet gestellten Artikel seien geeignet gewesen, das Sicherheitsempfinden und das Vertrauen in die Rechtssicherheit insbesondere der jüdischen Mitbürger empfindlich zu stören. *(Abs. 13)*

Das erfülle zwar den Tatbestand der Volksverhetzung nach § 130 Abs. 1 Nr. 2 StGB. Aber lediglich im Fall II.2 (offener Brief) könne eine Verurteilung auch wegen Volksverhetzung erfolgen. Nur hier läge eine Inlandstat vor, für die deutsches Strafrecht gelte. Für die Internet-Fälle (II.1 und II.3) gelte das deutsche Strafrecht indessen nicht, soweit es die Volksverhetzung betrifft (§ 3 StGB). Insoweit sei kein inländischer Ort der Tat (§ 9 StGB) gegeben, denn gehandelt (§ 9 Abs. 1 1. Alt. StGB) habe der Angeklagte nur in Australien, und einen zum Tatbestand gehörenden Erfolg (§ 9 Abs. 1 3. Alt. StGB) könne es bei einem abstrakten Gefährdungsdelikt wie der Volksverhetzung nicht geben. Auch sonst (§§ 5 bis 7 StGB) gelte das deutsche Strafrecht nicht. *(Abs. 14)*

B.

Presserechtliche Verjährung ist auch bei dem Fall II.1 schon deshalb nicht eingetreten, weil kein Presseinhaltsdelikt vorliegt, denn es geht nicht um die körperliche Verbreitung eines an ein Druckwerk gegenständlich gebundenen strafbaren Inhalts (vgl. BGH NStZ 1996, 492). *(Abs. 15)*

C. Revision des Angeklagten *(Abs. 16)*

Die Revision des Angeklagten hat mit einer Verfahrensrüge Erfolg. *(Abs. 17)*

I. Dem liegt folgendes Verfahrensgeschehen zugrunde: *(Abs. 18)*

1. Rechtsanwalt B. , der Wahlverteidiger des Angeklagten vor dem Landgericht, war am 25. März 1999 wegen Volksverhetzung verurteilt worden, weil er in einem anderen Strafverfahren gegen den dortigen Angeklagten Deckert einen Beweisantrag gestellt hatte, mit dem er den Völkermord an der jüdischen Bevölkerung unter der Herrschaft des Nationalsozialismus verharmlost hatte. Die Revisionen der Staatsanwaltschaft und des Angeklagten hat der Bundesgerichtshof in der Revisionshauptverhandlung vom 6. April 2000 verworfen (BGHSt 46, 36). *(Abs. 19)*

2. Unter Hinweis auf das gegen ihn anhängige Revisionsverfahren hatte der Verteidiger deshalb am 3. November 1999 - noch vor Beginn der zweitägigen Hauptverhandlung am 8. November 1999 - sein Wahlmandat niedergelegt und darum gebeten, ihn auch nicht als Verteidiger zu bestellen, weil er sich nicht in der Lage sehe, eine effiziente Verteidigung zu führen. Gleichwohl bestellte der Vorsitzende der Strafkammer am 4. November 1999 Rechtsanwalt B. als Verteidiger nach § 140 Abs. 1 Nr. 1 StPO mit der Begründung, dieser sei nicht gehindert, an der ordnungsgemäßen Durchführung des Strafverfahrens durch sachdienliche Verteidigung des Angeklagten mitzuwirken. *(Abs. 20)*

Am ersten Hauptverhandlungstag gab Rechtsanwalt B. nach Feststellung der Personalien des Angeklagten eine Erklärung ab, in der er konkret darlegte, daß er zu einer substantiierten Verteidigung nicht in der Lage sei. In der jetzigen Lage gäbe es für ihn - aus Angst vor weiterer Strafverfolgung - nur die Möglichkeit, die Hauptverhandlung zu verlassen oder schweigend zu verbleiben. Er werde jedoch die Hauptverhandlung, solange er beigeordnet sei, nicht verlassen. Die Verantwortung, ob der Angeklagte sachdienlich verteidigt sei, liege daher beim Vorsitzenden. Am zweiten Hauptverhandlungstag stellte der Angeklagte den Antrag auf Zurücknahme der Bestellung von Rechtsanwalt B. und auf Beiordnung eines namentlich benannten anderen Verteidigers. Der vorgeschlagene Verteidiger lehnte jedoch die Verteidigung wegen Arbeitsüberlastung ab. Die Bestellung von Rechtsanwalt B. nahm der Vorsitzende nicht zurück. Rechtsanwalt B. sei nicht gehindert, den Angeklagten im Rahmen der Gesetze zu verteidigen. Das Vertrauensverhältnis sei ersichtlich nicht gestört. Im übrigen sei dem Angeklagten die persönliche Situation seines Verteidigers bekannt gewesen; gleichwohl habe er keinen anderen Verteidiger beauftragt. Im Hinblick auf das Beschleunigungsgebot komme eine Zurücknahme der Bestellung nicht in Betracht. *(Abs. 21)*

Rechtsanwalt B. stellte in der Hauptverhandlung keine Beweisanträge; nach dem Schluß der Beweisaufnahme machte er keine Ausführungen und stellte auch keinen Antrag. *(Abs. 22)*

3. Rechtsanwalt B. legte für den Angeklagten Revision ein. Nachdem der Bundesgerichtshof in dem Verfahren gegen Rechtsanwalt B. den Termin für die Revisionshauptverhandlung bestimmt hatte, wies Rechtsanwalt B. das Landgericht darauf hin, daß mit einer Entscheidung des Bundesgerichtshofs erst nach Ablauf der Revisionsbegründungsfrist zu rechnen sei, und beantragte erneut die Bestellung eines anderen Verteidigers. Der Vorsitzende der Strafkammer lehnte den Antrag ab. In der von ihm verfaßten Revisionsbegründungsschrift erhob Rechtsanwalt B. lediglich die allgemeine Sachrüge. Er machte unter Hinweis auf die oben geschilderten Vorgänge geltend, er sei gehindert, die Sachrüge näher auszuführen, und beantragte die Bestellung eines anderen Verteidigers zur weiteren Revisionsbegründung, insbesondere zu der Frage, ob der Angeklagte vor dem Landgericht ordnungsgemäß verteidigt war. Diesen Antrag ließ der Vorsitzende der Strafkammer unbeschieden. Der Vorsitzende des erkennenden Senats hat mit Verfügung vom 25. Juli 2000 die Bestellung von Rechtsanwalt B. zurückgenommen und dem Angeklagten einen anderen Verteidiger bestellt, der die Verfahrensrüge erhoben und insoweit Wiedereinsetzung in den vorigen Stand erhalten hat. *(Abs. 23)*

II. Mit dieser Verfahrensrüge wird der absolute Revisionsgrund des § 338 Nr. 5 StPO geltend gemacht. Rechtsanwalt B. sei aus Furcht vor eigener Bestrafung daran gehindert gewesen, den Angeklagten sachgerecht und effektiv zu verteidigen. Er sei zwar körperlich anwesend gewesen, in der Hauptverhandlung jedoch untätig geblieben, insbesondere habe er keinen Schlußvortrag gehalten (§ 145 Abs. 1 StPO). *(Abs. 24)*

III. Der Senat kann offen lassen, ob der absolute Revisionsgrund des § 338 Nr. 5 StPO gegeben ist (vgl. BGHSt 39, 310, 313; BGH NStZ 1992, 503), denn sowohl in den Entscheidungen des Vorsitzenden der Strafkammer über die Auswahl und Bestellung als auch über die Nichtzurücknahme der Bestellung liegt ein Verfahrensverstoß, auf dem das Urteil beruhen kann. *(Abs. 25)*

1. In der Rechtsprechung des Bundesgerichtshofs ist anerkannt, daß die Verfügung des Vorsitzenden, durch die ein Verteidiger bestellt wird, als Vorentscheidung gemäß § 336 StPO unmittelbar der Überprüfung durch das Revisionsgericht unterliegt, weil das Urteil auf ihr beruhen kann. Die Statthaftigkeit einer solchen Rüge hängt nicht davon ab, daß der Angeklagte zuvor eine Entscheidung des Gerichts herbeigeführt hat. Dies gilt in gleicher Weise für eine Entscheidung des Vorsitzenden, mit der die Zurücknahme der Bestellung abgelehnt worden ist (BGHSt 39, 310, 311; BGH NStZ 1992, 292; NStZ 1995, 296 jew. m.w.N.; vgl. auch BGH StV 1995, 641; NStZ 1997, 401; StV 1997, 565). *(Abs. 26)*

2. Die Entscheidungen des Vorsitzenden verletzten § 140 und § 141 StPO und damit das Recht des Angeklagten auf wirksame Verteidigung (vgl. auch Art. 6 Abs. 3 Buchstabe c

MRK). Sie verstießen zudem gegen den Grundsatz des fairen Verfahrens (vgl. BGHSt 39, 310, 312). Es lag ein wichtiger Grund vor, Rechtsanwalt B. nicht zu bestellen und dessen Bestellung zurückzunehmen. *(Abs. 27)*

Als wichtiger Grund für die Bestellung oder die Zurücknahme der Bestellung kommt jeder Umstand in Frage, der den Zweck der Verteidigung, dem Beschuldigten einen geeigneten Beistand zu sichern und den ordnungsgemäßen Verfahrensablauf zu gewährleisten, ernsthaft gefährdet. Die Fürsorgepflicht gegenüber dem Angeklagten wird es dem Vorsitzenden regelmäßig verbieten, einen Verteidiger zu bestellen, der die Verteidigung wegen eines Interessenkonflikts möglicherweise nicht mit vollem Einsatz führen kann (BVerfG - Kammer - NJW 1998, 444). *(Abs. 28)*

Bei Rechtsanwalt B. lag ein solcher Interessenkonflikt offensichtlich vor. Er konnte den Angeklagten im Hinblick auf sein eigenes Strafverfahren nicht unbefangen verteidigen. Da die Maßstäbe für die Grenzen eines zulässigen Verteidigerverhaltens in Fällen der vorliegenden Art (§ 130 Abs. 5 StGB) höchstrichterlich noch nicht geklärt waren, konnte er keine effektive Verteidigung führen, denn er mußte besorgen, sich selbst strafbar zu machen. *(Abs. 29)*

IV. Für die neue Hauptverhandlung weist der Senat darauf hin, daß im Fall II.2 zu prüfen sein wird, ob neben dem Leugnungstatbestand (§ 130 Abs. 3 StGB) auch eine qualifizierte Auschwitzlüge (§ 130 Abs. 1 StGB) vorliegt. *(Abs. 30)*

D. Revision der Staatsanwaltschaft

Die Revision der Staatsanwaltschaft hat mit der Sachrüge überwiegend Erfolg; auch für die in den Internet-Fällen II.1 und II.3 tateinheitlich begangene Volksverhetzung gilt das deutsche Strafrecht. *(Abs. 31)*

I. Die Äußerungen in den Internet-Fällen II.1 und II.3 haben einen volksverhetzenden Inhalt, und zwar sowohl nach § 130 Abs. 1 Nr. 1 und Nr. 2 StGB als auch nach § 130 Abs. 3 StGB. *(Abs. 32)*

1. In beiden Internet-Fällen liegt die sog. qualifizierte Auschwitzlüge (BGH NStZ 1994, 140; BGHSt 40, 97) vor, die den Tatbestand des § 130 Abs. 1 Nr. 1 StGB (Beschimpfungs-Alternative) und des § 130 Abs. 1 Nr. 2 StGB (Aufstachelungs-Alternative) erfüllt. *(Abs. 33)*

a) Mit offenkundig unwahren Tatsachenbehauptungen (BVerfGE 90, 241; BGH NStZ 1994, 140; 1995, 340) wird nicht nur das Schicksal der Juden unter der Herrschaft des Nationalsozialismus als Lügengeschichte dargestellt, sondern diese Behauptung wird auch mit dem Motiv der angeblichen Knebelung und Ausbeutung Deutschlands zugunsten der Juden verbunden. Im Fall II.1 wird die Qualifizierung insbesondere deutlich durch die Formulierung: "... häufig fiebrigen Gehirnen entsprungen sind, die es auf eine Rente vom deutschen Staat abgesehen haben.". Im Fall II.3 insbesondere durch die Formulierungen "Schuldkomplex", "versklavt" und "Auschwitz-Keule". *(Abs. 34)*

b) Rechtsfehlerfrei hat das Landgericht deshalb angenommen, daß der Äußerungstatbestand des § 130 Abs. 1 Nr. 2 StGB, zumindest in der Form des Beschimpfens (vgl. von Bubnoff in LK 11. Aufl. § 130 Rdn. 22), gegeben ist. Es liegt eine besonders verletzende Form der Mißachtung vor. Im Fall II.1 insbesondere durch die Formulierung "ein Grund zum Feiern" und im Fall II.3 insbesondere durch die Formulierung "mit dem sie eine bösartige Denkungsweise ein halbes Jahrhundert lang versklavt hat". Da die Behauptungen darauf ausgingen, feindliche Gefühle gegen die Juden im allgemeinen und gegen die in Deutschland lebenden Juden zu erwecken und zu schüren, liegt auch ein Angriff gegen die Menschenwürde vor (BGH NStZ 1981, 258; vgl. auch BGHSt 40, 97, 100; von Bubnoff aaO § 130 Rdn. 12, 18; Lenckner in Schönke/Schröder, StGB 25. Aufl. § 130 Rdn. 7). *(Abs. 35)*

c) Nach den Feststellungen liegt aber auch - was dem Angeklagten bereits in der Anklage vorgeworfen wurde - eine Volksverhetzung im Sinne des § 130 Abs. 1 Nr. 1 StGB vor (vgl. dazu BGHSt 31, 226, 231; 40, 97, 100; BGH NStZ 1981, 258; 1994, 140; von Bubnoff aaO § 130 Rdn. 18; Lenckner aaO § 130 Rdn. 5a; Lackner/Kühl, StGB 23. Aufl. § 130 Rdn. 4; Tröndle/Fischer, StGB 49. Aufl. § 130 Rdn. 5, 20b). Die Feststellungen belegen (vgl. UA S. 21), daß die Äußerungen dazu bestimmt waren, eine gesteigerte, über die bloße Ablehnung und Verachtung hinausgehende feindselige Haltung gegen die in Deutschland lebenden Juden zu erzeugen (vgl. BGHSt 40, 97, 102). *(Abs. 36)*

2. Zugleich wird - was gleichfalls angeklagt ist - eine unter der Herrschaft des Nationalsozialismus begangene Handlung der in § 220a Abs. 1 StGB bezeichneten Art geleugnet und verharmlost (§ 130 Abs. 3 StGB). Die vom Angeklagten persönlich verfaßten Internetseiten waren für einen nach Zahl und Individualität unbestimmten Kreis von Personen unmittelbar wahrnehmbar und damit öffentlich (Lackner/Kühl aaO § 80a Rdn. 2). Der Leugnungstatbestand des § 130 Abs. 3 StGB steht in Tateinheit zum Äußerungstatbestand des § 130 Abs. 1 StGB (von Bubnoff aaO § 130 Rdn. 50). *(Abs. 37)*

3. Soweit daneben der Schriftenverbreitungstatbestand des § 130 Abs. 2 Nr. 1 Buchstabe b StGB erfüllt sein sollte, wird er von § 130 Abs. 1 StGB verdrängt, wenn sich - wie hier - die Äußerung gegen Teile der (inländischen) Bevölkerung richtet (Lenckner aaO § 130 Rdn. 27; für Tateinheit auch insoweit wohl von Bubnoff aaO § 130 Rdn. 50). *(Abs. 38)*

4. Die Voraussetzungen der Tatbestandsausschlußklausel des § 130 Abs. 5 StGB i.V.m. § 86 Abs. 3 StGB (vgl. dazu BGHSt 46, 36) liegen nicht vor. Die Äußerungen dienen nicht der Wissenschaft, Forschung oder Lehre (BVerfG - Kammer - Beschluß vom 30. November 1988 - 1 BvR 900/88 -; BVerwG NVwZ 1988, 933); sie sind auch nicht durch das Grundrecht auf freie Meinungsäußerung geschützt (BVerfGE 90, 241; BVerfG - Kammer - Beschluß vom 6. September 2000 - 1 BvR 1056/95 -). *(Abs. 39)*

5. Die Eignung zur Friedensstörung ist gemeinsames Tatbestandsmerkmal von § 130 Abs. 1 und Abs. 3 StGB, die zusätzlich zu der Äußerung hinzutreten muß. *(Abs. 40)*

a) Mit der Eignungsformel wird die Volksverhetzung nach § 130 Abs. 1 und Abs. 3 StGB zu einem abstrakt-konkreten Gefährdungsdelikt (vgl. Senat in BGHSt 39, 371 zum Freisetzen ionisierender Strahlen nach § 311 Abs. 1 StGB und in NJW 1999, 2129 zur Straftat nach § 34 Abs. 2 Nr. 3 AWG); teilweise wird diese Deliktsform auch als "potentielles Gefährdungsdelikt" bezeichnet (BGH NJW 1994, 2161; vgl. auch Sieber NJW 1999, 2065, 2067 m.w.N.). Dabei ist die Deliktsbezeichnung von untergeordneter Bedeutung; solche Gefährdungsdelikte sind jedenfalls eine Untergruppe der abstrakten Gefährdungsdelikte (Senat NJW 1999, 2129). *(Abs. 41)*

b) Für die Eignung zur Friedensstörung ist deshalb zwar der Eintritt einer konkreten Gefahr nicht erforderlich (so aber Rudolphi in SK-StGB 6. Aufl. § 130 Rdn. 10; Roxin Strafrecht AT Bd. 1 3. Aufl. § 11 Rdn. 28; Schmidhäuser, Strafrecht BT 2. Aufl. S. 147; Gallas in der Festschrift für Heinitz S. 181). Vom Tatrichter verlangt wird aber die Prüfung, ob die jeweilige Handlung bei genereller Betrachtung gefahrengeeignet ist (vgl. BGH NJW 1999, 2129 zu § 34 Abs. 2 Nr. 3 AWG). *(Abs. 42)*

Notwendig ist allerdings eine konkrete Eignung zur Friedensstörung; sie darf nicht nur abstrakt bestehen und muß - wenn auch aufgrund generalisierender Betrachtung - konkret festgestellt sein (HansOLG Hamburg MDR 1981, 71; OLG Koblenz MDR 1977, 334; OLG Köln NJW 1981, 1280; von Bubnoff aaO § 130 Rdn. 4; Tröndle/Fischer aaO § 130 Rdn. 2; Lenckner aaO § 130 Rdn. 11; Lackner/Kühl aaO § 130 Rdn. 19 i.V.m § 126 Rdn. 4; Streng in der Festschrift für Lackner S. 140). Deshalb bleibt der Gegenbeweis der nicht gegebenen Eignung zur Friedensstörung im Einzelfall möglich. *(Abs. 43)*

c) Dieses Verständnis von der Eignung zur Friedensstörung entspricht auch der Rechtsprechung des Bundesgerichtshofs zu vergleichbaren Eignungsdelikten wie dem Freisetzen ionisierender Strahlen nach § 311 Abs. 1 StGB (BGHSt 39, 371; NJW 1994, 2161) oder der Straftat nach § 34 Abs. 2 Nr. 3 AWG (BGH NJW 1999, 2129). Ähnliches gilt für den unerlaubten Umgang mit gefährlichen Abfällen nach § 326 Abs. 1 Nr. 4 StGB (vgl. BGHSt 39, 381, 385; BGH NStZ 1994, 436; 1997, 189). *(Abs. 44)*

d) Für die Eignung zur Friedensstörung genügt es danach, daß berechtigte - mithin konkrete - Gründe für die Befürchtung vorliegen, der Angriff werde das Vertrauen in die öffentliche Rechtssicherheit erschüttern (BGHSt 29, 26; BGH NStZ 2000, 530, zur Veröffentlichung in BGHSt 46, 36 bestimmt, BGH NStZ 1981, 258). *(Abs. 45)*

6. Die Taten waren geeignet, den öffentlichen Frieden zu stören. *(Abs. 46)*

a) Eine solche Eignung wird durch die bisherigen Feststellungen belegt. Im Hinblick auf die Informationsmöglichkeiten des Internets, also aufgrund konkreter Umstände, mußte damit gerechnet werden - und darauf kam es dem Angeklagten nach den bisherigen Feststellungen auch an -, daß die Publikationen einer breiteren Öffentlichkeit in Deutschland bekannt werden. *(Abs. 47)*

b) Der Angeklagte verfolgte das Ziel, revisionistische Thesen zu verbreiten (UA S. 3, 4) und er wollte auch, daß jedermann weltweit und damit auch in Deutschland die Artikel

lesen konnte (UA S. 18; die mißverständlichen Ausführungen auf UA S. 43 widersprechen dem nicht). Er wollte damit auch aktiv in die Meinungsbildung bei der Verbreitung der Thesen in Kreisen deutscher "Revisionisten" eingreifen, wie der "offene Brief" mit seinem Verteilerkreis im Fall II.2 zeigt. *(Abs. 48)*

c) Es ist offenkundig, daß jedem Internet-Nutzer in Deutschland die Publikationen des Angeklagten ohne weiteres zugänglich waren. Die Publikationen konnten zudem von deutschen Nutzern im Inland weiter verbreitet werden. Daß gerade deutsche Internet-Nutzer - unbeschadet der Abfassung in englischer Sprache - zum Adressatenkreis der Publikationen gehörten und gehören sollten, ergibt sich insbesondere auch aus ihrem Inhalt, der einen nahezu ausschließlichen Bezug zu Deutschland hat (etwa: "untersuchen wir die Behauptung, daß die Deutschen systematisch sechs Millionen Juden umgebracht haben"; "Die Jagdsaison auf die Deutschen ist eröffnet"; "Daher können alle Deutschen und Deutschstämmigen ohne den aufgezwungenen Schuldkomplex leben"; "Die Deutschen können wieder stolz sein"). *(Abs. 49)*

d) Das Landgericht hat daher zu Recht angenommen, daß der Angeklagte eine Gefahrenquelle schuf, die geeignet war, das gedeihliche Miteinander zwischen Juden und anderen Bevölkerungsgruppen empfindlich zu stören und die Juden in ihrem Sicherheitsgefühl und in ihrem Vertrauen auf Rechtssicherheit zu beeinträchtigen (UA S. 21). *(Abs. 50)*

II. Das deutsche Strafrecht gilt für das abstrakt-konkrete Gefährdungsdelikt der Volksverhetzung nach § 130 Abs. 1 und Abs. 3 StGB auch in den Internet-Fällen. Seine Anwendbarkeit ergibt sich aus § 3 StGB in Verbindung mit § 9 StGB. Denn hier liegt eine Inlandstat (§ 3 StGB) vor, weil der zum Tatbestand gehörende Erfolg in der Bundesrepublik eingetreten ist (§ 9 Abs. 1 3. Alt. StGB). *(Abs. 51)*

1. Die Auslegung des Merkmals "zum Tatbestand gehörender Erfolg" muß sich an der ratio legis des § 9 StGB ausrichten. Nach dem Grundgedanken der Vorschrift soll deutsches Strafrecht - auch bei Vornahme der Tathandlung im Ausland - Anwendung finden, sofern es im Inland zu der Schädigung von Rechtsgütern oder zu Gefährdungen kommt, deren Vermeidung Zweck der jeweiligen Strafvorschrift ist (BGHSt 42, 235, 242; Gribbohm in LK 11. Aufl. § 9 Rdn. 24). Daraus folgt, daß das Merkmal "zum Tatbestand gehörender Erfolg" im Sinne des § 9 StGB nicht ausgehend von der Begriffsbildung der allgemeinen Tatbestandslehre ermittelt werden kann. *(Abs. 52)*

2. Die Vorverlagerung der Strafbarkeit kann der Gesetzgeber durch verschiedene Ausgestaltungen eines Gefährdungsdelikts vornehmen. Er kann konkrete Gefährdungsdelikte schaffen (wie § 315c StGB), oder aber abstrakt-konkrete (wie § 130 Abs. 1 und Abs. 3, § 311 Abs. 1 StGB, § 34 AWG) und rein abstrakte Gefährdungstatbestände (wie § 316 StGB). Wie der Gesetzgeber den Deliktscharakter bestimmt, hängt häufig vom Rang des Rechtsguts und der spezifischen Gefährdungslage ab. *(Abs. 53)*

Daß konkrete Gefährdungsdelikte - als Untergruppe der Erfolgsdelikte - dort, wo es zur konkreten Gefahr gekommen ist, einen Erfolgsort haben, ist weitgehend unbestritten (vgl. nur Gribbohm aaO § 9 Rdn. 20 und Hilgendorf NJW 1997, 1873, 1875 m.w.N.). Abstrakt-konkrete Gefährdungsdelikte stehen zwischen konkreten und rein abstrakten Gefährdungsdelikten. Sie sind unter dem hier relevanten rechtlichen Gesichtspunkt des Erfolgsorts mit konkreten Gefährdungsdelikten vergleichbar, weil der Gesetzgeber auch hier eine zu vermeidende Gefährdung - den Erfolg - im Tatbestand der Norm ausdrücklich bezeichnet. Ob bei rein abstrakten Gefährdungsdelikten ein Erfolgsort jedenfalls dann anzunehmen wäre, wenn die Gefahr sich realisiert hat, braucht der Senat nicht zu entscheiden. *(Abs. 54)*

3. Bei abstrakt-konkreten Gefährdungsdelikten ist ein Erfolg im Sinne des § 9 StGB dort eingetreten, wo die konkrete Tat ihre Gefährlichkeit im Hinblick auf das im Tatbestand umschriebene Rechtsgut entfalten kann. Bei der Volksverhetzung nach § 130 Abs. 1 und Abs. 3 StGB ist das die konkrete Eignung zur Friedensstörung in der Bundesrepublik Deutschland (Collardin CR 1995, 618: speziell zur Auschwitzlüge, wenn der Täter in Deutschland wirken will; Kuner CR 1996, 453, 455: zu Äußerungen im Internet; Beisel/Heinrich JR 1996, 95; Heinrich mit beachtlichen Argumenten in GA 1999, 72; ähnlich Martin ZRP 1992, 19: zu grenzüberschreitenden Umweltdelikten). *(Abs. 55)*

a) Dies entspricht auch der Intention des Gesetzgebers bei Schaffung des Volksverhetzungstatbestandes im Jahre 1960 (vgl. dazu Streng aaO). Schon im Vorfeld von unmittelbaren Menschenwürdeverletzungen wollte er dem Ingangsetzen einer historisch als gefährlich nachgewiesenen Eigendynamik entgegenwirken und schon den Anfängen wehren (Streng aaO S. 508: "Klimaschutz"). *(Abs. 56)*

Mit der Einfügung des Leugnungstatbestandes des § 130 Abs. 3 StGB im Jahre 1994 betonte der Gesetzgeber nochmals die Intention, "eine Vergiftung des politischen Klimas durch die Verharmlosung der nationalsozialistischen Gewalt- und Willkürherrschaft zu verhindern" (Bericht des Rechtsausschusses des Deutschen Bundestages, BTDrucks. 12/8588 S. 8; vgl. auch Bundesministerin der Justiz bei der 1. Beratung des Gesetzentwurfs zur Strafbarkeit der Leugnung des nationalsozialistischen Völkermordes - BTDrucks. 12/7421 - am 18. Mai 1994, Plenarprotokoll der 227. Sitzung des Deutschen Bundestages, S. 19671). Der Gesetzgeber wollte somit den strafrechtlichen Schutz vorverlagern; schon die "Vergiftung des politischen Klimas" sollte unterbunden werden. Die Vorverlagerung der Strafbarkeit war - wie das Abstellen auf das "politische Klima" zeigt - auch davon bestimmt, daß eine konkrete Gefährdung oder gar eine individuelle Rechtsgutverletzung nur sehr selten unmittelbar auf eine einzelne Äußerung zurückgeführt werden könne (vgl. Streng aaO S. 512, der zusätzlich darauf hinweist, daß die Menschenwürde anderer nur angegriffen, nicht aber verletzt werden muß). *(Abs. 57)*

b) Auch sonst wird der Begriff des Erfolgsorts nicht im Sinne der allgemeinen Tatbestandslehre verstanden. *(Abs. 58)*

So hat der Bundesgerichtshof bei abstrakten Gefährdungsdelikten einen "zum Tatbestand gehörenden Erfolg" im Sinne des § 78a Satz 2 StGB (Verjährungsbeginn) durchaus für

möglich gehalten: "Bei diesen Delikten [§ 326 Abs. 1 StGB, abstraktes Gefährdungsdelikt] tritt mit der Begehung zugleich der Erfolg der Tat ein, der in der eingetretenen Gefährdung, nicht in einer aus der Gefährdung möglicherweise später erwachsenden Verletzung besteht" (BGHSt 36, 255, 257; siehe auch Jähnke in LK 11. Aufl. § 78a Rdn. 11). *(Abs. 59)*

Auch kann ein abstraktes Gefährdungsdelikt durch Unterlassen begangen werden. Dabei setzt § 13 StGB gleichfalls einen Erfolg voraus, "der zum Tatbestand eines Strafgesetzes gehört" (vgl. BGH NStZ 1997, 545: Tatbestandsverwirklichung des § 326 Abs. 1 StGB durch Unterlassung, die lediglich nicht fahrlässig war; BGHSt 38, 325, 338: die tatbestandlichen Voraussetzungen des § 326 Abs. 1 Nr. 3 StGB waren durch Unterlassen erfüllt, dieser Tatbestand wurde allerdings von § 324 StGB verdrängt). Das entspricht auch der überwiegenden Auffassung in der Literatur (Tröndle/Fischer aaO § 13 Rdn. 2; Lackner/Kühl aaO § 13 Rdn. 6; Stree in Schönke/Schröder, StGB 25. Aufl. § 13 Rdn. 3; aA Jescheck in LK 11. Aufl. § 13 Rdn. 2, 15). *(Abs. 60)*

c) Soweit von einer verbreiteten Meinung die Auffassung vertreten wird, abstrakte Gefährdungsdelikte könnten keinen Erfolgsort im Sinne des § 9 StGB haben (OLG München StV 1991, 504: zur Hehlerei als schlichtem Tätigkeitsdelikt; KG NJW 1999, 3500; Gribbohm aaO § 9 Rdn. 20; Tröndle/Fischer aaO § 9 Rdn. 3; Eser in Schönke/Schröder, StGB 25. Aufl. § 9 Rdn. 6; Lackner/Kühl aaO § 9 Rdn. 2; Jakobs Strafrecht AT 2. Aufl. S. 117; Horn/Hoyer JZ 1987, 965, 966; Tiedemann/Kindhäuser NStZ 1988, 337, 346; Cornils JZ 1999, 394: speziell zur Volksverhetzung im Internet), wird nicht immer hinreichend zwischen rein abstrakten und abstrakt-konkreten Gefährdungsdelikten differenziert. Aber auch dort, wo die Auffassung vertreten wird, daß abstrakt-konkrete bzw. potentielle Gefährdungsdelikte - als Unterfall der abstrakten Gefährdungsdelikte - keinen Erfolgsort hätten (Hilgendorf NJW 1997, 1873; Satzger NStZ 1998, 112), vermag das nicht zu überzeugen. *(Abs. 61)*

Die Verneinung eines Erfolgsorts bei abstrakten Gefährdungsdelikten wird zumeist nicht näher begründet, stützt sich aber ersichtlich auf den geänderten Wortlaut des § 9 StGB. Durch das 2. StrRG vom 4. Juli 1969 (BGBl I S. 717), in Kraft getreten am 1. Januar 1975 (BGBl I 1973 S. 909), wurde der Erfolgsort nicht mehr nur mit dem "Erfolg", sondern mit dem "zum Tatbestand gehörenden Erfolg" umschrieben. Da eine konkrete Gefahr oder gar eine Gefahrverwirklichung gerade nicht zum Tatbestand eines abstrakten Gefährdungsdelikts gehöre, könne auch der Ort der Gefährdung nicht Tatort sein. *(Abs. 62)*

Allerdings war das Ziel der Gesetzesänderung nicht, eine Begrenzung des § 9 Abs. 1 3. Alt. StGB auf Erfolgsdelikte vorzunehmen, wie Sieber (NJW 1999, 2065, 2069) überzeugend dargelegt hat. Das Merkmal "zum Tatbestand gehörender Erfolg" sollte lediglich klarstellen, daß der Eintritt des Erfolges in enger Beziehung zum Straftatbestand zu sehen ist (Kielwein in: Niederschriften über die Sitzung der Großen Strafrechtskommission IV, AT, 38. bis 52. Sitzung, 1958, S. 20). *(Abs. 63)*

Mit der Aufnahme der (konkreten) Eignung zur Friedensstörung in den Tatbestand des § 130 Abs. 1 und Abs. 3 StGB hat der Gesetzgeber indes die enge Beziehung des Eintritts des Erfolges zum Straftatbestand umschrieben und damit den zum Tatbestand gehörenden Erfolg selbst bestimmt. *(Abs. 64)*

d) Auch die vermittelnden Meinungen von Oehler (Internationales Strafrecht 2. Aufl. Rdn. 257), Jescheck (Lehrbuch des Strafrechts AT 4. Aufl. S. 160; nicht eindeutig Jescheck/Weigend, Lehrbuch des Strafrechts AT 5. Aufl. S. 178) und Sieber (NJW 1999, 2065), die bei der hier vorliegenden Fallgestaltung zu einer Verneinung des Erfolgsorts führen würden, vermögen an dem gefundenen Ergebnis nichts zu ändern. *(Abs. 65)*

4. Für die Anwendung des deutschen Strafrechts bei der Volksverhetzung nach § 130 Abs. 1 und Abs. 3 StGB in Fällen der vorliegenden Art liegt auch ein völkerrechtlich legitimierender Anknüpfungspunkt vor. Denn die Tat betrifft ein gewichtiges inländisches Rechtsgut, das zudem objektiv einen besonderen Bezug auf das Gebiet der Bundesrepublik Deutschland aufweist (vgl. Jescheck/Weigend aaO S. 179; Hilgendorf NJW 1997, 1873, 1876; Derksen NJW 1997, 1878, 1880; Martin ZRP 1992, 19, 22). Auch soll die Verletzung dieses Rechtsguts gerade von dieser Strafvorschrift unterbunden werden. *(Abs. 66)*

Das Äußerungsdelikt nach § 130 Abs. 1 StGB schützt Teile der inländischen Bevölkerung schon im Vorfeld von unmittelbaren Menschenwürdeverletzungen und will - wegen der besonderen Geschichte Deutschlands - dem Ingangsetzen einer historisch als gefährlich nachgewiesenen Eigendynamik entgegenwirken. Der Leugnungstatbestand des § 130 Abs. 3 StGB hat aufgrund der Einzigartigkeit der unter der Herrschaft des Nationalsozialismus an den Juden begangenen Verbrechen einen besonderen Bezug zur Bundesrepublik Deutschland (vgl. von Bubnoff aaO § 130 Rdn. 45; Lackner/Kühl aaO § 130 Rdn. 8a; Gemeinsame Maßnahme des Rates der Europäischen Union betreffend die Bekämpfung von Rassismus und Fremdenfeindlichkeit vom 15. Juli 1996, Amtsblatt der Europäischen Gemeinschaften vom 24. Juli 1996, Nr. L 185/5). *(Abs. 67)*

5. Es kann offen bleiben, ob der Angeklagte auch im Inland gehandelt haben könnte (§ 9 Abs. 1 1. Alt. StGB), wenn ein inländischer Internet-Nutzer die Seiten auf dem australischen Server aufgerufen und damit die Dateien nach Deutschland "heruntergeladen" hätte. Der Senat hätte allerdings Bedenken, eine auch bis ins Inland wirkende Handlung darin zu sehen, daß der Angeklagte sich eines ihm zuzurechnenden Werkzeugs (der Rechner einschließlich der Proxy-Server, Datenleitungen und der Übertragungssoftware des Internets) zur - physikalischen - "Beförderung" der Dateien ins Inland bedient hätte. Eine Übertragung des im Zusammenhang mit der Versendung eines Briefes (vgl. dazu Gribbohm aaO § 9 Rdn. 39) entwickelten Handlungsbegriffes (zu Rundfunk- und Fernsehübertragungen siehe auch KG NJW 1999, 3500) auf die Datenübertragung des Internets liegt eher fern. *(Abs. 68)*

III. Das deutsche Strafrecht gilt auch für die Erfolgsdelikte der Beleidigung (vgl. Tröndle/Fischer aaO § 185 Rdn. 15; Roxin aaO § 10 Rdn. 102; Hilgendorf NJW 1997, 1783, 1876) und der Verunglimpfung des Andenkens Verstorbener (vgl. Tröndle/Fischer

aaO § 189 Rdn. 2) in den Internet-Fällen. Die Ehrverletzung (zu den Grenzen der Meinungsfreiheit vgl. BVerfG - Kammer - Beschluß vom 6. September 2000 - 1 BvR 1056/95 -) trat jedenfalls mit der Kenntniserlangung des ermittelnden Polizeibeamten ein (vgl. BGHSt 9, 17; Tröndle/Fischer aaO § 185 Rdn. 15; Lenckner aaO § 185 Rdn. 5, 16). Hierbei handelte es sich nicht etwa um vertrauliche Äußerungen, von denen sich der Staat Kenntnis verschafft hat (vgl. BVerfGE 90, 255). *(Abs. 69)*

IV. Die somit entsprechend § 354 Abs. 1 StPO vorzunehmende Änderung des Schuldspruchs in den Fällen II.1 und II.3 führt zur Aufhebung der in diesen Fällen verhängten Einzelstrafen und der Gesamtstrafe. Da der Schuldspruch im Fall II.2 von der Revision der Staatsanwaltschaft nicht angegriffen wird, war die in diesem Fall verhängte Einsatzstrafe nicht aufzuheben, denn insoweit enthält die Strafzumessung keinen den Angeklagten begünstigenden Rechtsfehler. *(JurPC Web-Dok. 38/2001, Abs. 70)*

[online seit: 22.01.2001]

BGH, 12 December 2000[1]

On that date, the German Federal Court of Justice heard a case which has often been cited and which sheds light on the issues arising in connection with racism on Internet. An Australian citizen of German origin wrote an article and a circular letter, in which he denied the attempted extermination of the Jews (*actus reus* of the offence referred to as the "Auschwitz lie") and published these on the Internet in Australia and in the English language. The Australian citizen was arrested upon entering Germany. The question presented for judicial review by the Federal Court of Justice was whether German criminal law could and should be applied in this case, given that the place of commission was obviously not Germany, but in Australia.

The offence of public incitement to hatred under § 130, paras. 1 und 3 StGB, which was considered by the Federal Court of Justice, is an example of an offence of potential endangerment (*potentielles Gefährdungsdelikt*), which is in turn a subcategory under the heading of offences of abstract endangerment (*abstrakte Gefährdungsdelikte*)[2]. There is an unresolved debate in respect of endangerment offences as to whether it is even possible to commit the predicate offence. German criminal law theory distinguishes between endangerment offences and injurious offences (*Verletzungsdelikte*), a substantive element of which is the actual infringement of the protected right or freedom[3]. The particular characteristic of abstract endangerment offences, like the one with which the Federal Court of Justice was concerned in this case, is that they do not involve any substantive requirement of the accused having actually endangered the protected right of freedom. Instead, the legislature has chosen to punish the creation of an abstract danger, because it considers that conduct to be dangerous in itself. Against that background, most of the commentators proceed on the assumption that the successful realisation of the accused's intentions is not an element of an abstract endangerment offence[4]. The Federal Court of Justice came to a different conclusion, however: proceeding from the *ratio legis* of § 9 StGB, it held that German criminal law – even when the *actus reus* is committed abroad and particularly in internet cases – is to be applied whenever an infringement or endangerment, the avoidance of which is the purpose of the relevant provision, occurs within the country. That means, according to the Court, that the meaning of the concept of "successful completion as an element of the offence", as used in § 9 StGB, cannot be determined on the basis of the general definitional principles applicable to criminal offences. In these circumstances, the Court considered that the characterisation of the particular offence as an injurious offence or as a concrete or abstract endangerment offence is not decisive. Instead, each offence must be individually analysed in order to identify the successful completion which corresponds to the particular elements of the offence. According to the Court, the meaning of

[1] Summary and commentary of the judgment of the German Federal Court of Justice quoted above.
[2] BGH 12.12.2000, in JurPC, Abs. 41. Refer also to Tröndle/Fischer, *Kommentar zum StGB*, 49. Aufl. München 1999, § 130, Rn. 2.
[3] Refer to Tröndle/Fischer, *Kommentar zum StGB*, 49. Aufl. München 1999, § 13, Rn. 13. Injurious offences by their nature require that the protected right or freedom has been actually infringed and that constitutes the successful conclusion of the offence in the sense of § 9 StGB. The offence is deemed to have been committed at the place at which the infringement occurred. For this purpose, concrete endangerment offences are included within the category of injurious offences, because they involve a requirement, additional to the accused's conduct, of the creation of a real danger to the protected right or freedom, which danger is more likely than not to be realised.
[4] Refer to Tröndle/Fischer, *Kommentar zum StGB*, 49. Aufl. München 1999, § 9, Rn. 3.

"successful completion", as that term is used in § 9 Abs. 1 Var. 3 StGB, is not limited to the infliction of an injury or the creation of a concrete danger, but may in the context of a particular offence refer to one of the acts of the accused. The offence of public incitement to hatred under § 130 Abs. 1 und 3 StGB, which had to be analysed by the Court in the current proceedings, requires as its *actus reus* some conduct which is concretely capable of disturbing public order. The Court identified that requirement as constituting the necessary element of successful completion in the sense employed in § 9 Abs. 1 Var. 3 StGB.

[ECRI, Germany – General overview, "Legal measures to combat racism and intolerance in the member Sates of the Council of Europe", Situation as of 31 December 2002, pp. 29-30]

Germany (Race / insult)

BGH 28 February 1958, BGHSt 11, 207 and BGH 8 June 1983, BGHSt 32, 9: An insulting statement about the Jews as a group is punishable under § 185.

BGH 18 September 1979, BGHZ 75, 160: Calling the mass extermination of Jews under the Third Reich a "zionist lie" (Auschwitz Hoax) is an insult under § 185.

BVerfG, 13 April 1994: § 185 does not violate the freedom of expression to the extent that it prohibits denial of the Holocaust.

BayOblG, 17.12.1996, NStZ 1997, 283: The simple denial of the mass extermination of Jews can constitute a criminal offence under §§ 185, 189. There are no requirements as to the manner in which the denial was expressed, for example in a dogmatic or apodictic way.

[ECRI, Germany – General overview, "Legal measures to combat racism and intolerance in the member Sates of the Council of Europe", Situation as of 31 December 2002, p. 22]

Germany (Incitement to hatred and violence against segments of the population)

OLG Celle, 17 February 1982, NJW 1982, 1545: Denying the mass extermination of Jews during the Third Reich (Auschwitz Hoax) is not per se an "attack on human dignity".

BGH, 26 January 1983, BGHSt 31, 231 and BGH, 15 March 1994, NJW 1994, 1421: Blaming the Jews for having created the "legend of extermination" is an attack on human dignity and constitutes a crime punishable under § 130 (1) n° 1 (and n° 3 of the old legislation which corresponds to n° 2 of the new legislation).

OLG Frankfurt, 8 January 1985, NJW 1985, 1720: A sign in front of a restaurant prohibiting Turks from entering is not an "attack on human dignity" but a mere discrimination against the Turks living in Germany.

BGH, 6 April 2000, NJW 2000, 2217; BGH 10 April 2002, 5 Str 485/01: A denial may also take the form of pleadings entered by an attorney at law. An attorney can only rely upon the right to defend his client if his statements are actually made in defence of the client and not for purposes unrelated to legal representation.

[ECRI, Germany – General overview, "Legal measures to combat racism and intolerance in the member Sates of the Council of Europe", Situation as of 31 December 2002, pp. 20-21]

Article :	CERD-4-a / CERD-6
Subject :	states parties shall declare an offence punishable by law / dissemination of ideas based on racial superiority or hatred / states parties shall assure effective remedies
Keywords :	discrimination / race / freedom of expression / obligations of states / effective remedy
Communication :	038/2006
Parties :	**Zentralrat Deutscher Sinti und Roma et al. v. Germany**
Reference :	Opinion of 22 February 2008

Facts :

1.1 The petitioners are the association *Zentralrat Deutscher Sinti und Roma*, acting on its own behalf and on behalf of G. W.; the association *Verband Deutscher Sinti und Roma - Landesverband Bayern*; R. R.; and F. R. They claim to be victims of a violation by Germany [Footnote: 1. The Convention was ratified by Germany on 16 May 1969, and the declaration under article 14 was made on 30 August 2001.] of articles 4 (a) and (c); and 6 of the Convention on the Elimination of All Forms of Racial Discrimination. They are represented by counsel.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 14 September 2006.

AUTHOR'S SUBMISSIONS:

2.1 Detective Superintendent G. W., a member of the Sinti and Roma minority, wrote an article entitled "Sinti and Roma - Since 600 years in Germany", which was published in the July/August 2005 issue of the journal of the Association of German Detective Police Officers (BDK), "The Criminalist". In the October 2005 issue of the journal, a letter to the editor written by P. L., vice-chairman of the Bavarian section of the BDK and Detective Superintendent of the Criminal Inspection of the city of Fürth, was published as a reply to Weiss' article. The authors indicated that "The Criminalist" was a journal distributed to more than 20,000 members of one of the biggest police associations in Germany. The text of the letter by P. L. reads as follows:

> "With interest I read the article by colleague W., himself also a Sinti, but I cannot leave this non-contradicted. Even at a time where minority protection is put above everything else and the sins of the Nazi-era still affect ensuing generations, one need not accept everything that is so one-sided. As an officer handling offences against property I have dealt repeatedly with the culture, the separate and partly conspirative way of living as well as the criminality of the Sinti and Roma. We infiltrated the life of criminal gypsies through working groups and also with the help of under-cover agents ("Aussteiger"). We were told by Sinti that one feels like a "maggot in bacon" ("Made im Speck") in the welfare system of the Federal Republic of Germany. One should use the rationalisation for theft, fraud and social parasitism without any bad conscience because of the persecution during the Third Reich. The references to the atrocities against the Jews, homosexuals, Christians and dissidents who did not become criminal, were considered not relevant. As W. states there are no statistics about the share of criminal Sinti and Roma in Germany. If they existed, he could not have written such an article. But it is sure that this group of people, even if only about 100,000, occupies the authorities disproportionately by comparison.
>
> Who for example commits nationwide thefts largely to the disadvantage of old people? Who pretends to be a police officer to steal the scarce savings of pensioners which were hidden for the funeral in the kitchen cupboard or in the laundry locker? Who shows disabled and blind persons tablecloths and opens the door to accomplices? What about the trick with the glass of water and the paper trick?
>
> Is it really a prejudice when citizens complain about the fact that Sinti drive up with a Mercedes in front of the social welfare office? Is it not true that hardly any Roma works regularly and pays social insurance? Why does this group separate itself in such a way and for example inter-marries without the registry office? Why are fathers of Sinti children not named to the youth welfare office?
>
> (...)
>
> Whoever does not want to integrate but lives from the benefits of and outside this society cannot claim a sense of community. My lines do not only reflect my opinion as I learned by talking to many colleagues. They are not only a record of prejudices, generalisations ("Pauschalisierungen") or accusations but a daily reality of criminal activity.
>
> It is totally incomprehensible for me that a police officer who knows about this situation is so partial in his argumentation. His origins excuse him partly and his career deserves praise, but he should stick to the truth."

2.2 The authors claimed that P. L.'s letter contained numerous discriminatory statements against Sinti and Roma. They argue that P. L. used racist and degrading stereotypes, going as far as stating that criminality was a key characteristic of Sinti and Roma. In particular, they noted that the terms "maggot" and "parasitism" were used in the Nazi propaganda against Jews and Sinti and Roma. The authors claim that such a publication fuels hatred against the Sinti and Roma community, increases the danger of hostile attitude by police officers, and reinforces the minority's social exclusion.

2.3 In November 2005, after a public protest organized by the *Zentralrat Deutscher Sinti und Roma*, the Bavarian Ministry of the Interior suspended P. L. from his function in the police commissariat of Fürth, stating that generally negative statements about identifiable groups of the population, like the Sinti and Roma in the present case, were not acceptable.

2.4 On 24 November 2005, the *Zentralrat Deutscher Sinti und Roma* and R. R. lodged a complaint with the District Attorney of Heidelberg, and on 1 December 2005, the *Verband Deutscher Sinti und Roma - Landesverband Bayern* and F. R. filed a complaint before the District Attorney of Nürnberg-Fürth. Both complaints were then transferred to the competent authority: the District Attorney of Neuruppin in Brandenburg. The District Attorney of Neuruppin dismissed the first complaint on 4 January 2006 and the second one on 12 January 2006 with the same reasoning, namely that the elements constitutive of the offence under article 130 of the German Criminal Code were missing, refusing to charge P. L. with an offence under the German Criminal Code (GCC).

2.5 On 12 January 2006, the authors lodged an appeal with the General Procurator (*Generalstaatsanwaltschaft*) of the Land of Brandenburg against the two decisions of the District Attorney of Neuruppin. This was dismissed on 20 February 2006.

2.6 On 20 March 2006, the authors appealed to the Supreme Court of Brandenburg. Their appeal was rejected on 15 May 2006. As regards the individuals, the Court found the claim to be without merits. As regards the *Zentralrat Deutscher Sinti und Roma* and *Verband Deutscher Sinti und Roma - Landesverband Bayern*, the Supreme Court found the claim inadmissible on the grounds that, as associations, their rights could only have been affected indirectly.

2.7 The authors argue that, since the judicial authorities refused to initiate criminal proceedings, German Sinti and Roma were left unprotected against racial discrimination. By so doing, the State party would be tolerating a repetition of such discriminatory practices. The authors highlight a similar case involving discriminatory public statements against Jews, in which the Supreme Court of the Land of Hessen had stated that, in the past, the terms "parasite" and "social parasitism" had been used maliciously and in a defamatory way against Jews, and held that such public statements denied members of a minority the right to be considered as equals in the community.

THE COMPLAINT:
3. The authors claim that Germany violated their rights as individuals and groups of individuals under articles 4 (a) and (c); and 6 of the Convention on the Elimination of All Forms of Racial Discrimination, as the State party does not afford the protection under its Criminal Code against publications which contain insults directed against Sinti and Roma.

STATE PARTY'S OBSERVATIONS:
(...)

4.3 On the merits, the State party denies that there was a violation of articles 4, paragraph (a) and (c) and 6 of the Convention. As regards article 4(a), it maintains that all categories of misconduct under that provision are subject to criminal sanctions under German criminal law, particularly through the offence of incitement to racial or ethnic hatred ("*Volksverhetzung*") in article 130 of the GCC. [Footnote: 3. Article 130. Incitement to racial or ethnic hatred. (1) Whoever, in a manner that is capable of disturbing the public peace: 1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years. (2) Whoever: 1. with respect to writings (article 11, para. 3), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group: (a) disseminates them; (...)] In addition, the GCC contains other provisions that

criminalise racist and xenophobic offences, e.g. in article. 86 (dissemination of propaganda by unconstitutional organisations) and article 86(a) (use of symbols by unconstitutional organisations). The obligations arising from article 4 paragraph (a) of the Convention have thus been completely fulfilled by art. 130 of the GCC; there is no protection gap in this respect. That some discriminatory acts are not covered by the provision is not contrary to the Convention. The list in article 4 paragraph (a) of the Convention does not enumerate all conceivable discriminatory acts, but rather acts in which violence is used or where racist propaganda is the goal.

4.4 The State party adds that in accordance with General Recommendation No. XV, para. 2, article 130 of the GCC is effectively enforced. Under German criminal law, the principle of mandatory prosecution applies, by which prosecutorial authorities must investigate a suspect *ex officio* and bring public charges when necessary. In the present case, the State party submits that prosecutorial authorities reacted immediately, and that the situation was investigated thoroughly until the proceedings were terminated by the District Attorney of Neuruppin.

4.5 Regarding the interpretation and application of article 130 of the GCC, the State party notes that the District Attorney of Neuruppin, the Brandenburg General Prosecutor and the Brandenburg Supreme Court did not find that the elements constitutive of the offences under art. 130 or art. 185 GCC were met. These decisions show that not every discriminatory statement fulfils the elements of the offence of incitement to racial or ethnic hatred, but that there must be a certain targeting element for incitement of racial hatred. The State party recalls that all the above decisions referred to the wording of the letter as "inappropriate", "tasteless" and "outrageous and impudent". The State party points out that the central question is whether the courts correctly interpreted the relevant provisions of the GCC. It recalls that States parties have some discretion in the implementation of the obligations arising from the Convention and particularly as regards the interpretation of their national legal standards. With respect to the consequences suffered by P. L., it indicates that disciplinary measures were indeed taken against him.

(...)

4.7 Finally, with respect to article 6 of the Convention, the State party maintains that in the present case the criminal prosecution authorities acted quickly and fully discharged their obligation of effective protection through the prompt initiation of an investigation against P. L. After an in-depth examination the authorities concluded that the offence of incitement to racial or ethnic hatred could not be established and closed the proceedings.

AUTHOR'S SUBMISSIONS:
5.1 On 7 March 2007 the authors commented on the State party's submission. They note that the German authorities did not investigate the matter *ex officio*, but that they were prompted to act by a complaint from one of the complainants (*Zentralrat Deutscher Sinti und Roma*). They add that, to the present day, the police union has not disassociated itself in any way from the article of P. L.

5.2 The authors claim state that, although the organizations which co-authored the complaint have not been attacked by name in P. L.'s article, their own rights are harmed by such a sweeping criminalization of the entire Sinti and Roma minority. They claim that the derogation of the social reputation of the minority has consequences for the reputation and the possibility of the organisations to exert political influence, especially since they act publicly as advocates of the minority and are funded by the State party to do so.

5.3 On exhaustion of domestic remedies, the authors claim that a complaint to the Federal Constitutional Court would not only be declared inadmissible but would have no prospect of success, based on that Court's established jurisprudence. They state that they know of no case in which the Federal Constitutional Court accepted a complaint against a decision concerning a legal enforcement procedure.

5.4 As regards the provisions of the GCC, the authors doubt that articles 130 and 185, with their strict requirements, are sufficient to combat racist propaganda effectively. They doubt that the intent of the responsible party "to incite hatred against segments of the population" (as required by art. 130) is absent in the present case, given that P. L. is a police officer.

5.5 The authors reiterate that characterizations made in the article represent an attack on the human dignity of members of the Sinti and Roma communities, and that they cannot be considered to be a "permissible statement of opinion", nor the "subjective feelings and impressions of a police officer". Had those characterizations been made against Jews, massive judicial intervention would have resulted. The authors add that the State party approves of its police officers globally criminalizing an entire population group. The approval of such public

statements carries the danger that other police officers adopt a similar attitude against Sinti and Roma.

STATE PARTY'S OBSERVATIONS: / AUTHOR'S SUBMISSIONS:
6. By submissions dated 31 May 2007 and 16 November 2007, the State party generally reiterated the points made in the initial submission. In particular, it states that article 130 of the GCC has been successfully used in the past to act against instances of extreme right-wing extremist propaganda. By submission of 27 June 2007, the complainants replied to the State party's comments, restating the arguments previously offered.

Decision on admissibility:

7.1 Before considering any claims contained in a petition, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, decide whether or not it is admissible under the Convention.

(...)

7.6 In light of the above, the Committee declares the case admissible inasmuch as it relates to articles 4(a) and 6 of the Convention and proceeds to examine the merits.

Views:

7.7 On the merits, the main issue before the Committee is whether the provisions in the GCC provide effective protection against acts of racial discrimination. The petitioners argue that the existing legal framework and its application leave Sinti and Roma without effective protection. The Committee had noted the State party's contention that the provisions of its Criminal Code are sufficient to provide effective legal sanctions to combat incitement to racial discrimination, in accordance with article 4 of the Convention. It considers that it is not the Committee's task to decide in abstract whether or not national legislation is compatible with the Convention but to consider whether there has been a violation in the particular case. [Footnote: 7. See Communication No. 40/2007, *Er v. Denmark*, decision of 8 August 2007, para. 7.2.] The material before the Committee does not reveal that the decisions of the District Attorney and General Prosecutor, as well as that of the Brandenburg Supreme Court, were manifestly arbitrary or amounted to denial of justice. In addition, the Committee notes that the article in "The Criminalist" has carried consequences for its author, as disciplinary measures were taken against him. [Footnote: 8. See para. 2.3.]

8. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7, of the Convention on the Elimination of All Forms of Racial Discrimination, is of the view that the facts before it do not disclose a violation of articles 4(a) and 6 of the Convention.

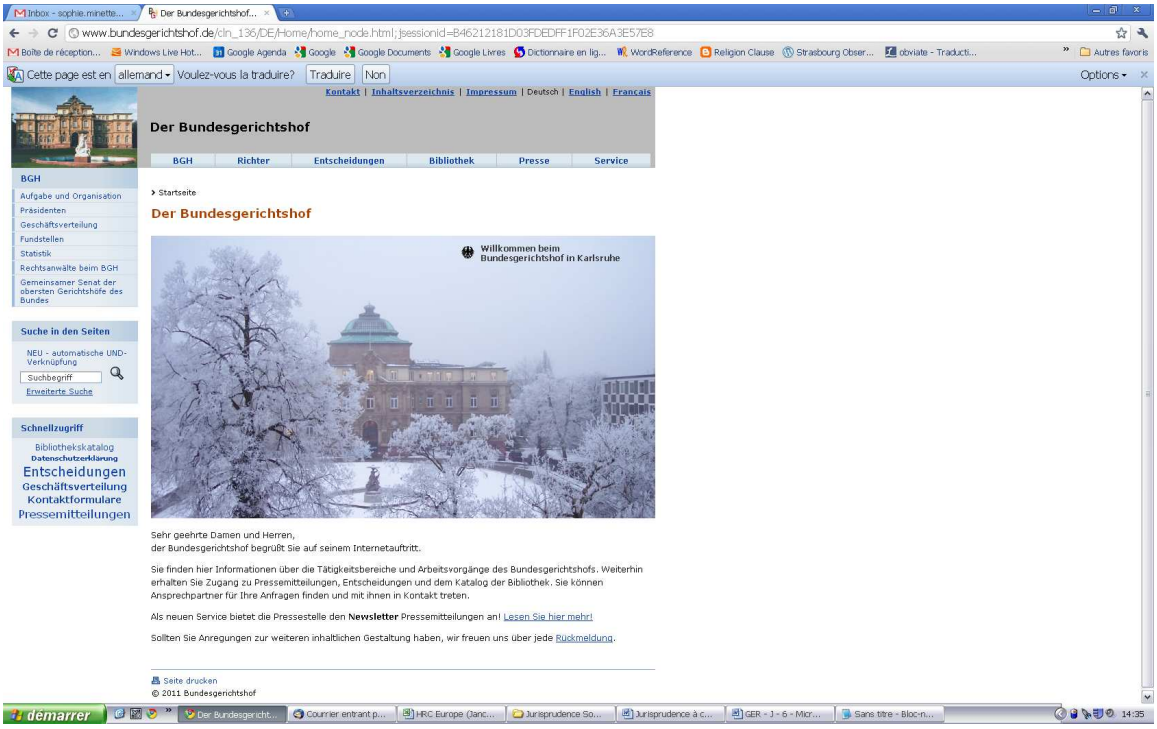
Remedy proposed :

9. Notwithstanding, the Committee recalls that P. L.'s article was perceived as insulting and offensive not only by the petitioners, but also by the prosecutorial and judicial authorities who dealt with the case. The Committee wishes to call the State party's attention to (i) the discriminatory, insulting and defamatory nature of the comments made by P. L. in his reply published by "The Criminalist" and of the particular weight of such comments if made by a police officer, whose duty is to serve and protect individuals; and (ii) General Recommendation 27, adopted at its fifty-seventh session, on discrimination against Roma.

Individual Opinion :

Germany

Bundesgerichtshof :
http://www.bundesgerichtshof.de/cln_136/DE/Home/home_node.html;jsessionid=B46212181D03FDEDFF1F02E36A3E57E8

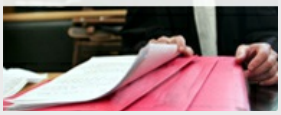


Public Policies

Beratungsformular

Häufig gestellte Fragen

Rechtsprechung



Forschungsprojekte

Newsletter

Grußwort

Herzlich Willkommen bei der Antidiskriminierungsstelle des Bundes!

Jeder Mensch, unabhängig von ethnischer Herkunft, Geschlecht, Behinderung, Religion, Weltanschauung, Alter und sexueller Identität, ist gleich wichtig und hat die gleichen Rechte.

Unser Ziel ist es, Bürgerinnen und Bürger davon zu überzeugen, dass Vielfalt uns alle voranbringt. Eine diskriminierungsfreie Gesellschaft ist nicht nur lebenswerter, sondern auch leistungsfähiger.

mehr ›

Aktuelles

Guide de la Loi générale sur l'égalité de traitement - AGG-Wegweiser jetzt auch auf Französisch

Die ADS hat ihr fremdsprachiges Informationsangebot über das Allgemeine Gleichbehandlungsgesetz (AGG) weiter ausbaut: Der 66 Seiten starke AGG-Wegweiser liegt gedruckt nun auch in französischer Sprache vor. Die Broschüre kann darüber hinaus auch in Deutsch, Englisch, und Türkisch bestellt werden. Downloadmöglichkeiten gibt es in Spanisch und Arabisch sowie in einer für Vorlese-Software optimierten Version.

mehr ›

Internationaler Tag der Migranten: Lüders warnt vor zunehmender Diskriminierung

Anlässlich des Internationalen Tages der Migranten am 18. Dezember warnt die Leiterin der ADS, Christine Lüders, vor einer zunehmenden Diskriminierung aufgrund ethnischer Herkunft und mahnt mehr Toleranz im Umgang mit anderen Kulturen an. Die stetige Wiederholung von Versäumnissen und Fehlern befördere nicht die Integration, sondern spalte die Gesellschaft. Lüders betonte: "Jede fünfte der inzwischen mehr als 12.000 Anfragen an uns bezieht sich auf Benachteiligungen wegen der ethnischen Herkunft oder der Religion. Die Tendenz ist weiter steigend."

mehr ›

Sieger im EU-Journalistenwettbewerb gegen Diskriminierung gekürt

Die nationalen Sieger des diesjährigen Journalistenpreises der EU-Kommission "Gemeinsam gegen Diskriminierung" stehen fest: Ein Preisgeld von 1.000 Euro erhält die Autorin Ruth Lemmer für eine Reportage in der "Wirtschaftswoche". Sie nimmt mit ihrem Text zudem am europäischen Wettbewerb der 27 nationalen Sieger teil. Wegen der Vielzahl qualitativ hochwertiger Beiträge unter den 41 Wettbewerbsarbeiten entschloss sich die Antidiskriminierungsstelle des Bundes, zwei Sonderpreise im Wert von jeweils 500 Euro zu stiften.

mehr ›

Pressemitteilungen

› Antidiskriminierungsstelle des Bundes legt ersten Bericht an den

Im Blickpunkt

Anonymisierte Bewerbungs-verfahren

Informationen in Gebärdensprache

Informationen in leichter Sprache

Bundesnetzwerk gegen Diskriminierung

Publikationen

Guide de la Loi générale sur l'égalité de traitement - explications et exemples de la Loi générale sur l'égalité de traitement

Expertise "Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben"

Dokumentation der Fachtagung: "Gleiche Rechte! Gleiche Chancen? – Herausforderungen effektiver Antidiskriminierungsarbeit"

Guide to the General Equal Treatment Act

Bundestag vor – Empfehlungen zu mehrdimensionaler Diskriminierung

- **Lüders warnt anlässlich des Internationalen Tages der Migranten vor zunehmender Diskriminierung – Informationsangebot ausgebaut**
- **Nationale Gewinner des Europäischen Journalistenpreises gegen Diskriminierung ausgezeichnet – ADS stiftet zwei Sonderpreise**
- **Lüders: „Diskriminierungsschutz muss auch in Verwaltung vorangetrieben werden" – Start für EU-gefördertes Projekt**

Alle Pressemitteilungen

Artikel und Interviews

- **Süddeutsche Zeitung "Anonyme Bewerbungen - Augen zu und durch"**
- **Hannoversche Allgemeine Zeitung "Celler Stadtverwaltung testet anonymisierte Bewerbungen"**
- **kobinet "Verwaltungen sollen Diskriminierungsschutz voranbringen"**

Alle Artikel und Interviews

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2009)19

ECRI REPORT ON GERMANY

(fourth monitoring cycle)

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FOREWORD

The European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe. It is an independent human rights monitoring body specialised in questions relating to racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, antisemitism and intolerance.

In the framework of its statutory activities, ECRI conducts country-by-country monitoring work, which analyses the situation in each of the member States regarding racism and intolerance and draws up suggestions and proposals for dealing with the problems identified.

ECRI's country-by-country monitoring deals with all member States of the Council of Europe on an equal footing. The work is taking place in 5 year cycles, covering 9/10 countries per year. The reports of the first round were completed at the end of 1998, those of the second round at the end of 2002, and those of the third round at the end of the year 2007. Work on the fourth round reports started in January 2008.

The working methods for the preparation of the reports involve documentary analyses, a contact visit in the country concerned, and then a confidential dialogue with the national authorities.

ECRI's reports are not the result of inquiries or testimonial evidences. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on an important number of national and international written sources. The in situ visit allows for meeting directly the concerned circles (governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to provide, if they consider it necessary, comments on the draft report, with a view to correcting any possible factual errors which the report might contain. At the end of the dialogue, the national authorities may request, if they so wish, that their viewpoints be appended to the final report of ECRI.

The fourth round country-by-country reports focus on implementation and evaluation. They examine the extent to which ECRI's main recommendations from previous reports have been followed and include an evaluation of policies adopted and measures taken. These reports also contain an analysis of new developments in the country in question.

Priority implementation is requested for a number of specific recommendations chosen from those made in the new report of the fourth round. No later than two years following the publication of this report, ECRI will implement a process of interim follow-up concerning these specific recommendations.

The following report was drawn up by ECRI under its own and full responsibility. It covers the situation as of 19 December 2008 and any development subsequent to this date is not covered in the following analysis nor taken into account in the conclusions and proposal made by ECRI.

SUMMARY

Since the publication of ECRI's third report on Germany on 8 June 2004, progress has been made in a number of fields covered by that report.

The new General Equal Treatment Act (AGG) came into force on 18 August 2006. Its purpose is to prevent or to put an end to discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. The AGG extends protection against discrimination on the basis of all of the grounds covered to a number of private-law fields as well as to public employment. It sets out the manner in which victims of discrimination may enforce their rights, and establishes a Federal Anti-Discrimination Agency entrusted with dealing with individual complaints, raising public awareness, taking measures to prevent discrimination and carrying out academic research into discrimination.

In the field of criminal law, the authorities have been active in investigating and prosecuting members of neo-Nazi groups. Section 130 of the Criminal Code was strengthened in March 2006, with respect to the expression of racist views at public gatherings. The number of demonstrations by neo-Nazi organisations is reported to have decreased in 2007 thanks to this change. Section 129 of the Criminal Code has also been successfully used to sentence the members of a right-wing extremist music group. Successes in fighting racist, xenophobic or antisemitic speech on the internet have also been achieved.

The German authorities regularly condemn antisemitic crimes, pursue perpetrators and bring them to justice where possible. At same time, a wide range of measures are taken to atone for the past and ensure remembrance of the victims of the Holocaust. ECRI salutes the authorities' commitment to denouncing and combating all forms of antisemitism and to supporting Jewish culture in Germany, although it notes that, with antisemitic crimes apparently on the rise at present in Germany, even more intensive efforts may be needed to reverse such a trend.

Beyond prosecuting individual offences, the authorities have adopted a range of measures aimed at fighting right-wing extremist, xenophobic and antisemitic crimes. These include supporting victims, assisting perpetrators to break out of extremist groups and seeking to prevent young people from going down the path of extremist activity. The police are also taking an increasingly active role in working to prevent racist, xenophobic and antisemitic crime. Local programmes continue to be funded, although some on only a short-term basis. At the time of writing, debates were also occurring on the possibility of introducing racist motivations as a specific aggravating circumstance under section 46 of the Criminal Code.

In recent years the authorities have expressly recognised that Germany is a country of immigration and have begun to develop a strong new focus on integration, aiming to help immigrants to master German and encourage them to participate fully in society. The new National Integration Plan has as its cornerstone the provision of integration courses for adult migrants, primarily focused on language learning. Successful participants in integration courses are eligible to apply for naturalisation earlier than other non-citizens. The National Integration Plan also includes measures in other fields, such as efforts to promote innovative television programmes with an integration approach.

The German authorities have taken a number of measures to eliminate inequalities or discrimination in the field of education and employment. These include efforts to promote and foster the linguistic abilities of children from the very earliest stages, as a key means of improving their school outcomes overall. At the same time, preventive

measures against exclusion and discrimination on the labour market and in society are the focus of the "XENOS – Integration and Diversity" programme, to run from 2007 to 2013.

As regards the situation of minority groups, the creation of the German Islam Conference is an important symbol of change. The goal of the Conference is to promote inclusive and constructive forms of community, and to ensure better integration of Muslims in Germany. It is intended to show that Muslims have become a part of German society, to counteract segregation of Muslims in Germany, and to prevent Islamism and extremism. In 2008, the election of a German of Turkish origin as one of the leaders of a German political party was also hailed as a landmark event. The state has also taken welcome steps to recognise officially the suffering experienced by Roma and Sinti communities during the Holocaust.

Since ECRI's third report, provisions have been enacted that have made it possible for persons who have been living in Germany with tolerated status for some years to be granted a trial residence permit. Recognised refugees are now allowed to choose where they reside.

ECRI welcomes these positive developments in Germany. However, despite the progress achieved, some issues continue to give rise to concern.

Since ECRI's third report, asylum-seekers and members of the Jewish, Black and Sinti/Roma communities have continued to be targeted in violent racist, xenophobic and antisemitic attacks. ECRI is concerned that, due to the narrow understanding of racism that currently prevails in Germany, unless the perpetrators of crimes are clearly identifiable as members of right-wing extremist groups or sympathisers of such groups, crimes based on racist motivations may not always be investigated or prosecuted as such. The absence of a precise reference in the Criminal Code to racist motivations as an aggravating circumstance for ordinary offences may also contribute to this phenomenon. In addition, the lack of an independent investigation mechanism to deal with complaints against the police may give rise to increased speculation as to a possible racist context, in particular in cases where members of visible minorities have died while in police custody.

The success in local and regional elections of certain parties expressing racist, antisemitic or revisionist views is worrying, and support for such parties has increased in recent years. At the same time, and despite the considerable efforts of the authorities to combat racism, xenophobia and antisemitism and promote a tolerant society, incidents of hate speech continue to occur, including racist propaganda on the internet, and neither the prevalence of racist expression on the internet nor the number of Neo-Nazis and other right-wing extremists appear to have decreased.

While the enactment of the AGG is a welcome step forward in ensuring that victims of discrimination have justiciable rights in Germany, some aspects of the AGG, in particular as regards its application to the field of housing, may leave room for improvements. The AGG remains largely unknown among potential victims and the time-limit of 2 months for initiating a complaint may be too short. This issue is compounded by the limited role afforded to NGOs under the law. At the same time, the Federal Anti-Discrimination Agency is perceived as distant from victims and lacking an understanding of their perspective; and, with a relatively small staff and annual budget, would for the moment appear to have relatively few resources to carry out its statutory tasks.

In daily life, children with a migration background continue to have significantly lower chances of success in the school system than other children, and some teachers are reported to display discriminatory attitudes in the classroom, in particular towards Turkish and Muslim children. This is of particular concern given the central role played by teachers in Germany in directing students towards the different streams of

secondary education. At the same time, the employment rate of immigrants remains significantly lower than that of native-born Germans and in the labour market, and visible differences are reportedly a significant factor in discrimination in access to employment. In the housing sector, discriminatory practices of landlords and property managers are reported, and studies indicate that migrants are disadvantaged in this sector, in some cases facing so-called "ghettoisation".

Discrimination in daily life is reported by members of the Muslim, Turkish, Black and Sinti/Roma communities. With regard to the exercise of the Muslim faith, the construction of mosques has often been surrounded by controversy and Muslim women report that, since laws were passed in certain *Länder* banning the wearing of headscarves in all or some parts of the public sector, it has also become increasingly difficult for women who choose to wear a headscarf to find employment in the private sector. Since the events of 11 September 2001, Muslims report that they have also increasingly been identified with crimes, and more specifically with terrorism. At the same time, members of the Black community continue to be especially vulnerable to racist violence. Black persons report that there are "no-go areas" in some *Länder* to which they avoid going alone, or avoid going altogether.

While significant improvements have been introduced since ECRI's third report with respect to asylum applications, some concerns remain with respect to expedited airport procedures. ECRI is also concerned that some persons with refugee status may see this status prematurely terminated, and that restrictions on freedom of movement of asylum-seekers may place the latter in situations of undue hardship.

With respect to integration courses, the investment of resources in the National Integration Plan is noteworthy. ECRI is concerned, however, that the possibility of imposing sanctions on persons obliged to attend integration courses if they fail to attend sufficiently regularly may have a stigmatising effect. It is also concerned that such sanctions may be damaging to individuals' rights, as they may lead to a refusal to extend a residence permit or to a reduction in welfare payments. At the same time, and while the introduction of a single, national, transparent test is a clear improvement on the previous situation, the introduction of naturalisation tests is an additional process applicable to those who wish to obtain German citizenship and is seen by some NGOs as sending an underlying message of exclusion rather than inclusion. ECRI is also concerned that some non-citizens may be discouraged from seeking to acquire German citizenship through naturalisation due to the requirement that they relinquish their present nationality, with the flow-on effect that they are prevented from participating effectively in German political life.

In this report, ECRI recommends that the German authorities take further action in a number of areas; in this context, it makes a series of recommendations including the following.

ECRI strongly recommends that the German authorities make specific provision in the criminal law for racist motivations for ordinary offences to constitute an aggravating circumstance. It also recommends that the German authorities intensify their efforts to provide training to police officers, prosecutors and judges on issues pertaining to the implementation of criminal legislation addressing racism and racial discrimination.

ECRI recommends that the German authorities keep under review the impact of the AGG in preventing and sanctioning discrimination, and revise the legislation if necessary. It also recommends that the authorities ensure that sufficient resources are available to the Federal Anti-Discrimination Agency to enable it to carry out its current and any future tasks.

ECRI strongly recommends that the German authorities take a more proactive role in raising awareness of the legal framework now in force against racial discrimination, notably among groups who are especially vulnerable to this phenomenon. To this end,

ECRI recommends that the authorities run an awareness-raising campaign specifically targeted at ensuring that potential victims of racial discrimination are aware of the existence and scope of the General Equal Treatment Act (AGG) and of the mechanisms for invoking their rights before the courts.*

Bearing in mind that no immediate move away from the present streaming system for secondary schooling in Germany has been envisaged, ECRI recommends that the German authorities take urgent steps to implement targeted training programmes to ensure that all teachers have the capacity to assess objectively the skills of students due to enter the secondary school system, in order to ensure that students are not sent to schools in the lower academic streams unless this is strictly necessary.*

ECRI strongly encourages the German authorities to continue and intensify their efforts to ensure that no children suffer disadvantage in the school system due to inequalities in their linguistic skills in German. It recommends that the authorities step up the provision of training programmes to teachers and other school staff, in order to equip them to work effectively in increasingly diverse classrooms.

ECRI strongly recommends that, as part of their ongoing efforts towards creating a workplace free of racism, the German authorities launch an awareness-raising campaign aimed specifically at changing employers' attitudes towards persons with an immigrant background. This campaign should focus not only on employers' obligations and liabilities under the new General Equal Treatment Act (AGG) but also on the positive aspects of diversity in the workplace. It could form part of a regular series of such campaigns.*

ECRI encourages the German authorities in their efforts to ban organisations which resort to racist, xenophobic and antisemitic actions and propaganda, to intensify their efforts to counter racist, xenophobic and antisemitic activities on the internet, and to implement measures aimed at ensuring the media are better equipped to deal with the diversity of present-day German society.

ECRI makes a series of recommendations to bolster the fight against racist, xenophobic and antisemitic violence, and encourages the German authorities to pursue their efforts to take a more comprehensive approach to this phenomenon.

With respect to minority groups, ECRI strongly recommends that the German authorities intensify their efforts to combat and prevent racism and discrimination vis-à-vis Muslims in Germany effectively. It also recommends that further steps be taken to improve the situation of Roma and Sinti in Germany, in consultation with representatives of these communities. ECRI also makes a series of recommendations concerning the situation of asylum-seekers.

ECRI strongly encourages the German authorities in their efforts to assist migrants to learn German and recommends that the authorities develop further other aspects of the National Integration Plan, such as programmes to help German citizens be more receptive to the diversity of contemporary German society.

ECRI reiterates its call for the establishment of an independent investigatory mechanism which can carry out enquiries into allegations of police misconduct and, where necessary, ensure that the alleged perpetrators are brought to justice.

* The recommendations in this paragraph will be subject to a process of interim follow-up by ECRI no later than two years after the publication of this report.

FINDINGS AND RECOMMENDATIONS

I. Existence and Implementation of Legal Provisions

International legal instruments

1. In its third report, ECRI recommended that Germany ratify as soon as possible Protocol No. 12 to the European Convention on Human Rights.

2. Germany has not yet ratified Protocol No. 12 to the ECHR. The authorities have indicated that discrimination is prohibited under German law, in accordance with section 3 of the Basic Law (Constitution) and with the General Equal Treatment Act 2006, and that ratification should therefore not have direct consequences in Germany. However, the inclusion of the criterion of national origin in Protocol No. 12 may not correspond to the existing situation in Germany, and the authorities have stated that they will await rulings on this point from the European Court of Human Rights, regarding other member states, before proceeding with ratification. ECRI recalls that Protocol No. 12 is one of the most important international instruments for combating racial discrimination, and that its ratification would make it possible to combat this phenomenon more effectively at national level.

3. ECRI urges Germany to ratify Protocol No. 12 to the European Convention on Human Rights.

4. In its third report, ECRI also recommended that Germany ratify the Additional Protocol to the Convention on Cybercrime and the European Convention on Nationality. It called on Germany to sign and ratify the Revised European Social Charter, the Convention for the Participation of Foreigners in Public Life at Local Level and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

5. ECRI welcomes the ratification by Germany, on 11 May 2005, of the European Convention on Nationality, which came into force in Germany on 1 September 2005.

6. Germany signed the Revised European Social Charter on 29 June 2007; the Federal Ministry of Labour and Social Affairs has initiated the formal scrutiny procedure for ratification, and ratification is planned for a later date, following a comprehensive process of coordination on content with the relevant government agencies. Germany has also signed but not yet ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems. The authorities have indicated, however, that they consider that German law complies with its provisions and that they intend to ratify the Protocol at the same time as they implement the EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.

7. No steps have been taken towards signing the Convention for the Participation of Foreigners in Public Life at Local Level and it does not appear from the information provided by the authorities that there is any intention to sign this Convention in the near future. Likewise, there has been no progress towards signing the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. ECRI stresses that these two conventions may make important contributions to the fight against racism and racial discrimination.

8. ECRI strongly encourages Germany to ratify as soon as possible both the Revised European Social Charter and the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems.

9. It reiterates its call for the signature and ratification by Germany of the Convention for the Participation of Foreigners in Public Life at Local Level. ECRI also reiterates its recommendation that Germany sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Citizenship law

10. As from 1 January 2000, the principle of *jus soli* was introduced into German law in so far as children born in Germany to non-German parents as from that date have acquired German citizenship automatically at birth, provided that at least one of their parents has lived legally in Germany for at least eight years and has the right of permanent residence. In such cases, the child must, however, choose between German citizenship and the citizenship of his/her parents before reaching the age of twenty-three. Other foreigners who are unable to surrender their previous nationality, or for whom that would prove particularly difficult, no longer need to surrender their previous nationality in order to acquire German citizenship.

11. In its third report, ECRI encouraged the German authorities in their efforts to facilitate the acquisition of German citizenship by long-term residents and persons born in Germany. It recommended that the German authorities continue public debate in view of the adoption of a more flexible approach to dual nationality, and encouraged them to examine the application, in practice, of the criteria for naturalisation in order to address any possible patterns of excessively restrictive application of such criteria or of direct or indirect discrimination on grounds of race, colour, religion, nationality and national or ethnic origin.

12. Since ECRI's third report, the Nationality Act has again been amended, in particular as regards the naturalisation of long-term residents. As from the entry into force of the amendments on 28 August 2007, Germany no longer requires that nationals of the other Member States of the European Union or Swiss nationals surrender their previous nationality upon naturalisation. For these persons, it is therefore no longer necessary to first obtain permission to retain their previous nationality should they wish to keep it when acquiring German citizenship. German nationals also do not lose their German nationality if they acquire the nationality of one of these states.

13. These more relaxed conditions do not apply to individuals holding a nationality other than that of another EU member state or Swiss nationality, however. ECRI is concerned that many non-citizens who may fulfil the requirements for acquiring German citizenship through naturalisation may be discouraged from doing so due to the requirement that they relinquish their present nationality, with the flow-on effect that they are prevented from participating effectively in German political life. On the impact of the requirement that applicants for naturalisation demonstrate sufficient knowledge of the German language, see further below.[1]

14. In Germany, the practical application of naturalisation criteria is controlled by the competent ministers of the interior of the *Länder*. Following the introduction by certain *Länder* of tests that applicants were required to pass in order to obtain citizenship, the contents of which were the subject of some debate in Germany,

[1] See below, *Vulnerable/Target groups – Situation of migrants, asylum-seekers, [etc] – Integration*.

the Standing Conference of Ministers of the Interior of the *Länder* decided to introduce a uniform test, to be applied throughout Germany as from 1 September 2008. The contents and impact of the introduction of this test are examined in more depth elsewhere in this report.[2]

15. ECRI recommends that Germany facilitate the acquisition of German citizenship for all long-term residents and persons born in Germany in order to promote the integration of those residents who may wish to acquire German citizenship without relinquishing their own.

Criminal law provisions against racism

16. As described in ECRI's third report, section 130 of the German Criminal Code prohibits incitement to hatred and violence against segments of the population (§ 130.1), including through the dissemination of publications or broadcasts (§ 130.2). This section also prohibits the approval, denial or playing down of the genocide committed under the National Socialist regime (§ 130.3), including through the dissemination of publications (now covered by § 130.5). The dissemination and use of symbols of unconstitutional organisations is prohibited under section 86a of the Criminal Code, and Section 86 prohibits the dissemination of propaganda of unconstitutional organisations. Section 85 prohibits the continuation of the activities of an organisation that has been banned. Section 46 of the Criminal Code contains a list of circumstances to be taken into account in sentencing offenders, which include the motives and the aims of the offender. Racist motivations are not explicitly listed as an element to be taken into account as a specific aggravating circumstance in sentencing.

17. In its third report, ECRI recommended that the German authorities keep under close review the effectiveness of the existing criminal law provisions in the areas covered by ECRI's mandate. It encouraged the German authorities to examine the extent to which existing criminal legislation enabled the criminal justice system to bring to light the racist dimension of offences, and recommended that the German authorities explicitly provide in law that racist motivations constitute an aggravating circumstance for all offences.

18. At the time of writing, debates were occurring, at the initiative of civil society and certain *Länder*, on the possibility of introducing racist motivations as a specific aggravating circumstance to be taken into account under section 46 of the Criminal Code. The German authorities have indicated that, while they share the objective of punishing racist crimes, they remain unconvinced that such a step would be useful. They have underlined in particular that racist motivations can already be taken into account within the general formulation of section 46, and that they consider that placing the accent specifically on racist motivations might disturb the balance of elements to be taken into account by judges when sentencing offenders, and might be seen as diminishing the importance of other relevant motivations and factors. Moreover, for offences defined under section 130 of the Criminal Code, the authorities consider that motivations such as racist motivations are an integral part of the offence; taking account of them again as an aggravating circumstance under section 46 in such cases would therefore amount to counting them twice. ECRI stresses that, in line with its General Policy Recommendation No. 7,[3] the principle of taking account of racist motivations as an aggravating circumstance applies only to ordinary offences, i.e. offences, such as physical assault, in which the racist element is not already an integral part of

[2] See below, *Vulnerable/Target groups – Situation of migrants, asylum-seekers, [etc] – Integration*.

[3] See ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, § 21, as well as § 47 of its explanatory memorandum.

the offence. The principle is not designed to apply to provisions such as section 130 of the Criminal Code.

19. NGOs have, however, voiced considerable concern that, as the law stands, racism is understood only in its strongest forms, and in particular as a manifestation of right-wing extremism. ECRI has repeatedly heard that other, less obviously extreme manifestations of racism tend to be neglected as such in the criminal process. As a result, members of visible minorities feel that only offenders who are identifiably members or sympathisers of right-wing extremist groups are likely to be pinpointed in the criminal justice system as authors of racist acts, with the result that some racist offences are not treated as such at all.[4] ECRI is particularly concerned that the absence of a precise reference in the Criminal Code to racist motivations as an aggravating circumstance for ordinary offences may contribute to this phenomenon, as neither police nor prosecutors nor judges have any explicit legal basis on which to look beyond extremist motivations in their investigations, the charges they bring or the judgments they deliver. Moreover, a failure to take due account in practice of offenders' racist motivations may leave Germany at risk of breaching the European Convention on Human Rights. ECRI draws the German authorities' attention to the consistent case-law of the European Court of Human Rights in this field.[5]

20. Concerns have also been expressed that, although the definition of crimes contained in sections 86a and 130 of the Criminal Code may provide a basis for prosecuting crimes committed via racist propaganda on the internet, incidents of hate speech continue to occur, including racist propaganda on the internet.[6] Efforts to prevent such racially motivated offences and ensure that the relevant legislative provisions are effectively implemented continue to be needed.

21. As regards the expression of racist views at public gatherings, in March 2006, §130.4 of the Criminal Code was strengthened. It now provides that a person who publicly or in a gathering disturbs the public peace by harming the dignity of the victims of the Nazi regime or who approves, glorifies or justifies the genocide committed under the Nazi regime can be sentenced to imprisonment for up to three years. This section applies in particular to memorial places of Holocaust victims. According to the Ministry of the Interior, the number of demonstrations by neo-Nazi organisations clearly decreased in 2007 (down from 126 in 2006 to 66 in 2007), thanks to the intensified application of §130.4 of the Criminal Code. The authorities have also referred to section 129 of the Criminal Code, which prohibits forming, being a member of, recruiting members to or supporting organisations of which the aims or activity are directed towards the commission of crimes. This provision was successfully used to sentence the members of a right-wing extremist music group that sought to use their band as a political instrument and to stir up hatred.

22. ECRI strongly recommends that the German authorities make specific provision in the criminal law for racist motivations for ordinary offences to constitute an aggravating circumstance, taking account of the recommendations contained in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.[7]

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[4] See also below, *Racist violence*.

[5] See notably *Šečić v. Croatia,* Application no. 4357740116/02, 31 May 2007, § 67; *Anguelova and Iliev v. Bulgaria*, Application no. 55523/00, 26 July 2007, § 115.

[6] See below, *Racism in public discourse*.

[7] See ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, § 21, as well as § 47 of its explanatory memorandum.

23. It also recommends that the German authorities intensify their efforts to provide training to police officers, prosecutors and judges on issues pertaining to the implementation of criminal legislation addressing racism and racial discrimination, in order to ensure that all offences with racist motivations, whether or not they fall into the category of extremist crimes, are properly identified and dealt with as racially motivated offences. It further recommends that lawyers be given the opportunity to receive training on these matters.

Civil law provisions: the General Equal Treatment Act

24. In its third report ECRI encouraged the German authorities to adopt anti-discrimination legislation in all key fields of public life, and to ensure that victims of racial discrimination would be granted the highest level of protection. A certain level of resistance to such legislation first had to be overcome within Germany, however, with some politicians regrettably considering such legislation would simply lead to increased bureaucracy or needless and expensive litigation.

25. In 2006, however, the Parliament enacted the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG), which came into force on 18 August 2006. The AGG constitutes the transposition into German law of several EU equal treatment directives.[8] The purpose of the Act, as defined in section 1, is "to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation". ECRI draws the authorities' attention to the fact that two important grounds included in its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination do not appear to be covered by this list: namely, language and nationality. As regards the scope of application of the AGG, it covers the fields of employment, vocational guidance and training, membership in workers' and employers' organisations, social protection and social benefits, education, and access to and the supply of goods and services, including housing. It sets out the manner in which victims of discrimination may enforce their rights, and establishes a Federal Anti-Discrimination Agency entrusted with dealing with individual complaints, raising public awareness, taking measures to prevent discrimination and carrying out academic research into discrimination.[9] The AGG is essentially applicable to private-law relationships; except in the field of public-law employment relationships (covered by section 24 of the AGG), persons who consider they have been discriminated against by public authorities must continue to rely on the general prohibition on discrimination laid down by Article 3 of the Constitution (Basic Law).

26. ECRI welcomes the enactment of the AGG, which constitutes a significant step forward in ensuring that victims of discrimination have justiciable rights in Germany. It notes that, as finally enacted, the AGG goes further than the EU directives in some respects, in particular in so far as it does not confine protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation, to the sole field of employment, but extends protection against discrimination on the basis of all of the grounds covered to a number of other fields. While section 9 of the AGG does provide for a permissible difference of treatment on the grounds of religion or belief, where such grounds constitute a justified occupational requirement for a particular religion or belief, this provision has so far been interpreted narrowly. Thus, the Hamburg Labour Court ruled in December 2007 that a German evangelical social welfare organisation which aids

[8] Of specific relevance to ECRI's terms of reference are Council Directives 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and 2000/78/EC, establishing a general framework for equal treatment in employment and occupation.

[9] On the role and powers of the Federal Anti-Discrimination Agency, see further below, *Anti-Discrimination Bodies and other institutions*.

immigrants had discriminated against a German citizen of Muslim faith when it refused to hire her as an integration counsellor for immigrants. The court found that the rejection of the applicant constituted a discriminatory act since in this context religious faith could not be interpreted as a genuine occupational requirement for the job.[10]

27. The text as enacted may nonetheless leave room for improvements. As regards the scope of the Act, two aspects in particular give rise to concern. First, section 19(3) of the AGG expressly allows for differential treatment in the case of rental or housing where it serves to create and maintain stable or balanced social structures or settlement structures. While the authorities have stressed that this provision is intended to ensure integration, that it only applies to landlords owning at least 50 rental units and that in practice, no complaints have so far been lodged by persons having been refused housing on the basis of the provision, ECRI shares the concerns voiced by both civil society and international actors regarding the possible negative effects of including, in the very Act intended to give effect to the prohibition of discrimination, a provision expressly allowing differential treatment on the basis of all the protected grounds, including racial or ethnic origin. ECRI observes that positive measures intended to compensate for disadvantage are already provided for under section 5 of the AGG and that the precise scope of section 19(3) is therefore all the harder to grasp.

28. A second question concerns the applicability of the AGG to the field of education. Whereas it is clear that private schools are subject to the provisions of the AGG, it appears that public (state-funded) schools are not. As it is the *Länder*, in the German federal system, that are competent in the field of education, it will be up to each *Land* to ensure that the prohibition on discrimination in this field is made effective in practice. In this context, ECRI stresses that education has a fundamental impact on children's future life choices and that – bearing in mind the current inequalities in school outcomes in Germany[11] – it is all the more urgent that discrimination be eliminated in this field.

29. Two important obstacles to the use of the AGG by victims of racial discrimination have also been identified. First, although racial discrimination remains a significant phenomenon in daily life,[12] the existence, scope and purpose of the AGG remain largely unknown, including among potential victims from this group. According to a recent study, 56% of persons surveyed considered that discrimination on the grounds of ethnic origin was widespread (compared with 23% who considered discrimination on the grounds of gender to be widespread); in the same study, 16% of persons surveyed reported having seen someone being discriminated against or harassed on the grounds of their ethnic origin, and 8% on the grounds of their religion or belief (compared with 5% reporting having witnessed someone being discriminated against or harassed on the grounds of their gender). Yet only 26% of persons surveyed stated that they knew their rights if they were victims of discrimination or harassment, and only 29% were aware of the existence of a law prohibiting discrimination on the basis of ethnic origin by employers when hiring new employees.[13] Moreover, the Federal Anti-Discrimination Agency itself reports that only 14.5% of cases it dealt with between August 2006 and December 2008 concerned discrimination on the grounds of ethnic origin, and a total of 2.88% on the grounds of belief or religion

[10] Decision of 4 December 2007, no. 20 Ca105/07. This decision was subsequently overturned by the Hamburg Regional Labour Court (decision of 29 October 2008, no. 3 Sa 15/08), on unrelated grounds, namely that the professional qualifications of the plaintiff did not meet the requirements specified in the vacancy notice.

[11] See further below, *Discrimination in Various Fields – Education*.

[12] See further below, *Discrimination in Various Fields.*

[13] Discrimination in the European Union Report (2007) – Special Eurobarometer 263.

– compared with 24.84% on the basis of gender, 26.24% on the basis of disability and 19.75% on the basis of age. As regards court proceedings, the majority of case-law to date concerns discrimination on the grounds of age or disability; at the time of writing, only two judgments were known to have been delivered in cases concerning discrimination on the grounds of ethnic origin. This discrepancy between the proportion of instances of discrimination on the grounds of ethnic origin, religion or belief observed and the proportion of cases actually reported would seem to point to a lack of awareness amongst victims or potential victims of racial discrimination of the existence and scope of the AGG. Against this background, the information that the Anti-Discrimination Agency has recently published information on the internet in Arabic, English, French, Polish, Russian, Spanish and Turkish, in addition to German, is welcome.

30. A further obstacle frequently referred to by NGOs active in the anti-discrimination field is the time-limit of 2 months for initiating a complaint laid down by sections 15(4) and 21(5) of the AGG. The authorities have indicated that in all cases, complainants then have three months in which to lodge a claim with a court. ECRI is concerned, however, that the initial two-month period may be too short. It emphasises that, as described above, many victims, in particular where discrimination on the grounds of their ethnic origin is at stake, remain unaware of the existence of the AGG, or of their rights under it. Moreover, victims may not immediately know where to turn for advice, and may initially be reluctant to raise the issue, or unable to do so because they do not uncover important information until after the deadline has expired. This issue is compounded by the limited role afforded to NGOs under the law, which, as ECRI understands it, may provide legal advice to victims but may not represent them in court. ECRI stresses in this context that in order for the AGG to be effective in practice, it must not only be widely known by the general public, but also provide effective relief to victims when discrimination does occur.

31. As noted above (§ 24), the enactment of the AGG sparked considerable debate in Germany, some of it hostile. While this did not in the end prevent the enactment of a text that in many respects corresponds to the key elements contained in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, it seems that suspicion towards the AGG still exists. A striking example is one law firm's free internet service, to which employers who are the subject of a claim on the basis of the AGG can turn in order to find out whether the claimant in their case has lodged similar claims previously. Amongst the express aims of the site is that of preventing individuals from making serial claims under the Act with the sole purpose of milking employers for money. Not only may the existence of such a website deter some victims from making legitimate complaints; it also shows that even among lawyers, understanding of the need for effective legislation against discrimination is not universal. ECRI notes with interest that the Data Protection Commission of Baden-Württemberg (where the law firm is based) has intervened to put an end to this service, and that the case is currently pending.

32. ECRI observes that, in its General Policy Recommendation No. 7, it recommends that the law explicitly prohibit discrimination on the grounds not only of race, colour, religion, or national or ethnic origin but also of language or nationality. ECRI considers that, even though these latter grounds may in many cases be covered within the existing grounds, including these elements as part of the AGG would be useful, for example to counter the reportedly continuing practice of advertising jobs reserved to mother-tongue German speakers only.[14]

[14] See below, *Discrimination in Various Fields – Housing*.

33. ECRI recommends that the German authorities incorporate in the relevant anti-discrimination legislation all of the grounds referred to in ECRI's General Policy Recommendation No. 7, in order to ensure that the highest level of protection is afforded to victims of racial discrimination.

34. ECRI strongly recommends that the German authorities take a more proactive role in raising awareness of the legal framework now in force against racial discrimination, notably among groups who are especially vulnerable to this phenomenon. To this end, ECRI recommends that the authorities run an awareness-raising campaign specifically targeted at ensuring that potential victims of racial discrimination are aware of the existence and scope of the General Equal Treatment Act (AGG) and of the mechanisms for invoking their rights before the courts.

35. ECRI encourages the authorities to ensure that information in languages other than German concerning the content and scope of the legal framework for combating racial discrimination is distributed as widely as possible. It recommends that NGOs, lawyers and other interested parties such as employers and employment agencies be involved in this process.

36. ECRI further recommends that the German authorities keep under review the impact of the new legislation in preventing discrimination and in ensuring that it is effectively sanctioned when it does occur. In this respect, ECRI recommends that the authorities scrutinise particularly closely the manner in which the provisions concerning housing, education and legal representation are applied in practice, and revise them if necessary.

Anti-discrimination bodies and other institutions

- *Federal Government Commissioner for Migration, Refugees and Integration*

37. The Federal Government Commissioner for Migration, Refugees and Integration is responsible for combating discrimination against foreigners, and has competence to deal with and assist in individual cases within the framework of the AGG. The Commissioner's key tasks include dealing with racial discrimination and discrimination on account of ethnic origin and the elimination of structural forms of discrimination. The Commissioner also has lead responsibility for the coordination of the National Integration Plan.[15]

38. In 2005 the Federal Government assigned the office of the Federal Government Commissioner for Migration, Refugees and Integration to the Federal Chancellery, thereby highlighting the importance attached to integration policy. At the same time, the Commissioner was also given permanent access to the Cabinet. The Commissioner is in regular contact with the Commissioners for Integration and the Commissioners for Foreigners' Issues of the *Länder* and the local authorities, and supports them in their work.

- *Federal Anti-Discrimination Agency*

39. In its third report, ECRI encouraged the German authorities to establish a specialised body to combat racism and racial discrimination at national level and to take into account in this respect its General Policy Recommendations Nos. 2 and 7.

40. Since ECRI's third report, a Federal Anti-Discrimination Agency has been set up under the AGG. In addition to the Agency's competences to carry out awareness-raising work, take measures to prevent discrimination on any of the grounds

[15] *Vulnerable/Target groups – Situation of migrants, asylum-seekers, [etc] – Integration*.

covered in the AGG and conduct academic research into such discrimination, any person who believes they have been discriminated against on any of the grounds covered by the AGG may take their case to the Agency, which is entrusted with giving such persons independent assistance. This may include providing information, arranging for advice to be provided by another authority or endeavouring to seek an out-of-court settlement between parties. The Agency is not, however, entitled to investigate complaints itself or to bring proceedings before the courts. It is also required to co-operate with the competent Parliamentary Commissioners of the German Bundestag and Federal Government Commissioners, including the Federal Government Commissioner for Migration, Refugees and Integration, where their competencies overlap. To avoid duplication, in cases which come under the responsibility of these Commissioners, the Agency is required to forward the petitioner's complaint to them. The Agency is also required to involve in its work, in an appropriate manner, non-governmental organisations and institutions active in the field of the protection against discrimination.

41. ECRI welcomes the creation in Germany of a body specifically entrusted with combating discrimination, and hopes that both its existence and activities will help to increase the visibility and effectiveness of the fight against discrimination in Germany. It notes in this context that the Agency has recently published a detailed brochure containing explanations and examples on the AGG.[16] Other material with appeal to the broader public is also being prepared. ECRI is concerned, however, that so far, in the eyes of civil society actors working in the field of combating racial discrimination, the Agency is perceived as somewhat distant from victims and lacking an understanding of their perspective. From ECRI's perspective, one of the primary purposes of setting up a national body with special competencies in the fight against racism and racial discrimination is to bring avenues of redress closer to victims. ECRI therefore hopes that this perception will change rapidly, and that both the presentation of the Agency's first annual report to Parliament in 2009 and the publication in languages other than German of information about the new legal framework in place to fight discrimination will provide an opportunity not only to raise the Agency's public profile but also to make it more accessible to victims. It also hopes that the Agency will be able to strengthen its contacts with non-governmental associations working with victims of discrimination.

42. As regards the guarantees of effective functioning of the Agency, ECRI observes that with a staff of 23 people and an annual budget of 2.8 million EUR in 2008 and 3 million EUR in 2009, the Agency would appear to have relatively few resources to carry out its statutory tasks; this will be even more the case as public awareness of the AGG and of the Agency itself increases.

43. ECRI recommends that the German authorities examine, in line with ECRI's General Policy Recommendation No. 7, the possibility of extending the competencies of the Federal Anti-Discrimination Agency to include the power to investigate individual complaints, as well as the right to initiate, and participate in, court proceedings.

44. ECRI recommends that the German authorities ensure that sufficient necessary financial and human resources are available to the Agency to enable it to carry out its current tasks, and that these resources are expanded as necessary to ensure that the Agency can keep pace with any increases in workload as its work becomes better known.

[16] *AGG-Wegweiser: Erläuterungen und Beispiele zum Allgemeinen Gleichbehandlungsgesetz*, published November 2008.

II. Discrimination in Various Fields

Education

45. In its third report, ECRI encouraged the German authorities in their efforts to improve the position of non-citizen children[17] in schools. It considered education in German as a second language from kindergarten level upwards as one of the priority areas for action. It stressed, however, that measures aimed exclusively at non-citizen children would not suffice to ensure equality of opportunities of these children in education. In this respect, it recommended initiatives to strengthen the intercultural competence of the school communities through measures targeted at the majority population as well.

46. Both international studies and research carried out within Germany in recent years show that first- and second-generation immigrant children continue to have significantly lower chances of success in the German school system than German children – although their desire to succeed is as high as, or even higher than, that of German children.[18] In Germany's multi-track secondary school system, despite the mechanisms in place to ensure permeability between the different streams, the proportion of non-citizens in the lowest stream (*Hauptschule*) is well over twice as high as that of German children, and the proportion of non-citizens who do not even complete *Hauptschule* is considerably over twice the proportion of German citizens. At the same time, the proportion of non-citizens in the highest stream (*Gymnasium*), giving access to university education, is well under half that of German children. One study found that in Baden-Württemberg, non-citizen children were three-and-a-half times more likely to end up in a special school for children with learning disabilities than German children. Overall, only 62.6% of men and 51.3% of women with an immigrant background have completed education or training of some form, compared with 88% of men and 73.4% of women who do not have an immigrant background. ECRI emphasises that this contrast in the education received by, and the education outcomes of, non-citizen and German children with a migration background as compared with other German children is deeply worrying. It notes that studies on this situation have stressed two key factors that may help to redress the situation: first, providing support for developing linguistic skills in the language of instruction (German), and second, addressing the tendency to direct children with a migration background to schools with lower performance expectations, which are dominated by socio-economically disadvantaged student populations.

47. The German authorities have indicated that German as a second language and special remedial language courses for children whose mother-tongue is not German have become an important element in the German day-care, education and training system. Education is a competence of the *Länder*, and the latter have all developed binding education and training plans for pre-school facilities and schools, which fall within their sphere of competence. These plans are either already in place or are being implemented progressively. The key elements of these education and training plans are the promotion of language and intercultural skills. Indeed, in most *Länder*, the language skills of all children are assessed at pre-school level, and extra classes provided if required. These

[17] ECRI's third report was published in 2004. ECRI notes that since 2006/7, the term "children with a migration background" has been used, covering both citizen children with a migration background and non-citizen children.

[18] See in particular OECD 2006, *Where Immigrant Students Succeed: A Comparative Review of Performance and Engagement in PISA 2003*; see also Federal Ministry of the Interior, *Migration and Integration: Residence law and policy on migration and integration in Germany*, April 2008, from which the following figures are drawn. In the present paragraph, the terms "non-citizen" and "immigrant background" correspond to the terms used in the relevant studies.

measures are not restricted to foreign children, but focus on all children with language deficits or children whose mother-tongue is not German. In parallel, specialists in the field of education working in day-care and educational facilities are required to undergo relevant training.

48. ECRI welcomes these measures, which are no doubt a step towards providing children experiencing initial language difficulties with greater chances of achieving better outcomes in school. It welcomes in particular efforts made to promote and foster the linguistic abilities of children from the very earliest stages, as a key means of improving their school outcomes overall. While it seems that kindergarten attendance rates are in any case high, ECRI stresses that those children having missed out on kindergarten are likely to be those who subsequently perform less well in school, in particular due to language difficulties. Given the stark disadvantages faced by children with a migration background in the education system, ECRI particularly emphasises the key role in improving the education outcomes of disadvantaged children that could be played by ensuring that all children have access to free kindergarten education, at very least for the final year before school.

49. As regards teacher training, it is reported that relatively few teachers are trained in teaching German as a second language. ECRI also notes that in a system where children with a migration background are considerably less likely to succeed in school than others, the number of teachers who are themselves first- or second-generation immigrants is unlikely to increase rapidly. Efforts to increase the cultural awareness of teachers are thus all the more urgent. Not only do teachers' attitudes influence children's perceptions of their own capacities; in Germany, teachers also play a central role in directing students towards the different streams of secondary education. NGOs report that some teachers display openly discriminatory attitudes in the classroom, in particular towards Turkish and Muslim children, and some may have a tendency (for example, through the misguided belief that it will simply be easier for these students to cope in the lower levels of the system) to direct such students more often towards the lower streams of secondary education, even, in some cases, where the students have the skills to complete *Gymnasium*. In addition, parents of first- and second-generation immigrant children may be less well equipped than German parents to question such recommendations, as they may themselves experience language difficulties or be less familiar with the German school system. ECRI notes that the system of streaming in schools is currently the subject of some debate in Germany but stresses that for as long as it continues to exist, every effort must be made to ensure that it does not produce, promote or compound problems of discrimination in Germany.

50. At an Education Summit held in Dresden on 22 October 2008, involving both the German authorities and the *Länder*, some significant targets were set. These included a pledge to provide more language assistance to immigrant children, and a proposal to increase spending on education and research to 10% of GDP by 2015. However, it was reported that the summit did not provide an opportunity to examine the entire education chain from kindergarten all the way through to university and life-long education. Concrete decisions on funding and on measures to translate the important agreements of principle into practice were moreover deferred pending their preparation by a strategy group that is not due to report until after the next federal elections, in autumn 2009.

51. Against the above background, ECRI draws the attention of the German authorities to its General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education. It stresses in particular the elements of this Recommendation that concern the development of policies at national and regional level to ensure the full participation, on an equal footing, of

children from minority groups in education; combating racism and racial discrimination within schools, in particular through ensuring that the fight against such phenomena in schools, whether they emanate from pupils or educational staff, is part of a permanent policy; and training all teaching staff to work in multicultural environment.

52. ECRI strongly encourages the German authorities to continue and intensify their efforts to ensure that no children suffer disadvantage in the school system due to inequalities in their linguistic skills in German, and recommends that they draw inspiration in this regard from ECRI's General Policy Recommendation No. 10. In this context, ECRI also recommends that the German authorities ensure that all children in Germany have access to free kindergarten education, at very least in the final year before primary school.

53. ECRI strongly recommends that the German authorities step up the provision of training programmes to teachers and other school staff, in accordance with ECRI's General Policy Recommendation No. 10, in order to increase their understanding of a variety of cultures and equip them to work effectively in increasingly diverse classrooms, including increasing their capacity to teach German as a second language to children with a different mother tongue.

54. Bearing in mind that no immediate move away from the present streaming system for secondary schooling in Germany has been envisaged, ECRI recommends that the German authorities take urgent steps to implement targeted training programmes to ensure that all teachers have the capacity to assess objectively the skills of students due to enter the secondary school system, in order to ensure that students are not sent to schools in the lower academic streams unless this is strictly necessary.

Employment

55. In its third report, ECRI encouraged the German authorities to prevent and combat racial discrimination, racism and xenophobia in the labour market. It reiterated its recommendation that the German authorities ensure that the barriers encountered by non-citizens and persons of immigrant background for entry into the labour market were accurately identified, in order to target funding to initiatives in priority areas. It further recommended that the German authorities evaluate the implementation of the new competences of the Works Councils in the field of combating racial discrimination and promoting the integration of foreign workers, and that the "XENOS – Living and Working in Diversity" programme be evaluated, in order to assess its effectiveness in combating racial discrimination, racism and xenophobia in the labour market.

56. Persons with a migration background in Germany continue to suffer from serious discrimination in access to employment, particularly in the case of qualified workers. Even with equivalent qualifications, immigrants and their children have greater difficulty finding work than the rest of the population. An OECD report published in 2007 found that, for immigrants with tertiary qualifications, the employment rate was 68%, compared with 84% for persons born in Germany. At the other end of the scale, for jobs requiring few or no qualifications, a slightly higher proportion of immigrants (45%) was employed than of persons born in Germany (40%). Young immigrants are more likely than Germans to seek apprenticeships, yet even so, their percentage of the overall number of apprentices remains lower than their percentage of the population in Germany. Even taking account of the lower educational attainment of children with a

migration background,[19] the employment rate of immigrants remains significantly lower than that of native-born Germans.

57. NGOs report that in the labour market, visible differences – including a person's name – are a significant factor in discrimination in access to employment, especially where such differences are linked to a perceived Muslim or Turkish background. It is still common to include photographs on CVs in Germany and women graduates, even with high marks from highly respected German academic institutions, report that they are not invited to interviews if their photograph shows them wearing a headscarf.[20] Black persons applying for work report being turned away as soon as employers see them. Advertisements requiring "mother-tongue German" have also been reported. Precarious residency status can also act as an added barrier for non-citizens seeking access to work or apprenticeships. ECRI observes that the new anti-discrimination legislation should help to provide a remedy for some individuals who have been subject to discrimination and who are in a position to make a complaint within the required time-limits.[21] However, structural approaches to combating discrimination are also required, and increased efforts to change employers' attitudes and promote a diversity approach in the workplace appear to be urgently needed. ECRI notes with interest that a Charter of Diversity was initiated by the business community in 2006, to which several hundred businesses have subscribed.

58. Since ECRI's third report, the implementation and effects of the 2000-2006 "XENOS – Living and Working in Diversity" programme, which included around 250 multi-year and nationwide projects against xenophobia and right-wing extremism and for tolerance and diversity on the labour market have been evaluated. The results of and recommendations made in this evaluation were incorporated into the follow-up programme drawn up by the Federal Ministry for Labour and Social Affairs called "XENOS - Integration and Diversity" (2007-2013 funding period). The goal of the new programme is to boost awareness of democracy and tolerance and to eliminate xenophobia and racism. The main focus is on preventive measures against exclusion and discrimination on the labour market and in society. Activities against xenophobia, racism, right-wing extremism, antisemitism and discrimination on the labour market are to be promoted in areas such as: work, administration, training, schools and vocational training in Germany and in the European context. Six priority areas have been identified: qualification and further training at school, in training and at work; cross-border and transnational measures; in-company measures and educational work in companies and public administrations; measures to integrate immigrants; teaching facts about and awareness-raising against right-wing extremism; and promoting moral courage and strengthening civil-society structures in local communities and rural regions.

59. ECRI encourages the German authorities to pursue their efforts to create a workplace free of racism, racial discrimination, xenophobia and other related forms of intolerance, including through measures such as the programme "XENOS – Integration and Diversity".

60. ECRI strongly recommends that, as part of their ongoing efforts towards creating a workplace free of racism, the German authorities launch an awareness-raising campaign aimed specifically at changing employers' attitudes towards persons with an immigrant background. This campaign should focus not only on

[19] See above, *Discrimination in Various Fields – Education*.

[20] See further below, *Vulnerable/Target groups – Muslim community*.

[21] See above, *Existence and Implementation of Legal Provisions – Civil law provisions: General Equal Treatment Act*.

employers' obligations and liabilities under the new General Equal Treatment Act (AGG) but also on the positive aspects of diversity in the workplace. It could form part of a regular series of such campaigns.

Housing

61. In its third report, ECRI recommended that research be carried out into discriminatory practices and barriers or exclusionary mechanisms in public and private sector housing, in order to inform targeted policy responses to any problems found.

62. Various studies carried out in the past have shown that on average, migrants living in Germany pay higher rent than German citizens but live in smaller houses or apartments. In some cities migrants also live mostly in specific districts, a fact that is readily used by conservative commentators to criticise migrants, and especially Muslims, for creating and living in "parallel societies". In public debates on how to reduce the concentration of migrants in some neighbourhoods, the focus has at times tended to be on finding ways to make migrants relocate to new neighbourhoods or to prevent them from moving in to districts which already have a high proportion of migrants, rather than on, say, incentives that could be offered to German citizens to move into such neighbourhoods, or measures (such as improving schools or living conditions) to make such districts more attractive. NGOs report that a key role is played, however, by discriminatory practices of landlords and property managers, based for example on a person's name or on their fluency in German. Cases in which rooms are advertised as available for mother-tongue German speakers only are also reported.

63. The authorities have pointed out that housing is one of the fields covered by the General Equal Treatment Act (AGG) 2006. However, as noted above (§ 27), the inclusion in the Act of a provision expressly permitting differential treatment on the basis of racial or ethnic origin gives rise to doubts as to whether the AGG will be of assistance in turning this situation around.

64. ECRI strongly recommends that the German authorities carry out research into discriminatory practices and barriers or exclusionary mechanisms in public and private sector housing, in order to inform targeted policy responses to any problems found. It recalls in this context its recommendation made earlier in this report that the authorities keep under review the impact of the new legislation in preventing discrimination and in ensuring that it is effectively sanctioned when it does occur, in particular as regards the provisions concerning housing

III. Racism in Public Discourse

Political discourse

65. In its third report, ECRI encouraged the German authorities in their efforts to ban political parties and other organisations which resort to racist, xenophobic and antisemitic actions and propaganda. It recommended that the authorities consider enacting legislation to withdraw public financing from organisations that promote racism, xenophobia and antisemitism.

66. Since ECRI's third report, some worrying developments have occurred in the political arena in Germany. The success in Mecklenburg-Western Pomerania in 2006 of the National Democratic Party (NPD) – which has flags and symbols similar to Nazi paraphernalia and which was labelled as "racist, antisemitic and revisionist" in the 2006 *Verfassungsschutzbericht* – is a particular case in point. The leader and two senior members of the NPD were indicted in early 2008 on charges of racial incitement. Support for the party, which receives state funding, quadrupled in local elections in Saxony in June 2008, and it is now represented

in all 10 regional councils of Saxony. Supporters of this party have distributed xenophobic and antisemitic tracts in schools in several *Länder* and chanted antisemitic slogans during protest marches. Attempts to ban the party in 2003 failed, as some evidence against it had been improperly gathered by undercover informants; however, suggestions that efforts should be made to have the party banned resurfaced in 2008. Meantime, the far-right German People's Union (DVU) won a number of seats in the Brandenburg legislature. As mentioned elsewhere in this report, a single-issue anti-mosque movement created in Cologne won 5% of votes (as well as 5 seats) in recent local elections there.

67. While most mainstream parties have for the most part avoided racist comments or overtones, some discourse aimed at Muslims has tended to focus essentially on security issues, or on a supposed integration deficit of Muslims in German society. This approach is also of concern to ECRI.[22]

68. ECRI again encourages the German authorities in their efforts to ban political parties and other organisations which resort to racist, xenophobic and antisemitic actions and propaganda. It recommends that the authorities consider, in line with ECRI's General Policy Recommendation No. 7,[23] enacting legislation to withdraw public financing from organisations that promote racism, xenophobia and antisemitism.

69. ECRI recommends that the authorities encourage politicians to take the utmost care to avoid perpetuating hostility or negative stereotypes about non-citizens and members of minority groups; instead, they should take the lead in denouncing racism and discrimination and in ensuring that non-citizens and members of minority groups are perceived as equal and valuable members of society.

Neo-Nazi propaganda

70. In its third report, ECRI recommended that special efforts be deployed to counter the right-wing extremist hate music scene. ECRI notes that music from the extreme right-wing scene continues to act as a vector for spreading racist, antisemitic and xenophobic ideas, and is also often used as a tool for recruiting youths as new members of right-wing extremist groups. These groups reportedly seek to recruit young people directly in schoolyards, for example by giving away free CDs to students, and use music and magazines to create links between extremist groups and young people. The authorities estimate that there are presently around 4 400 Neo-Nazis and 10 000 sub-culture-oriented and other right-wing extremists having a tendency to violence in Germany, numbers which have not decreased in recent years.

71. The authorities have been active in investigating and prosecuting members of neo-Nazi groups.[24] In October 2008, the German authorities carried out nationwide raids on the offices and homes of individuals affiliated with a youth group having links to the NPD, and suspected of indoctrinating teenagers and children with neo-Nazi ideas during summer camps. In April 2007, the Interior Ministry of Saxony prohibited a neo-Nazi group that had committed several acts of racist violence. In March 2007, three men were sentenced for burning the diary of Anne Frank. In March 2006, major raids were carried out on the homes of over 100 persons suspected of having links to the banned Blood and Honour skinhead

[22] See below, *Vulnerable/Target Groups – Muslims,– Situation of migrants, asylum-seekers, [etc] – Integration.*

[23] See § 16 of the General Policy Recommendation and § 36 of the accompanying explanatory memorandum.

[24] Acts of violence by neo-Nazis are dealt with below, under *Racist violence*.

group. ECRI welcomes these efforts as an essential part of the fight against racism, xenophobia and antisemitism.

72. ECRI strongly encourages the German authorities to pursue their efforts to ban neo-Nazi organisations and groups, and refers to its further recommendations made below concerning the fight against racist violence, including the need to take a comprehensive approach in order to identify and combat the causes of such violence.

Internet

73. In its third report, ECRI recommended that the German authorities intensify their efforts to counter racist, xenophobic and antisemitic activities on the Internet, and encouraged the authorities to promote initiatives which had proved successful in countering racist, xenophobic and antisemitic activities on the Internet. ECRI notes that since its third report, the prevalence of racist expression on the internet does not appear to have decreased. A high proportion of racist expression via the internet appears to be authored by persons belonging to neo-Nazi groups; their targets are most often Roma/Sinti or members of the Jewish community. The authorities report that it is not always easy to bring prosecutions in such cases or to close down offending sites, as they frequently hosted on overseas servers. However, successes have been achieved through international co-operation, including at the initiative of NGOs.

74. ECRI reiterates its recommendation that the German authorities intensify their efforts to counter racist, xenophobic and antisemitic activities on the Internet, and again draws the authorities' attention to its General Policy Recommendation No. 6. ECRI again encourages the German authorities to promote the use of initiatives which have proved successful in countering racist, xenophobic and antisemitic activities on the Internet.

Media

75. In its third report, ECRI referred to the need to ensure that reporting did not perpetuate racist prejudice and stereotypes, and to the adoption and implementation of codes of self-regulation as useful tools to these ends. It also noted the need for the media to equip itself better to reflect a diverse society, both through training journalists from the majority population and through a stronger representation of persons with an immigrant background in the media professions.

76. ECRI notes that certain measures related to the media, such as efforts to promote innovative and integrational television programmes, are included in the National Integration Plan.[25] The Federal Agency for Civic Education also runs activities aimed at strengthening the role of local journalists in contributing to the cohesion of communities in their district, city or region. ECRI is therefore concerned to learn that the only multicultural radio programme currently being broadcast, radiomultikulti in Berlin, is to be shut down in 2009 by local radio station RBB. Generally speaking, minorities continue to report that they are underrepresented in the media, and where they are represented, it is usually with stereotypes. This phenomenon affects not only the Black community and Sinti and Roma, as noted elsewhere in this report,[26] but also Muslims. The latter point out that they have tended to be associated, as a group, with the offences of a few. They also point to intense media coverage of an incident where the

[25] See below, *Vulnerable/Target groups – Situation of migrants, asylum-seekers, [etc]* – Integration and naturalisation.

[26] See below, *Vulnerable/Target Groups – Black Community, – Sinti and Roma*.

headmaster of a school attended mostly by students with an immigrant background, in Berlin's Neukölln district, asked for help as he considered the situation there had gone beyond his control; at the same time, similar incidents in schools mostly attended by German pupils passed unreported. ECRI emphasises the importance of equipping media professionals with special training on reporting in a diverse society. It also stresses that a stronger representation of persons of immigrant background in the media profession could positively affect the image of persons of immigrant background reflected by the press.

77. ECRI encourages the German authorities to raise awareness amongst the media, without encroaching on their editorial independence, the need to ensure that reporting does not perpetuate racist prejudice and stereotypes and also the need to play a proactive role in countering such prejudice and stereotypes. ECRI recommends that the German authorities engage in a debate with the media and members of other relevant civil society groups on how these ends could best be achieved.

78. ECRI encourages the authorities and all relevant actors to implement all measures of the National Integration Plan aimed at ensuring the media are better equipped to deal with the diversity of present-day German society.

IV. Racist Violence

79. As mentioned in previous reports, ECRI considers racist, xenophobic and antisemitic violence to be one of the most dangerous expressions of racism, and a priority area for action in Germany. Asylum-seekers, members of Jewish communities, Roma and Sinti continue to be targeted by such attacks. Visible minorities, especially in the eastern parts of the country, where the highest numbers of crimes occur in per capita terms, are reported to be particularly exposed to racist violence.[27] Unfortunately, the number of violent crimes with extremist, xenophobic or antisemitic motivations has continued to rise in recent years.

80. Many of these attacks are committed against single victims by several young men or teenagers acting together and belonging to or sympathising with more or less organised Neo-Nazi, skinhead or other right-wing extremist groups. In its third report, ECRI noted that the problem of racist, xenophobic and antisemitic violence was not only linked to conditions specific to the youth who are perpetrators of these crimes, however, but was also favoured by other, more general conditions prevailing in German society as a whole. It encouraged the authorities in their efforts to take a more comprehensive approach to the phenomenon of racist, xenophobic and antisemitic violence, not focusing exclusively on the activities of right-wing extremists but seeking to address other causes underlying this violence which may be found in society as a whole, such as perceptions about non-citizens and their place within German society; the incidence of racial discrimination in everyday life; and the latent racism, xenophobia and antisemitism existing more generally in other segments of the population of Germany. In this context, ECRI notes with interest that long-term academic research is being carried out into the phenomenon of group-focused enmity in Germany, its causes and the conditions in which it is likely to find expression. It welcomes the interest displayed by the authorities in the results of this work, which may help in designing increasingly effective strategies to prevent and combat racist violence in Germany.

81. A number of initiatives supported by the authorities may also be noted. One such initiative is the Alliance for Democracy and Tolerance, which has been in place

[27] See also below, *Vulnerable/Target Groups – Black Community*.

since 2000 and of which the mission is to promote positive messages around democracy and tolerance through preventive and practical measures. The measures aim to increase acceptance of immigrants in German society, promote the efforts of immigrants to integrate and increase their participation, and find concrete solutions when integration problems arise. Following on from an earlier programme, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth also initiated two German-wide programmes against right-wing extremism, xenophobia and anti-Semitism in 2007. The first, "Diversity feels good. Youth for diversity, tolerance and democracy", aims to raise awareness amongst children and young people with a view to getting them involved in the fight against right-wing extremism, xenophobia and antisemitism. The programme currently supports 90 model projects and 90 local action plans throughout Germany. The second, "Competent for democracy – Counselling network against right-wing extremism" provides professional counselling on issues related to racism, xenophobia or anti-Semitism, in particular to help respond to crisis situations, and aims to enhance the co-operation between the federal government and the *Länder*. Almost all the *Länder* have now set up counselling networks in the framework of this programme. The police are also taking an increasingly active role in working to prevent racist, xenophobic and antisemitic crime. This work primarily targets young people, for example through the distribution to schools of the "Wolves in Sheep's Clothing" media kit, including a film targeted at 13-year-olds and supplementary material for teachers on how to use the material in classes; as well as a follow-up DVD including award-winning television spots against right-wing extremism made by schoolchildren. It has also led to the publication of a leaflet designed to help parents identify signs (for example, brands of clothing or other insignia) that their children may be becoming involved in the activities of extreme right-wing, and particularly neo-Nazi groups. As part of its broad mandate to promote civic education, the Federal Agency for Civic Education set up a specific extremism unit in 2007. The Forum against Racism set up by the Federal Ministry of the Interior in 1998 also continues to serve its members (30 governmental organisations and 60 non-governmental organisations) as a platform for dialogue on the fight against racism and xenophobia. Other initiatives at grassroots levels include support programmes for victims, as well as programmes to assist offenders to leave right-wing groups. Non-governmental organisations report, however, that even though it is clear that sustained efforts are needed to combat the prevalence of racist, xenophobic and antisemitic violence in Germany, local programmes continue to be funded on only a very short-term basis, which hampers their capacity to be effective.

82. ECRI welcomes the above initiatives and notes that considerable resources have been invested in combating the gravest forms of racism and xenophobia through a variety of means. It also welcomes the fact that action is being taken at several different levels, including supporting victims, fighting crime when it occurs, assisting perpetrators to break out of extremist groups and seeking to prevent young people from going down the path of extremist activity. Bearing in mind the high levels of racist violence that currently prevail in some parts of German society, ECRI emphasises that programmes such as these are likely to be needed for a considerable time to come.

83. As regards the situation of victims of racist violence, ECRI is not aware of any new research carried out in recent years. In terms of compensation, as noted in ECRI's third report, the authorities may now pay compensation on a voluntary basis to victims of racist violence under the Victims Compensation Act of 2001. While these provisions are overall welcome, ECRI understands that the criteria on the basis of which the level of compensation is determined do not depend on the type and severity of the offence suffered by the victim so much as on their country of origin and the length and basis of their residence in Germany. ECRI stresses that, no matter what the citizenship or residency status of the victim,

racist violence constitutes the worst form of expression of racism; it considers that compensation awarded to victims should reflect this.

84. ECRI strongly encourages the German authorities to pursue and consolidate their efforts to take a more comprehensive approach to the phenomenon of racist, xenophobic and antisemitic violence, not focusing exclusively on the activities of right-wing extremists but also addressing other causes underlying this violence which may be found in society as a whole.

85. ECRI reiterates its recommendation that the German authorities continue and intensify their support to local initiatives aimed at strengthening democratic civil society and at equipping local communities against right-wing extremism and, more generally, against racism, xenophobia and anti-Semitism. It also recommends that they improve access to funding, in particular long-term funding, for grass-roots organisations working in this field.

86. ECRI recommends that the German authorities continue and intensify their efforts in order to address the position of victims of racist, xenophobic and antisemitic violence, taking account of the fact that compensation in this respect should reflect the harm suffered by the victim. It recommends that these efforts also include concrete initiatives to rehabilitate victims as well as academic research in this field.

87. In its third report, ECRI encouraged the German authorities in their efforts to search for means to improve the implementation of existing criminal legislation to combat right-wing extremism and, more generally, to combat racist, xenophobic and antisemitic violence. It also highlighted the continuing need for training of law enforcement officials on such legislation, and strongly encouraged the German authorities in their efforts to monitor racist, xenophobic and antisemitic crimes and, within these, violent crimes.

88. Although the concept of "hate crimes" is not expressly recognised as such in the German Criminal Code,[28] since 2001 the police have gathered statistics on "politically motivated offences" (divided into four categories: "left-wing", "right-wing", politically motivated activities by foreigners and other types of politically motivated crimes). These statistics cover, inter alia, offences directed against individuals due to their political beliefs, nationality, ethnic origin, race, colour, religion, ideology, origin, sexual orientation, disability, appearance or social status. Offences are considered to be "extremist" if they are aimed at overthrowing the state. Xenophobic crimes (committed due to the victim's real or perceived nationality, ethnicity, race, skin-colour, religion or origin) and antisemitic crimes (committed because of an anti-Jewish sentiment) are registered as sub-groups of these offences. The vast majority of antisemitic and xenophobic crimes recorded as politically motivated offences are registered in the right-wing category. Overall, 24.4% of right-wing politically motivated crimes recorded in 2007 were considered to be hate crimes.

89. In 2007, the Federal Criminal Police Office registered 17 176 politically motivated offences, of which 980 were acts of violence. In 2006, 17 597 such offences were recorded, 1 047 of which were acts of violence. 16% of registered right-wing extremist offences registered in 2007 were recorded as having a xenophobic background. NGOs working with victims of such crimes note, however, that the parallel statistics they keep of racist incidents reported to them are consistently higher than the official statistics for the relevant politically motivated offences.

[28] See above, *Criminal law provisions against racism*.

One reason cited for this is a lack of confidence amongst victims of racist offences that police officers will deal appropriately with them.[29]

90. Representatives of victims of racist violence also emphasise that one of the key barriers to successful prosecutions of offenders in this field is the narrow understanding of racism that currently prevails in Germany. As mentioned above (§ 84), there is no definition of racism in German law but it is understood (including in official documents[30]) as a view held essentially by right-wing extremists, and based on considerations as to the supposed biological superiority of certain "races" over others. NGOs point out that this understanding is widespread throughout German society, including in the criminal justice system, i.e. amongst police, prosecutors and judges. Thus, unless the perpetrators of crimes are clearly identifiable as members of right-wing extremist groups or sympathisers of such groups, crimes based on racist motivations may not be investigated or prosecuted as such. Even if they are, judges' understanding of racism, combined with the absence of a specific reference in the Criminal Code to racist motivations as an aggravating circumstance for ordinary offences,[31] may again make it difficult to get an appropriate conviction.

91. ECRI is concerned that because of this, persons having committed racist offences may be escaping due prosecution and punishment for their acts. It draws the authorities' attention to the definition of racism contained in its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, which states that, for the purposes of the Recommendation, "'racism' shall mean the belief that a ground such as race[32], colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons," and stresses that the mere fact that the perpetrator of a violent crime has no manifest links with the extreme right-wing scene does not mean that they had no racist motivations for their act. ECRI stresses, as has been repeatedly highlighted by the European Court of Human Rights, that racist violence is particularly destructive of fundamental rights, and that it is essential that it be identified and punished accordingly.

92. ECRI recommends that the German authorities seek means to improve the implementation of existing criminal legislation to combat right-wing extremism and, more generally, to combat racist, xenophobic and antisemitic violence. It recommends that the authorities intensify their efforts to train law enforcement officials, including police, prosecutors and judges, on such legislation, in order to ensure that no incidents of racist, xenophobic or antisemitic violence pass unnoticed due to an unnecessarily narrow interpretation of the existing law. It recommends that lawyers also be given the opportunity to receive training on these matters.

V. Vulnerable/Target Groups

Jewish communities

93. See below, Antisemitism.

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[29] See below, *Conduct of law enforcement officers*.

[30] See, for example, the explanation of racism given in the glossary of the Ministry of the Interior: http://www.bmi.bund.de/cln_145/DE/Service/Glossar/Functions/glossar.html?nn=105094&lv2=296448&lv3=152418

[31] See above, *Criminal law provisions against racism*.

[32] Since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races". However, in this definition ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to "another race" are not excluded from protection.

Muslims

94. In its third report, ECRI recommended that the German authorities take steps to combat and prevent racism and discrimination vis-à-vis Muslims in Germany effectively. It drew the authorities' attention in particular to its General Policy Recommendation No. 5, which proposes a range of legislative and policy measures governments can take to this end.

95. The German authorities estimate that approximately 3.4 million Muslims live in Germany. The great majority are not German citizens. As with other groups, Muslims who do not have German citizenship are referred to and perceived as foreigners, regardless of how long they or their family have lived in Germany, and, unless they are nationals of another EU member state, they do not have the right to vote in elections at any level. Given the increasing diversity of the backgrounds and beliefs of Muslims living in Germany, they reportedly do not have a strong collective identity. Few Muslims hold high-profile positions in German political parties and very few have been elected to the Federal Parliament (*Bundestag*).

96. Muslims frequently experience discrimination in daily life, facing difficulties in access to employment as well as so-called "ghettoisation" in the housing sector.[33] In the field of education, Muslim children are not only strongly affected by the phenomenon of lower school outcomes that affects children with a migration background in general, but also report cases of discrimination against them by some teachers.[34] Nearly two-thirds of Muslims reported experiencing some form of discrimination in the past twelve months. As regards attitudes of society in general towards Muslims, when questioned about their experiences in the past year, many Muslims reported having been treated as simple or odd, treated rudely because they were perceived as foreigners, subjected to pejorative comments such as being told to "go home", intentionally insulted or subjected to name-calling; one-fifth reported have been discriminated against by the police or other authorities, nearly one in ten reported having had property deliberately damaged or destroyed and 3% reported having been physically assaulted.[35]

97. ECRI notes with concern a new law on registration of personal data, which will come into force in January 2009. Under this law, Muslims, in contrast with persons affiliated to religions that are registered as corporate bodies under public law, are prohibited from registering their faith. ECRI is concerned that this may be a violation of the principle of equal treatment.

98. As regards practising and learning about the Muslim faith, it may be noted that religious education in schools is permitted in Germany, but Muslim religious education in schools is at present a relative rarity. In March 2008, the third official Islam Conference agreed to add Islam to the school curriculum in public schools. However, this initiative has been hampered by a lack of qualified Muslim teachers with sufficient knowledge of German to teach the Muslim faith in schools. With respect to practising the Muslim faith, the construction of mosques has often been surrounded by controversy, and in some cases used by extreme right-wing parties to push their own anti-Islam agendas. In response to plans to build one of Europe's largest mosques in Cologne, a single-issue anti-mosque movement was created and won 5% of votes (as well as 5 seats) in recent local elections. The movement invited nationalist groups from around Europe to join a rally and congress in Cologne in mid-September 2008 to fight what it called the "Islamisation and immigration invasion" of Germany and Europe; however, the

[33] See above, *Discrimination in Various Fields –Employment, Housing.*

[34] See above, *Discrimination in Various Fields – Education.*

[35] *Muslime in Deutschland*, p105.

demonstration was stopped by several thousand anti-right demonstrators who blocked access to the square where it was planned. Not all such projects have been controversial, however: in a number of instances political leaders and the majority of the population have given their support to the building of a mosque. In Duisburg, Germany's largest mosque – combined, in an unprecedented move in Germany, with a local community meeting centre open to all members of the community – opened in October 2008 with general support.

99. A major point of difficulty for Muslim women is the impact, in particular on their chances of finding employment, of the choice to wear a headscarf. Following a decision by the *Land* of Baden-Württemberg in 2000, prohibiting a female Muslim teacher from wearing a headscarf, in 2003 the Federal Constitutional Court – finding in favour of the teacher in that case – ruled that it was up to the *Länder* to legislate to define which religious symbols could be worn in which circumstances. Since then eight *Länder* – Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North-Rhine-Westphalia and Saarland – have passed laws that explicitly prohibit the wearing of headscarves in schools. In Hesse, all civil servants are banned from wearing headscarves. The public discussion about headscarves is reported to have had even more detrimental effects than the laws themselves for Muslim women, who were portrayed in public discourse as oppressed and dependent. Muslim women moreover report that it has also become increasingly difficult to find employment in the private sector since these laws were passed, as they have sent the message that it is reasonable to reject an applicant solely because she wears a headscarf.

100. Civil society actors continue to report that since the events of 11 September 2001, media coverage of Muslims in Germany has tended to be one-sided. One study found, for example, that police announcements concerning raids on mosques were invariably published as front-page news, yet the fact that virtually all such raids produced no results was not mentioned. Some commentators blame Muslims themselves for the discrimination they experience, suggesting that it is their fault because they do not want to integrate – for example, because they watch satellite television in the language of their country of origin. Likewise, political discourse has also frequently been negative.[36] Muslims have increasingly been identified, both by the press and by the authorities, with crimes, and more specifically with terrorism. Political discourse concerning Muslims frequently revolves around "internal security issues", and the strong focus of the authorities, in particular the German Intelligence Agency (*Verfassungsschutz*), on identifying radical Islamist groups, may result in even moderate groups being denied access to public funding and excluded from policy-making. While it recognises the legitimacy and importance of ensuring internal security, ECRI is concerned that an approach in which the non-violent individuals who form the vast majority of the Muslim community are simply equated with the few who may be prepared to resort to violence may stigmatise all Muslims in the eyes of the general public, and in the long run, alienate more than it reassures. ECRI emphasises that messages sent by the authorities and by the media are of central importance in building confidence and strengthening dialogue in order to foster a society based on trust rather than mutual suspicion or fear.

101. Against this background, ECRI welcomes the creation by the Ministry of the Interior of the German Islam Conference (*DIK*), intended to create a permanent space for dialogue between the authorities at all levels and Muslims in Germany. Such a space had previously been lacking, in part due to the authorities' insistence on seeking a single partner for dialogue, to represent the full breadth and diversity of the country's more than 3 million Muslims from Europe, Northern

[36] See above, *Racism in Public Discourse.*

and sub-Saharan Africa, the Middle East and Asia. The Conference is thus an important symbol of change for the authorities. The authorities have indicated that the goal of the Conference is to promote inclusive and constructive forms of community, and to ensure better integration of Muslims in Germany. It is intended to show by example that Muslims have become a part of German society, to counteract segregation of Muslims in Germany, and to prevent Islamism and extremism. ECRI observes that the exercise at stake is a delicate one: as much as the new dialogue between Muslims and the authorities may send a positive message to society as a whole, this message risks being obscured by the focus on security issues. The risk is that the latter focus may create the false impression that extremism is a generalised phenomenon amongst Muslims, and a problem solely of Muslims. How this issue is managed will therefore have a strong influence on whether the Conference is able to achieve its goals.

102. ECRI strongly recommends that the German authorities intensify their efforts to combat and prevent racism and discrimination vis-à-vis Muslims in Germany effectively. It draws the authorities' attention once again to its General Policy Recommendation No. 5 on fighting intolerance and discrimination against Muslims, which proposes a range of legislative and policy measures governments can take to this end.

103. ECRI recommends that the German authorities take all necessary steps, in the field of registration of personal data, to ensure that persons practising the Muslim faith are treated on an equal footing with persons practising religions that are registered as corporate bodies under public law.

104. ECRI strongly recommends that the German authorities make every effort to differentiate, in their own work and in the messages sent to society as a whole, between the small number of Muslims who may, as in any group, hold radical views, and the vast majority. It draws the authorities' attention to its General Policy Recommendation No. 8, which proposes a range of legislative and policy measures governments can take to fight effectively against terrorism while at the same time effectively combating racism.

Turkish community

105. The Turkish community in Germany comprises around 2.7 million people and is the largest single group of residents of non-German origin. Around 1.7 million of these persons do not have German citizenship, although the great majority have been living in Germany for more than 7 years.[37] Frequently considered simply as a subset of the Muslim community, the Turkish community includes immigrants from a variety of backgrounds. Nonetheless, their experience of discrimination is similar to that of many Muslims: as children with a migration background, many children of Turkish origin experience below average education outcomes; members of the Turkish community also experience discrimination in access to employment and housing, for example on the basis of their name or their non-native German.[38] As the largest group of non-citizens in Germany, Turks are also particulary affected by the introduction of the new national integration policy, with the positive and negative effects described elsewhere in this report.[39] They are moreover not immune from violent racist attacks. The many members of the Turkish community who are not German citizens or citizens of other EU countries are also not entitled to vote or stand in elections at any level.

[37] On the acquisition of German citizenship, see above, *Citizenship law*.

[38] See above, *Discrimination in Various Fields – Education, Employment, Housing*.

[39] See below, *Vulnerable/Target groups – Situation of migrants, asylum-seekers, (etc) – Integration*.

106. Against this background, a survey conducted in March 2008 found that, while most persons of Turkish origin did not regret their decision to come to Germany, more than half felt unwelcome and inadequately represented. The election in November 2008, for the first time, of a German of Turkish origin as one of the leaders of a German political party was understandably hailed as a landmark event in German politics.

107. ECRI draws the authorities' attention to the recommendations made elsewhere in this report, in particular those concerning access to citizenship, discrimination in the fields of education, employment and housing, and integration, and underlines in this context the importance of creating an environment in which members of the Turkish community as well as immigrants from all backgrounds feel welcome.

Black community

108. Members of the Black community continue to be especially vulnerable to racist violence. A number of particularly violent and brutal attacks against Black persons have occurred since ECRI's third report. Black persons report that there are still "no-go areas" in some *Länder* to which they avoid going alone, or avoid going altogether if possible, and to which they would not take their children at all, for fear of being targeted by racist attackers. Black victims of racist violence also report being treated as "second-class" victims when they turn to the police for help, for example being treated as suspected drug-dealers, or at best as time-wasters, when they wish to report a racist attack, or benefiting from active police intervention to put a stop to a violent attack, only to discover later that a failure by the police officers present at the scene to arrest or even to check the identities of the attackers has compromised the chances of successful prosecution.

109. Frequently referred to as visible minorities in relation to racist violence, members of the Black community (which is estimated to include 200 000 to 300 000 persons) complain that they are otherwise virtually invisible as active members of society. Subject to discrimination in access to employment,[40] Black people find few professional role models, whether working as teachers, bank clerks or public servants. They also suffer from the streaming system in place in the field of education.[41] Moreover, there is a relative lack of diversity in the media[42] and where Black actors appear, the characters they play often merely respond to prevailing stereotypes. In the field of advertising, NGOs report that some advertisements depict Black persons as commodities rather than human beings. ECRI further notes that there appears to have been little research carried out into the situation of the Black community in Germany that would make the issues they face more visible to the authorities and to the public at large, and by the same token easier to tackle.

110. ECRI draws the German authorities' attention to the recommendations made elsewhere in this report, aimed in particular at overcoming racist violence and racial discrimination in various fields of daily life and at increasing diversity in the media, and stresses their importance to overcoming the forms of racism most frequently experienced by members of the Black community; it furthermore recommends that research be carried out into the specific situation of members of the Black community in Germany, in order to identify any fields where action is most urgently needed to redress the disadvantages they face.

[40] See above, *Discrimination in Various Fields – Employment*.

[41] See above, *Discrimination in Various Fields – Education*.

[42] See above, *Racism in Public Discourse – Media*.

Roma/Sinti communities

111. German Sinti and Roma are one of the four national minorities recognised in Germany and as such, receive support from the federal state in order to defend and promote their interests as a minority. The state has also taken welcome steps to recognise officially the suffering experienced by these communities during the Holocaust. In daily life, however, members of the Roma and Sinti communities report that they continue to face discrimination, in particular in access to housing and in the field of education, where teachers frequently have little knowledge of the history of Sinti and Roma, and perpetuate negative stereotypes. Representatives of the Roma and Sinti communities also draw attention to a generally unfavourable climate of opinion towards them, both amongst the media – which continue mentioning accuseds' Roma or Sinti origin unnecessarily in their reports – as well as amongst the police.[43] They also express deep concern about increasingly widespread and virulent expressions of anti-Roma sentiment on the internet. Similar stigmatisation is also experienced by Roma having recently arrived in Germany; moreover, their situation with respect to access to social rights is often more precarious, as many are refugees or asylum-seekers, or remain in Germany only with tolerated status.

112. ECRI recommends that further steps be taken to improve the situation of Roma and Sinti in Germany, in consultation with representatives of these communities, in order to combat and prevent racism and racial discrimination against them. It again draws attention to its General Policy Recommendation No. 3 on combating racism and intolerance against Roma/Gypsies, which proposes a range of legislative and policy measures governments can take to this end.

Situation of migrants, asylum-seekers, refugees, other beneficiaries of international protection and persons with tolerated status

- *Refugees and asylum-seekers*

113. In its third report, ECRI encouraged the German authorities in their efforts to ensure that persecution from non-state agents and gender persecution were recognised in Germany for the purposes of granting refugee status under the Geneva Convention, and recommended that the authorities intensify their efforts to provide specific training on asylum and refugee questions to judges involved in the asylum process. It further recommended that the German authorities ensure that no person was forcibly returned to his or her country of origin contrary to the principle of *non-refoulement* and Article 3 of the ECHR. ECRI also made a number of recommendations concerning the application of the airport procedure and the situation of unaccompanied children.

114. Since the entry into force of the new Immigration Act on 1 January 2005, Convention refugees and refugees recognised under the terms of the Consitution have benefited from the same status in German law. Gender persecution and persecution by non-state actors have been expressly included as criteria for the recognition of a person as a refugee in Germany. ECRI welcomes this development and notes that since then, recognition rates for refugees have increased. While this may be due to a variety of factors, including variations in countries of origin of asylum-seekers, it seems that at least part of the increase may be ascribed to better implementation of the relevant criteria. However, some concerns remain as to whether the criteria are as yet consistently and effectively applied in practice, meaning that some genuine cases may still be missed.

[43] See below, *Conduct of law enforcement officers*.

115. With regard to airport procedures, that is expedited procedures applied to asylum applications lodged on arrival by air and prior to the applicants' entry into German territory, asylum-seekers continue to be entitled to legal counselling in these circumstances. However, ECRI notes that, amongst other concerns with respect to this expedited procedure, higher proportions of asylum-seekers subject to airport procedures (rather than in-country procedures) are found to have manifestly unfounded claims, meaning they are denied entry to German territory. Vulnerable groups such as unaccompanied minors may also still be subject to this procedure, although the number of unaccompanied minors subjected to airport procedures was reported to have decreased in 2007.

116. ECRI is also concerned at the low threshold applied by the courts for revoking asylum or refugee status under section 73 of the Asylum Procedures Act. This means that some persons with refugee status may see this status prematurely terminated, leading them to be induced or in some cases forced to return to their country of origin although the conditions there are not yet conducive to return.

117. ECRI recommends that the German authorities pursue and intensify their efforts to provide specific training on asylum and refugee questions to judges and all other officials involved in the asylum process, in particular to ensure that the new criteria for recognition included in the Immigration Act of 2004 are effectively applied in practice.

118. ECRI recommends that the German authorities keep the airport procedure under review and modify it if necessary to ensure that genuine asylum-seekers are not deprived of protection. ECRI reiterates its recommendation that unaccompanied minors be excluded from the application of this provision.

119. ECRI recommends that the German authorities exercise the utmost caution before revoking refugee status, particularly where this may lead to a loss of residence rights for the person.

120. In its third report, ECRI reiterated its recommendation that the German authorities ensure that asylum seekers were not left in a state of destitution, including by allowing them adequate access to work. ECRI also recommended that the German authorities ensure that asylum seekers' freedom of movement was respected, and that full family reunification rights were guaranteed to all recognised refugees.

121. Following a decision of the Federal Administrative Court on 15 January 2008, recognised refugees are now allowed to choose where they reside. Beneficiaries of subsidiary protection who are dependent on social welfare are still assigned to residence areas, however. Asylum-seekers are subject to even more stringent requirements, as they must reside and remain in their district of assigned residence, and are not allowed to travel outside their assigned district without permission. ECRI notes that an application to the European Court of Human Rights under Article 2 of Protocol No. 4 to the European Convention on Human Rights, contesting the application of this rule, was declared inadmissible.[44] Independently of any question of compatibility with the European Convention on Human Rights, however, ECRI is concerned that these restrictions on freedom of movement of asylum-seekers – which aim to distribute amongst the *Länder* the costs of looking after asylum-seekers – may place the latter in situations of undue hardship. It draws the authorities' attention to the fact that asylum-seekers, who are already vulnerable and who by definition may have been exposed to persecution in their countries of origin, are in some cases required to live in parts of Germany where racist violence is known to be high, even though in many

[44] *Omwenyeke v. Germany*, application no. 44294/04, 20 November 2007, Fifth Section.

cases they belong to the groups most likely to be targeted by perpetrators of racist violence. They are thus placed in a situation where they are particularly exposed to racism and xenophobia, without the option of moving to areas where they would be less exposed. Moreover, ECRI understands that while permission to travel is regularly granted to allow an individual to seek legal advice from a lawyer or an NGO, it may not necessarily be granted to visit family members, a result that is likely to compound the isolation and anguish asylum-seekers already experience simply by virtue of their status.

122. The authorities have indicated that asylum-seekers are provided with benefits to cover their basic needs. Benefits are usually given in kind, with some sums given in money to cover additional needs, and are overall around 20% lower than social benefits given to other categories of people. Although asylum-seekers receive a work permit one year after their arrival, this entitlement is only subordinate, meaning they can only be offered a job if there is no other suitable applicant with an ordinary work permit. Asylum-seekers are not entitled to an ordinary work permit until their application has been determined, or up to a maximum of three years after their arrival. They are housed in initial reception centres for a maximum of three months, then dispatched to live in collective centres across Germany. In some *Länder*, children have access to school from the outset; in others, access to school is not granted as long as the family is in the initial reception centre.

123. ECRI notes that some of these collective centres, where asylum-seekers may in some cases live for several years, are still located in isolated areas, where counselling on legal and social issues is less readily available. More generally, ECRI is concerned that accommodating asylum-seekers together in collective housing, even beyond the maximum three-month period in which they may be required to stay in initial reception centres, may be detrimental to their long-term chances of integration, as it not only delays their contact with German society and but may also serve to stigmatise them in the eyes of the majority population. ECRI is also worried that asylum-seeking children assigned to *Länder* where they are not obliged to attend school may in practice not have access to education, and strongly hopes that efforts currently under way to address this issue will come to fruition. ECRI has also received reports that asylum-seekers are required to pay fees when they apply for permission to travel outside of their assigned residence areas. Bearing in mind the low social benefits granted to asylum-seekers, especially in cash form, and their preclusion from access to work, ECRI is concerned that this may leave them with little opportunity to travel in practice, including to consult a lawyer or NGO with respect to their case.

124. As regards family reunification of refugees, ECRI notes that refugees are eligible once their status has become final and they have obtained a residence permit, and that they may, and in some cases must, be exempted from the usual requirement to show that they are not dependent on social welfare and can provide sufficient living space for their family. However, those eligible are generally limited, except in cases of exceptional hardship, to the refugee's spouse and minor children. Moreover, the application process may take many months to process, a situation that is especially difficult for minors seeking to join their parents.

125. ECRI recommends that the German authorities review the restrictions imposed on freedom of residence of beneficiaries of subsidiary protection and freedom of residence and movement of asylum-seekers, in order to ensure that these measures do not have a disproportionate human cost on asylum-seekers.

126. ECRI recommends that the German authorities consider the possibility of extending the access to work of asylum-seekers, to ensure that they have

adequate means to live, and reiterates its recommendation that full family reunification rights be guaranteed to all recognised refugees.

- *Persons with tolerated status*

127. Persons with tolerated status (*Duldung*) in Germany are in principle obliged to leave the country; their presence is tolerated because they cannot be deported (for example, because, even though they have not been recognised as refugees, the situation in their country of origin makes it impossible to deport them). These persons usually have only short-term permits to remain in Germany (for example, for three months, although this period may be renewed repeatedly), making it difficult for them to find work. They are not entitled to take up work at all until they have been in Germany for 1 year, and are also not entitled to benefit from integration measures.

128. In its third report, ECRI encouraged the German authorities in their plans to grant temporary residence permits to persons entitled to temporary protection, at the same time recommending that the authorities work towards a humane solution, respectful of human rights, for those persons who had been living in Germany with tolerated status for a long time and had developed close ties with Germany. ECRI welcomes the fact that, since then, provisions have been enacted that have made it possible for persons who have been living in Germany with tolerated status for some years – 6 years if they have children, 8 if they do not – to be granted a trial residence permit, provided they have accommodation and do not have a criminal record; they can then be granted a residence permit if they are able to demonstrate that they have found work before the end of 2009. This deadline is fixed, however, so persons with tolerated status having arrived in Germany more recently will not benefit from the present provisions. The authorities indicate that to date, around 50 000 people have gained legal status under the present provisions and a previous version.

129. ECRI encourages the German authorities to work towards a solution which is humane and respectful of human rights for all persons, including those who will not benefit from the present provisions, who have been living in Germany with tolerated status for a long time and have developed close ties with Germany.

- *Family reunification*

130. In its third report, ECRI recommended that the German authorities ensure that the right to private and family life and the rights of the child were fully respected for all persons residing in Germany, including non-citizens. It called for measures to facilitate reunification of children with their families and to facilitate visits from family members living abroad. It considered that the maximum age of children falling under the scope of family reunification, which was then 16 years, should not be lowered but should instead be raised to 18 years for all children.

131. The German authorities have stated that as Council Directive 2003/86/EC on the right to family reunification has been transposed into German law, the age limit for the immigration of children for the purposes of family reunification will not be reduced to below 16 years. In accordance with applicable legislation, the age limit of 18 years applies where the children are considered to have a "positive integration prognosis", in the case of children of those entitled to asylum and recognised Convention refugees, or when children transfer their main ordinary residence to the Federal Republic of Germany together with their parents.

132. Since ECRI's third report, new measures have been introduced concerning family reunification for spouses. As from 2007, persons arriving in Germany to join their spouse have been obliged to demonstrate proficiency in German to at least A1 level on the Common European Framework of Reference before leaving their

country of origin. In order to prove that they possess the required level of proficiency, spouses must supply a certificate of the Goethe Institute stating that they have passed the "Start Deutsch 1" test; in countries where this test is as yet unavailable, embassies or consulates general make the relevant determination during the visa application procedure. Examination dates, fees and application procedures depend on where the examination is taken. The authorities indicate that to acquire the necessary level of German, persons can attend language courses provided by the Goethe Institute or other organisations; free beginner and more advanced German courses are also available in almost 30 languages on the Deutsche Welle website. In addition, certain groups of persons are exempt from the language proficiency requirement, namely: EU citizens; persons with a physical or mental illness or disability that prevents them from demonstrating basic knowledge of the German language; persons holding a university degree or equivalent qualification; persons not wishing to reside permanently in Germany; persons whose spouse holds a residence permit as a highly skilled worker, researcher, company founder, person entitled to asylum or recognised refugee, or holds a permanent right of residence granted by another EU state; and citizens of Australia, Israel, Japan, Canada, the Republic of Korea, New Zealand or the United States of America.

133. The authorities have indicated that this measure serves to promote new immigrants' ability to integrate. The logic is that basic language proficiency makes it easier to find one's feet on arrival in Germany and forms the basis for further, state-funded integration courses in which new immigrants have had a right to take part since 2005.[45] ECRI observes, however, that language classes are not always readily available outside major cities; they are rarely provided free of charge when they are available; and for those living outside major cities, internet services are not accessible everywhere, for example, in rural areas in some countries from which candidates for family reunification may wish to apply. Yet the language could be learned upon arrival in Germany, and progress may occur considerably faster upon immersion in a German-speaking environment. Moreover, obliging spouses to remain apart until the spouse who has remained in the country of origin has attained A1 level in German does nothing to further the integration of a spouse already living in Germany – indeed, this separation may rather contribute to a negative, even alienating experience of Germany, without the emotional and psychological support that the presence of family members can provide. There is also no exceptional clause allowing hardship cases to be taken into account. Overall, then – and whereas from the point of view of the majority population, the new requirements may at first glance appear reassuring, as they should mean fewer immigrants arrive in Germany with no knowledge of German – in fact, they may do little to promote the integration of migrants and may even serve to hinder it. Moreover, they may also be discriminatory, as they may result in the *de facto* exclusion of candidates from some countries for family reunification.

134. ECRI reiterates its recommendation that the maximum age of children falling under the scope of family reunification be raised to 18 years for all children.

135. ECRI recommends that the German authorities keep under review the new language requirements for family reunification, in order to ensure that they do not have a discriminatory or counter-productive effect in practice and to allow corrective measures to be taken if necessary, including to allow hardship cases to be taken into account.

[45] On integration courses, see below, *Vulnerable/Target Groups – Situation of migrants, asylum-seekers (etc) – Integration and naturalisation*.

- *Integration and naturalisation*

136. Many immigrants arrived in Germany between 1955 and 1973 as "guestworkers" (*Gastarbeiter*); the intention at the time was that they would stay only for limited periods in Germany and then to return to their home countries, to be replaced by new foreign workers. In line with this thinking, taking measures to assist these workers to integrate into German society was not considered a priority. A second wave of immigration occurred from 1988 to the late 1990s, with the arrival of around 3 million ethnic German repatriates and refugees. The authorities have recently recognised that the earlier understanding that immigrants would only remain for short periods in Germany has proved wrong, and that Germany is a country of immigration; however, today the reality is striking. Nearly two-thirds of non-citizens presently living in Germany have been resident for more than ten years, and more than 20% have been resident for over thirty years. Official figures show that in total, around 9% of the population of Germany, or more than 7 million people, are non-citizens. Moreover, it is estimated that overall, nearly one in five persons living in Germany, whether citizens or non-citizens, have a migration background.

137. In keeping with this understanding of Germany as a country of immigration, the federal authorities have over the past decade begun to develop a strong new focus on integration. Following a first national integration summit in 2006, a National Integration Plan was presented in July 2007. All levels of government – federal, the *Länder* and local authorities – as well as representatives of civil society and migrants were involved in developing the National Integration Plan, which includes 400 voluntary measures that may be taken by the various authorities, encompassing a broad range of fields. They include, for example, measures to improve immigrant children's education outcomes (such as providing targeted funding either to schools with a high percentage of children having an immigrant background or for the training of teachers at those schools, or providing increased support to language learning in schools or kindergartens), measures to improve the access of young immigrants to the labour market, programmes to promote integration through sports, as well as measures to promote the participation of parents in their children's education or to improve access to health care, to promote a more diverse approach in the media or to address the specific situation of women and girls. The overall estimated expenditure by the federal authorities in the field of integration is 750 million EUR.

138. ECRI welcomes the recognition by the German authorities that Germany is today a country of immigration, and that immigrants should be encouraged to participate fully in society and helped to master the basic tool for such participation: the German language. The National Integration Plan represents a significant investment by the authorities in assisting the process of integration, and ECRI salutes the authorities' willingness to devote considerable resources to this process.

139. The cornerstone of the National Integration Plan is the provision of "integration courses" for adult migrants, primarily focused on language learning. These have been in existence since they were introduced by the Immigration Act in 2005 but were revised following an evaluation in 2006. Today, the standard language course is 600 hours. However, other options are offered to take account of individual needs: these range from an intensive course (400 hours) to a course specifically designed for women (900 hours) to a literacy course (1200 hours). Participants in the first three courses who have not achieved the target level of proficiency within the given time – that is, B1 level, or the first level corresponding to an "independent user" of the language in the Common European Framework of Reference for Languages – may follow a further 300 hours of classes. Proficiency is now assessed via standardised tests throughout Germany. In

addition, 45 hours of instruction on Germany's history, culture and legal system are provided in orientation classes. Support measures to increase participation have been introduced since the 2006 evaluation, such as the reimbursement of travel expenses, the provision of childcare facilities and the reimbursement of 50% of the costs of the course if successfully completed. In principle, and based on the logic that participants will be more committed to the process if they have paid for it, integration courses are not free of charge. Participants' fees are set at 1 EUR per hour. However, the courses are provided free of charge to ethnic German repatriates (*Spätaussiedler*) and recipients of welfare benefits; persons not receiving welfare benefits but with a similarly low income may also be exempted from the fees. The courses are primarily targeted at non-citizens, but German citizens may attend them if they so choose.

140. All newcomers to Germany who are considered as having a perspective of permanent residency are entitled to participate in integration courses, and (with some exceptions) they are obliged to do so if their level of German on arrival is less than A1 on the Common European Framework of Reference. Persons arriving in Germany through family reunification – who are now obliged to demonstrate proficiency in German to at least A1 level before leaving their country of origin – are also required to follow integration courses if their proficiency in German is less than B1 level and unless they fall into an exempted group of people (for example, EU citizens).[46] Other non-citizens for whom these courses are mandatory are certain recipients of welfare benefits, and foreigners "in need of integration", i.e. legal guardians of children who do not speak German themselves. There is no obligation to succeed (that is, to pass a test demonstrating that the individual has reached the target proficiency level of B1 in German), but there is an attendance obligation for persons for whom the courses are mandatory, which is understood as an obligation to attend regularly enough not to endanger the possibility of successful completion of the course. Sanctions may be imposed on persons considered to have committed a "gross breach of duty": that is, in cases where the individual concerned fails to attend the integration course in accordance with the applicable provisions. Thus, recipients of social welfare benefits under the Second Volume of the Social Code (SGB II) who participate in the courses on the basis of an integration agreement may see their benefits cut by up to 30 % and, if they repeatedly fail to attend, their benefits may be cut altogether. Newcomers for whom mandatory attendance was a factor in the attribution of a residence permit may not be granted an extension of that permit.

141. ECRI is concerned that the obligation imposed on some persons to attend integration courses may be counterproductive, as it may tend to give the impression that, in the absence of such an obligation, it would be impossible to integrate those persons subject to it in German society. Moreover, the fact that the obligation to demonstrate a basic knowledge of German (A1 level) prior to arriving in Germany is only imposed on immigrants from some countries and not on immigrants from others may create the false impression that the capacity to integrate in German society is a direct function of a person's country of origin.

142. ECRI is concerned at the possibility of imposing sanctions on persons subject to an obligation to attend integration courses if they fail to attend sufficiently regularly. It notes that such sanctions may have a stigmatising effect. At the same time, they may be damaging to individuals' rights, as they may lead to a refusal to extend a residence permit or to a reduction in welfare payments. ECRI notes that at the very least, exceptions should be possible in some circumstances.

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[46] See above, *Vulnerable/Target Groups – Situation of migrants, asylum-seekers (etc) – Family reunification*.

143. As concerns naturalisation, ECRI notes that benefits for successful participants in integration courses are directly linked to naturalisation, as applicants for naturalisation are now required by German law to demonstrate sufficient knowledge of the German language[47] and successful completion of an integration course serves as proof of having attained the requisite level in this context. Persons who succeed in the integration course are also eligible to apply for naturalisation after seven years of legal residence, rather than the usual eight. Immigrants demonstrating evidence of integration achieved, in particular a higher level of proficiency in German than the required B1 level, may be eligible for naturalisation after six years of legal residence.

144. As mentioned elsewhere in this report, the practical application of naturalisation criteria is controlled by the competent ministers of the interior of the *Länder*. In recent years, and independently of any language requirements, certain *Länder* have introduced controversial tests that some or all applicants were required to pass in order to obtain citizenship. In Baden-Württemberg, a 30-question test covering applicants' personal and political views, for example with respect to sexual orientation, was introduced in 2005, to be applied if anti-constitutional tendencies were suspected. However, the Ministry of the Interior in Stuttgart was reported as holding the view that "in general", it was to be doubted that Muslims who verbally committed to German constitutional principles were "really internally" committed to them. Citizens of the 57 member States of the Organisation of the Islamic Conference (OIC) and anyone else appearing to be Muslim were thus to be subjected to the test. Following considerable criticism of the test and of the discriminatory attitudes it revealed towards Muslims, a new test was distributed from June 2007 onwards, to be applied to all applicants for naturalisation. Another test introduced in Hesse contained 100 questions, many quite complex.

145. Following discussions within the Standing Conference of Ministers of the Interior of the *Länder*, it was decided to introduce a uniform naturalisation test, replacing the various tests then existing at the level of the *Länder*, to be applied throughout Germany as from 1 September 2008. The relevant legal provisions have been enacted at federal level but will be implemented by the *Länder*. Applicants for naturalisation will be required to pass the test in order to obtain citizenship. The stated aim of the test is nonetheless to open the door to citizenship, rather than to make it harder to obtain. The questions for this test have been made available on the internet in order to allow applicants to prepare for the test. There is no limit on the number of times applicants may sit the test.

146. ECRI welcomes the fact that earlier, *Land*-specific tests have been abolished, in particular the test introduced in Baden-Württemberg in 2005. It considers that the application of a single, national, transparent test is a clear improvement on the previous situation. ECRI notes the authorities' intention that the new tests should "open the door" to citizenship, rather than make it harder to obtain. At the same time, it notes that the introduction of nationwide naturalisation tests is an additional process applicable to those who wish to obtain German citizenship, in addition to existing residency, language and income requirements. While the process of learning for the test may indirectly serve to help integration, by teaching migrants some additional facts about Germany, the underlying message sent to German society is seen by some NGOs as one of exclusion rather inclusion. ECRI notes that it was reported in late November 2008 that since the tests were introduced, 98% of candidates have passed it.

147. ECRI stresses that integration is a two-way process that implies mutual recognition between the majority population and minority groups. Integration

[47] See above, *Existence and Implementation of Legal Provisions – Citizenship law.*

should allow minority groups to participate fully in society, but not be felt by them as a unilateral obligation to become indistinguishable from the mass. ECRI observes that the question of integration is at a particularly delicate stage in Germany at present: while the authorities have begun to move towards an important new understanding of the diversity of German society today and of measures that may be needed to ensure that all members of today's society are able to participate fully, it seems that this understanding – which itself is still evolving – has not yet filtered through to German society as a whole. The protests that frequently accompany proposals to build new mosques are a striking example of the gap between the majority society's view of present-day Germany and the reality of the latter's diversity. In this context, the experience of immigrants is that the onus to integrate is placed very much on them: while the investment of resources in the National Integration Plan is noteworthy, the sense at grassroots level is that it is only migrants who are being asked to make individual efforts to adapt to the environment they live in. At their worst, the debates surrounding integration, including discussions on "parallel societies", may have contributed to creating an impression amongst migrants that understanding and respecting the German constitutional order is not enough: some migrants are left with the impression that they will only be welcome in German society if they dress, look and think like the majority population.

148. ECRI strongly encourages the German authorities in their efforts to assist migrants to learn German. In this context, it recommends that everything be done to ensure that measures taken to achieve this result do not have a counter-productive effect on integration, by stigmatising those whose mother tongue is not German or endangering their individual rights.

149. ECRI strongly encourages the authorities to develop further other aspects of the National Integration Plan, aiming to support immigrants through measures in such fields as education, employment, health, sports and the media. It recommends that the authorities pay particular attention to developing programmes to help German citizens be more receptive to the diversity of contemporary German society.

150. ECRI recommends that the German authorities keep under review the new, national, naturalisation test, and in particular its impact on applications for naturalisation, both made and granted, in order to ensure that it does not have a counter-productive effect and to allow corrective measures to be taken if necessary.

VI. Antisemitism

151. In its third report, ECRI recommended that the German authorities continue and intensify their efforts to address all manifestations of antisemitism in Germany. As described above,[48] the German authorities have adopted a broad range of measures aimed at fighting right-wing extremist crimes, including antisemitic crimes.

152. Nonetheless, from 2005 to 2007, the number of right-wing politically motivated offences with an extremist and antisemitic background registered by the Federal Criminal Police Office (BKA) hovered at around 1600 each year, i.e. an average of more than 30 such crimes each week. While the numbers declined slightly each year during this period, preliminary figures for the first three quarters of

[48] See above, *Racist violence*.

2008 showed an increase of 10% on the same period in 2007.[49] The most frequently reported offences involved the desecration of Jewish cemeteries or other monuments. In some cases gravestones were knocked over; in others, graffiti was sprayed, including the use of swastikas and other Nazi symbols. As regards violent antisemitic crimes, 49 such crimes were registered in 2005, 43 in 2006 and 59 in 2007. Alongside these crimes involving violence against persons or property, antisemitic and neo-Nazi hate speech also continue to be of deep concern.[50]

153. The German authorities regularly condemn such crimes. They also pursue perpetrators and bring them to justice where possible. Numerous charges with respect to Holocaust denial or the use of Nazi symbols have thus been brought since ECRI's third report.[51] At same time, a wide range of measures are taken to atone for the past and ensure remembrance of the victims of the Holocaust. These include the ethnic German repatriation programme, thanks in part to which there are now estimated to be around 110 000 Jews or people of Jewish origin living in Germany; memorial ceremonies organised to mark anniversaries of significant events during or leading up to the Holocaust; and the reopening of synagogues. In the week prior to the seventieth anniversary of the Night of Broken Glass riots of 9 November 1938, the lower house of the federal parliament also adopted a resolution renewing its commitment to counter every form of anti-Jewish hatred and antisemitism and urging the government to continue supporting and protecting Jewish life in Germany, expand teaching in schools on Jewish life in Israel, and set up a group of experts to issue a regular report on antisemitism in Germany.

154. ECRI salutes the authorities' commitment to denouncing and combating all forms of antisemitism and to supporting Jewish culture in Germany. It stresses nevertheless the need to make constant efforts to ensure that these words are translated into concrete actions. With antisemitic crimes apparently on the rise at present in Germany, even more intensive efforts may be needed to reverse such a trend.

155. ECRI recommends that the German authorities continue and intensify their efforts to combat all manifestations of antisemitism in Germany. It stresses the role to be played by the various opinion leaders in society, be they politicians, religious groups, the media or civil society, in consistently speaking out against any manifestations of antisemitism.

VII. Conduct of Law Enforcement Officials

156. In its third report, ECRI made a number of recommendations relating to the conduct of law enforcement officials, calling for the establishment of an independent body entrusted with the investigation of allegations of ill-treatment by police officers, recommending that training in intercultural competence and to raise the awareness of law enforcement officials of the issues of racism and direct and indirect racial discrimination be provided to police throughout the territory of Germany, and calling for measures to ensure adequate representation of members of minority groups in the police.

157. Since ECRI's third report, several persons belonging to visible minorities have died either at the hands of police officers or while in police custody. ECRI notes

[49] By definition, the preliminary figures are subject to change. The German authorities have pointed out that differences in reporting patterns between the *Länder* make it difficult to predict how far the final figure will vary from the preliminary reports.

[50] See above, *Racism in public discourse*.

[51] See above, *Racism in public discourse*.

that such events could reveal particularly serious breaches of fundamental rights and stresses that an effective investigation into such deaths, including into any allegations that a racist motivation may have played a part in events, is a key part of the rights protected under Articles 2 and 14 of the European Convention on Human Rights.[52] It also underlines that the authorities' capacity to respond rapidly and effectively to suspected cases of ill treatment by law enforcement officers is crucial in maintaining the confidence of society as a whole in the law enforcement system.

158. Elsewhere in this report, ECRI has drawn attention to the treatment of Black victims of racist violence as "second-class" victims when they turn to the police for help.[53] It notes, moreover, that NGOs consistently report higher numbers of incidents of racist violence than police, a fact that suggests that some victims may lack confidence in the police to deal effectively with their case.

159. ECRI is also concerned at the publication in 2005, in a journal distributed to over 20 000 police officers, of a letter to the editor that was subsequently found by the UN Committee for the Elimination of Racial Discrimination to have included comments of a "discriminatory, insulting and defamatory nature" towards Roma, which were "of particular weight…if made by a police officer whose duty is to serve and protect individuals."[54] The failure of the relevant police association since to distance itself from this letter is disturbing. ECRI is concerned that this situation may reveal deeper or more widespread prejudices within the police force towards certain groups, prejudices which should be combated as a matter of urgency. ECRI welcomes in this context the recognition by the higher echelons of the police of the importance of awareness-raising and other measures to increase the intercultural competence of police officers at all levels.

160. ECRI stresses the importance of setting up an independent investigatory mechanism which can carry out enquiries into allegations of police misconduct and, where necessary, ensure that the alleged perpetrators are brought to justice, and reiterates its call for the establishment of such a body in Germany.

161. ECRI also reiterates its recommendation that the German authorities ensure that training in intercultural competence and training to raise the awareness of law enforcement officials of the issues of racism and direct and indirect racial discrimination is provided to police throughout the territory of Germany. It further recommends that the German authorities take steps to introduce a network of trained officers responsible for serving as a point of contact between the public, and especially members of minority groups, and the police, and for helping to increase the two groups' understanding of each other.

VIII. Monitoring Racism and Racial Discrimination

162. In its third report, ECRI emphasised that, if done in accordance with European laws, regulations and recommendations on data protection and the protection of privacy, and the principle of freedom of declaration, the collection of data disaggregated by ethnic origin could help the authorities to better assess the situation of the various minority groups living in Germany in different fields of life, such as employment, housing and education.

163. The German authorities have indicated that data are collected in Germany by reference to people's religion, citizenship, gender and age, but not on the basis of

[52] See in particular *Nachova and Others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, Judgment of 6 July 2005 (GC), and subsequent case-law.

[53] See above, *Vulnerable/Target Groups – Black Community*.

[54] CERD/C/72/D/38/2006

ethnic origin. Some minority groups do not wish the last criterion to serve as a basis for data collection; others, however, believe it is important. The authorities have indicated that there are other means to estimate the number of members of specific groups, that may be preferable. In the light of repeated recommendations by international bodies, they have, however, commissioned a study to examine whether it is desirable, permissible by law and necessary to collect such data.

164. ECRI reiterates its recommendation that the German authorities improve their monitoring systems by collecting relevant information broken down according to categories such as religion, language, nationality and national or ethnic origin. It emphasises that this should in all cases be done with due respect to the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. These systems should also take into consideration the possible existence of double or multiple discrimination.

INTERIM FOLLOW-UP RECOMMENDATIONS

The three specific recommendations for which ECRI requests priority implementation from the German authorities are the following:

- ECRI strongly recommends that the German authorities take a more proactive role in raising awareness of the legal framework now in force against racial discrimination, notably among groups who are especially vulnerable to this phenomenon. To this end, ECRI recommends that the authorities run an awareness-raising campaign specifically targeted at ensuring that potential victims of racial discrimination are aware of the existence and scope of the General Equal Treatment Act (AGG) and of the mechanisms for invoking their rights before the courts.

- Bearing in mind that no immediate move away from the present streaming system for secondary schooling in Germany has been envisaged, ECRI recommends that the German authorities take urgent steps to implement targeted training programmes to ensure that all teachers have the capacity to assess objectively the skills of students due to enter the secondary school system, in order to ensure that students are not sent to schools in the lower academic streams unless this is strictly necessary.

- ECRI strongly recommends that, as part of their ongoing efforts towards creating a workplace free of racism, the German authorities launch an awareness-raising campaign aimed specifically at changing employers' attitudes towards persons with an immigrant background. This campaign should focus not only on employers' obligations and liabilities under the new General Equal Treatment Act (AGG) but also on the positive aspects of diversity in the workplace. It could form part of a regular series of such campaigns.

A process of interim follow-up for these three recommendations will be conducted by ECRI no later than two years following the publication of this report.

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