

German Institute for Human Rights – UPR submission – Germany – February 2009

I. Introduction and General Remarks

The German Institute for Human Rights (GIHR) welcomes the opportunity to submit its views to the UPR on Germany (scheduled for February 2009).

Germany actively and substantially participates in the international as well as regional human rights systems, including the UN Human Rights Council, the UN treaty body system and the instruments of the Council of Europe. However, German legislation and jurisdiction only rarely refers to international human rights norms. Even university based law schools pay insufficient attention to questions of the international human rights protection.

The GIHR welcomes the recently started ratification process of the *UN Convention on the Rights of Persons with Disabilities* and expects a rapid ratification without reservation.

Over the last years, the issue of the *extraterritorial validity and application* of human rights obligations has been under discussion, with special attention given to German participation in international military interventions and to participation in EU pre-border control measures. It seems that the government has not yet reached full consensus on this important issue.

The GIHR would also like to draw attention to the enormous and continuously growing importance that *European Union legislation* has on virtually all political areas of the member states. This includes EU impact on human rights sensitive issues, such as asylum, migration, police cooperation, data protection, etc. Hence human rights agencies and actors are confronted with an increasing challenge to develop policies, strategies and instruments to address this EU impact and to set up an efficient EU human rights monitoring system. *Responsibility of EU member states for the human rights impacts of common EU policies should therefore also become a matter of consideration in the UPR.*

The following remarks are intended to highlight *critical issues*. The intention is not to present a full and comprehensive picture of the situation of human rights in Germany.

II. Domestic Concerns

1. National Human Rights Infrastructure

The national human rights infrastructure in Germany comprises a highly differentiated and effective court system, active civil society organisations (with the “Forum Menschenrechte” performing a platform function) and a National Human Rights Institution with A-status, i.e. the GIHR. The picture is further complemented by a number of institutions with an intermediary protection function such as Parliamentary Petitions Committees at the federal level and *Länder*-level and governmental commissioners with political mandates in various fields, and finally the Federal Anti-Discrimination Office, established in 2007.

For victims seeking *non-judicial protection or advice*, however, the system is confusing and unlikely to be effective. Therefore, the Council of Europe Commissioner for Human Rights, Mr. Thomas Hammarberg, recommended in his 2007 Germany report that Germany should promote the independence of extrajudicial complaints bodies and should also provide the general public with easily accessible information on the available extrajudicial complaints bodies at federal and *Länder* levels. The GIHR supports this recommendation.

2. Prohibition and Prevention of Torture and Inhumane Treatment

A number of cases of inhumane treatment in police operations and in prisons were publicly discussed in Germany. They include Mr. Oury Jalloh who, in January 2005, burned to death while he was being detained and cuffed in a police cell in Dessau (Saxony-Anhalt). Another incident happened in November 2006, when prisoner Mr. Hermann H. (at the Siegburg youth detention centre, North Rhine Westphalia) was murdered by two cell mates who had tortured him over a period of 12 hours. These two very different cases highlight the urgent need of clear instructions and sufficient resources for state governments to ensure effective protection of prison inmates from violence.

The German Federal Parliament recently paved the way for the ratification of the *Optional Protocol to the UN Convention against Torture*. However, the GIHR is concerned that the proposals presented by the government for the future National Preventive Mechanism do not meet the criteria set out in the OP-CAT (in terms of staff, diversity and resources).

Given the political “climate change” in the wake of September 11, the *absolute prohibition of torture* and other forms of degrading and humiliating treatment or punishment has become a matter of public controversy over the past years. Although a clear majority of politicians, lawyers and academics continue to defend the absolute ban on torture, those advocating for possible exceptions in emergency situations have become more influential in the public debate. The GIHR is worried by this development which, in the long run, is expected to negatively affect the culture of human rights protection in Germany.

A matter not yet finally settled is that of *CIA rendition flights* through Europe, including Germany, to mainly Arab countries and whether or not German authorities had knowledge of activities which might have resulted in cases of torture. A parliamentary investigation committee is expected to publish results of its work in the beginning of 2009. A debate on improved control over intelligence agencies including has started recently.

3. Institutions of Care for Elderly People

A significant number of *elderly persons in care situations* suffer from a lack of food, drink and appropriate care. This is particularly true for persons in nursing homes. In its Concluding Observations of 2001, the UN ESC Committee called for urgent measures. In a 2006 study, the GIHR underlined structural human rights deficiencies in terms of the rights to physical integrity, health, adequate standard of living, and adequate housing. However, the government does not seem to acknowledge the human rights dimension of the problem. Systemic problems have not yet been tackled in an appropriate way. To date, the state obligation to monitor treatment of elderly people in nursing homes is not effectively implemented.

4. Combating Racism

At the Durban World Summit 2001 the German government committed itself to develop a *National Action Plan against Racism* (NAP). By August 2008, the NAP has not yet been finalized. A first draft presented in autumn 2007 was criticized, inter alia, for focussing primarily on right wing extremism, thereby largely neglecting structural forms of racist discrimination within mainstream society. The draft NAP was also criticized for its failure to deal sufficiently with the specific forms of discrimination directed against specific groups and for not providing any new measures. The GIHR shares this criticism.

The lack of sufficiently disaggregated *statistical data* on the treatment of ethnic minorities and people with an immigration background constitutes one of the main problems for tackling structural and indirect forms of racist discrimination.

The GIHR has started a public debate about *discontinuing the use of the term “race”* with regard to human beings, especially in legislation, because the concept of “race”, has been the carrier of racist ideologies and stereotypes in Germany and worldwide.

5. Gender Issues

In its 5th state report to CEDAW (August 2002), the German government committed itself to *Gender Mainstreaming*. It seems, however, that the government has largely abandoned that policy in the meantime. The department for gender mainstreaming within the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth has been closed down, and the intra-governmental working group on gender mainstreaming does not exist anymore. These changes were implemented without any substantial consultation with civil society.

6. Homophobia

The GIHR is concerned about still widespread stereotypes and discriminatory attitudes towards LGBTI-people in all parts of the German society which often leads to violent attacks and desecration or damage of memorials as e.g. the memorial for lesbian and gay victims of the Nazi regime in Berlin's district Tiergarten in August 2008.

7. Anti-Discrimination Legislation

With the transposition of four EU anti-discrimination directives, Germany has taken an important step towards improving legal protection against discrimination by non-state actors. After a long and controversial debate, the *General Equal Treatment Act* entered into force in August 2006. The GET Act prohibits discrimination on the grounds of "race" and ethnic origin, gender, religion and belief, disability, age and sexual orientation. The GIHR welcomes that the Act largely avoids any ranking among the different grounds for discrimination.

At the same time, the GIHR is concerned about the possible negative impact of an exception clause in the GET Act concerning the access to rental housing. The unclear wording of this clause (i.e. the purpose of "establishing or maintaining socially stable inhabitant structures, balanced housing structures and balanced economical, social and cultural circumstances") might become a pretext for racist discrimination. Moreover, the GIHR submits that limiting legal claims against incidents of discrimination to a period of two months will likely have negative consequences for the effectiveness of legal remedies.

8. Children's Rights

The GIHR is concerned that there has been no progress in removing the *German reservation to the CRC* on immigration and "aliens", although this issue had been on the agenda of human rights organizations for many years.

In this context the GIHR would like to draw attention to the situation of *unaccompanied foreign minors*, especially refugee children in Germany. Unaccompanied minors are routinely pushed into burdensome, not child-friendly asylum proceedings, which are generally unsuccessful. Frequently, unaccompanied minors remain in the status of "toleration" (*Duldung*) and thus live in permanent fear of deportation. Once these children have attained 16 years of age, they are frequently excluded from the Child Welfare Service and placed in adult accommodations for asylum-seekers. The existing practice to determine the age of the children is also problematic and runs counter to the best interest of the child.

9. Asylum and Migration

A comprehensive reform package of aliens and asylum law entered into force in August 2007, with the purpose of transposing various EU directives on immigration and asylum into national law. At the same time, a series of new restrictions of rights of migrants and asylum seekers were introduced. These restrictions include, for example, *rejection and expulsion of asylum seekers* without suspensive effect of legal remedies in certain cases; new possibilities for the detention of aliens; new obstacles (in particular *language tests*) in many (not all) cases of family reunification; a merely reduced protection of adolescents against expulsion as well

as vaguely phrased provisions for the expulsion of persons who are considered to be potential terrorists.

The GIHR deplors the missed opportunity to reform the residence law in order to expand the period – currently only six months – for return of non-citizens who have left the country. Such a reform of the residence law had been advocated by NGOs and experts (including the GIHR) as a most important instrument in the attempt to combat the practice of *forced marriages*.

The GIHR welcomes that the 2007 amendments introduce, on the basis of a key date regulation, a *new permanent residence permit* for some categories of persons having legally lived for more than 6 or 8 years in Germany (6 years for families, 8 years for singles). However, the GIHR is of the opinion that some regulations concerning this new residence permit raise serious questions of practicability, have potentially discriminatory effects against parts of the immigration population; they also may be incompliant with children's rights.

Current legal provisions on *asylum* depict Germany as being surrounded by “safe third countries”. Hence asylum seekers face enormous difficulties when attempting to access asylum procedures. In the last years, refugee legislation has increasingly become a matter of EU-based harmonization. The GIHR is of the opinion that the human rights consequences of expanded border control policies of the EU – such as undermining effects on the principle of *non-refoulement* or a *de facto* denial of the right to seek asylum and the rights to leave a country – do not only fall within the responsibility of the countries along the EU external borders, because they follow from common policies and common legislation of all EU countries, including Germany

The GIHR is troubled by the *withdrawal of asylum status* of persons who had been recognized as refugees in Germany years ago. Asylum status was withdrawn mainly for refugees from Iraq and Kosovo but also for refugees from Afghanistan, Sri Lanka and other countries to which safe return very often is difficult or impossible.

The GIHR is also concerned about deficiencies with regard to *de facto* access of *undocumented migrants* to education and health care facilities. Although access is legally possible, state institutions (with few exceptions) are required to report undocumented migrants to the authorities. This has turned out to be a major obstacle for the persons in question to make effectively use of their rights to education and to health.

10. Trafficking in Human Beings

The situation of *victims of human trafficking* for the purpose of sexual and labour exploitation depends significantly on these persons's disposition and ability to testify against perpetrators in criminal proceedings. In accordance with current legislation, third-country-nationals (i.e. persons who are neither German citizens nor EU citizens) when identified as victims of human trafficking, generally have four weeks to decide whether or not they want to cooperate with the law-enforcement-authorities. A residence permit or minimal state benefits are limited to the duration of the criminal proceedings. With very few exceptions, victims are not compensated by the state or perpetrators. The GIHR is of the opinion that the current practice fails to do justice to the human rights of the persons concerned.

11. Freedom of Religion and Belief

In the wake of a Federal Constitutional Court decision (of September 2003), a number of *Länder* (8 out of the total of 16 *Länder*) issued legislation forbidding teachers in public schools to wear ostentatious *religious symbols in schools*. However, most of these *Länder* laws provide exceptions for symbols from the Christian tradition which are said to belong to the common cultural heritage of the country rather than being merely denominational. The

GIHR is concerned that legislation privileging symbols of a specific religion is discriminatory and constitutes a violation of the freedom of religion.

12. Right to Privacy

The right to privacy was infringed upon by new security legislation and new measures of systematic data screening (“*Rasterfahndung*”) in the wake of September 11th 2001. New surveillance competencies for state authorities on the Federal and the *Länder* levels include the retention of telecommunication data, the possibility of online searches and the video surveillance in private homes. The Federal Constitutional Court had to decide on a number of new security laws in recent years (e.g. decisions on electronic eavesdropping, data screening, online searches, automatic scanning of registration plates, interim decision on the law on data retention). Parts of the new legislation were declared unconstitutional due to un-proportional infringements on the right to privacy and related human rights norms.

13. Right to Education

In line with recommendations by the UN Special Rapporteur on the Right to Education, Mr. Vernor Munoz (see his 2007 Germany report), the GIHR is concerned that some categories of children suffer from *structural discrimination in the German school system*. This affects mainly children with an immigration background, children with disabilities, and children from poor families. Many of these children drop out of the education system too early, without a real chance of finding a work place or an apprenticeship.

Institutions of *early childhood education* and care are not sufficiently available throughout the country, particularly in the Western and Southern regions. Quality of early childhood education is often very poor and does not support the children’s learning, particularly in terms of language. As a result, many children from immigrant families start school with insufficient knowledge of the German language, and the *Länder* likewise fail to invest enough human and financial resources into primary schools to address this issue. This problem has meanwhile been identified by the government as a main political task.

The GIHR understands the right to education as including a right to *human rights education*. CoE Commissioner for Human Rights, Mr. Thomas Hammarberg, recommended that Germany should promote human rights education more than it has done so far.

14. Arising New Topics

The Federal Government’s 2008 “Poverty and Wealth Report” raises a number of problems related to poverty – such as obstacles to participate in public life, reduced life expectancy, etc. – that have an obvious human rights dimension. However, the report itself hardly ever refers to human rights. The GIHR is of the opinion that a systematic domestic discussion of the relationship between *poverty* and the effective enjoyment of human rights is overdue.

Another topic only recently emerging in the public debate relates to the human rights of *intersexual persons*. Approximately 80,000 - 120,000 people classified as “intersexuals” currently live in Germany. Some 95% of this group of persons are subjected to intensive medical interventions to change their fundamental and individual sexual characteristics, with the aim to produce “sexual clarity”. This generally happens in early childhood and without informed consent of the persons affected or their parents. The irreversible and extensive psychosomatic and mental damages as well as the preservation of the secondary sex characteristics through medical treatment during the total lifespan result in an extensive oppression of the persons concerned.

Massive abuses of personal data by private companies have recently triggered a debate about enhanced state responsibility to protect the right of *privacy against abuses on the side of private agencies*.