

UPR – SUBMISSION – GERMANY – MAY 2013



**NATIONAL COALITION
FOR THE IMPLEMENTATION OF THE
UN CONVENTION ON THE RIGHTS OF THE CHILD IN GERMANY**

The National Coalition for the Implementation of the UN Convention on the Rights of the Child in Germany (NC) is in alliance with more than 110 organizations and associations across Germany. NC members promote the realization of children's rights in Germany. In their watchdog function, they also highlight the shortcomings in implementing the UN Convention on the Rights of the Child (CRC) in Germany. The legal entity of the NC is the Board of the Child and Youth Welfare Association (AGJ).

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1. IMPLEMENTATION OF THE CRC FOR REFUGEE CHILDREN IN GERMANY

In the context of the review of Germany by the UN Human Rights Council in the procedure of Universal Periodic Review (UPR) 2009 the withdrawal of the reservations to the UN Convention on the Rights of the Child was required under paragraph 81 (4.) of the recommendations in the report of the Working Group on the Universal Periodic Review (UPR) to Germany (A/HCR/11/15, 4 March 2009). A recommendation, that was also enclosed in the Concluding Observations of the reporting of Germany to the UN Convention on the Rights of the Child (CRC) 1995 (CRC/C/15/Add.43, 27 November 1995, paragraph 13) and 2004 (CRC/C/15/Add.226, 30 January, paragraph 7).

Although the answer of Germany submitted during the course of UPR 2009 (A/HRC/11/15/Add.1, 20 May 2009) says, that such a withdrawal won't be possible because it affects an area for which the *Länder* (Federal States) have exclusive responsibility, the Federal Government managed to convince the *Länder* to withdraw the so called interpretative declaration on July 15, 2010.

Unfortunately, the hoped improvement of the situation of refugee children in Germany is still missing. Germany did still not adapt corresponding national laws, like they were already required in the Concluding Observations of the reporting of Germany to the CRC 1995 (CRC/C/15/Add.43, 27 November 1995, paragraph 13) and 2004 (CRC/C/15/Add.226, 30 January, item 7).

That's why the German NC refers again to the following problem areas, which in course of UPR 2009 were also already part of the recommendations of the Report of the Working Group on the UPR Germany (A/HCR/11/15, 4 March 2009) and the Supplementary Report of the NC to the Third and Fourth Report of the Federal Republic of Germany to the United Nations pursuant to Article 44, para. 1 (b) of the CRC.

Refugee children have less rights

Under the Immigration Law, the priority of the best interests of the Child (art. 1 CRC) as principle of the CRC has been left out. Therefore, all appropriate measures must be taken, in order to ensure that the principle of best interests of the child is included in all legislation and budgets. Furthermore, this principle should also be reflected in all administrative decisions, policies, services and programs that may relate or impact children (see CRC/C/15/Add. 226 para. 27).

Refugee Children need protection and adequate living conditions

Refugee children are placed in communal residences, which subsequently may lead to chronic diseases and permanent mental distress. It is extremely difficult for children who live in communal residences to have their basic needs met, they have restricted play time, their ability to learn is distressed and their perception and experiences are strained. As a result, both the housing and living conditions are in constant violation of the child's fundamental rights (article 27 CRC), the right to development of the personality (article 29 CRC), the right to rest, play and leisure (article 31 CRC) and the right to protection from violence, abuse and neglect (article 19 CRC). There are not enough Youth-Welfare-Institutions, where a qualified Clearing Procedure for unaccompanied minors may take place. Refugees have no existing clearing process, in which vulnerable groups may be identified and subsequently provide solutions.

Age appropriate treatments are denied to minors because mistakes are made in age assessment. The arbitrary age assignment can lead to considerable disadvantages and legal uncertainties.

Asylum Procedures for the Welfare of the Child.

There is no procedure that guarantees that the child's best interests are respected in cases of rejection or expulsion at the border. Unaccompanied minors and asylum seekers are regularly rejected at the border without evaluating the best interests of the child or contacting the youth welfare office. In addition, the so called "Airport Procedure" is applied to unaccompanied minors. This emergency court procedure is contrary to the principle of the best interests of the child (Art. 1 CRC and CAT/C/DEU/CO/5 para. 27a).

Since procedural responsibility in asylum procedures for young people over 16 is mandatory, young refugees are from 16 years on without any assistance during the asylum procedure; they are overwhelmed and this could reduce their secure residence status opportunities.

Germany explicitly does not exercise the principle of the best interests of the child in the so-called "Dublin Procedure". Additionally, there is no sufficient legal protection for an impending transfer under the "Dublin Procedure".

Ban Custody Pending Deportation for children

Many underage refugees continue to be taken into Custody Pending Detention – with or without their families - although European- and UN-Guidelines only tolerate them as "Ultima Ratio". The German Federal Government does not document the Custody Pending Detention of unaccompanied minors. Therefore, it can't provide information, if minors are separated from adults

during Custody Pending Detention, if they are only arrested for a short period of time or if alternatives are taken into account. Essentially, detention of minors should be excluded.

Secure the Family Unit

“[...] the Committee remains concerned that: the national requirements and procedures for family reunification for refugee families, as defined under the 1951 Refugee Convention, are complex and too long [...]” (see CRC/C/15/Add. 226 para. 54, d). This statement of the UN Committee on the rights of the child is still current. The right of children to live with their families depends on the residence status and economic conditions in Germany. As a result, family reunification fails or can only be achieved after substantial delays. In addition, Germany has a very narrow notion of what “family” entails and in many cases refuses to allow children to be with relatives – even though those relatives have their residence/live in Germany. Children are also separated from their families because of deportations.

Ensure Access to Education and Training

The German School System rarely offers enough support for the integration of children with migration background. The placement of minors in communal residences is particularly problematic for the schooling and education of a child.

Access to education should be facilitated to asylum seekers and minors (art. 28 CRC).

Grant Full Social-Benefits

Asylum seekers and people whose legal residence status is a temporary suspension of deportation receive benefits under the Asylum Seekers Power Act (AsylbLG). This benefits are often granted as vouchers, food packages or clothing. Under the AsylbLG and other Regulations, children in Germany grow in conditions which deprive them from basic life opportunities and a healthy development. The right to a medical treatment is only possible when they suffer from an acute illness or pain. Aids: such as glasses, hearing aids, braces, wheelchairs are often not granted. Medical emergency care is not in accordance with the law on the Best Health Care Possible (art. 24 CRC).

2. CHILDREN'S RIGHTS IN THE CONSTITUTION

The current situation of Refugee Children in Germany makes clear that the best interests of the child are not sufficiently respected in the German Basic Law (Constitutional law). Therefore, one of the long lasting demands of the German NC is the embodiment of children's rights in the German Basic Law.

By including children's rights in the Basic Law the German NC hopes to achieve:

- a strengthening of the general awareness of children's rights;
- a greater focus on the needs of children in all legislative, political and judicial decisions;
- a more conscious orientation of parental responsibility regarding children's rights, their subject position and their rights to protection, promotion and participation.
- the recognition of the interests of the child in their everyday life situations.
- a general clarification of the legal protection of children through an constitutional complaint¹.

The demand for a constant revision of children's rights in the German Basic Law was also included in the Concluding Observations of the reporting to the UN Committee on the Rights of the Child in 2004 (CRC/C/15/Add.226, 30 January 2004, paragraph 9).

In one way or another, 14 of the 16 German Federal States have already incorporated children's rights in their State Constitutions.

Recently, the German Federal Council (Bundesrat) has explicitly requested the Federal Government to include children's rights in the Constitution (Federal Council printed matter 386/11 (new)). However, the Statement of the Federal Minister of Justice to the resolution makes it clear that the Government still feels there is no need for action.

Even though German jurisdiction (more precisely the Federal Constitutional Court – Bundesverfassungsgericht) acknowledges that children, like every person, “shall have the right to the free development of his personality as long as he does not violate the rights of others or offends the constitutional order or the moral law²”, the German NC still thinks it is necessary to have an absolute and conclusive inclusion of children's rights in the Basic Law. Particularly in view of the role of the Basic Law as an instrument of influence regarding the general legal awareness.

¹expressly emphasized by overlooking the efforts of Germany regarding the third additional protocol to the UN Convention on the Rights of the Child an individual complaint procedures for children. Germany was here among the first signatories.

²Vgl. BVerfGE 24, 119(144)

3. CREATION OF AN INDEPENDENT³ MONITORING FOR THE CRC IN GERMANY

The Concluding Observations of the reporting of Germany to the CRC 2004 (CRC/C/15/Add.226, 30 January, paragraph 16) expressed the following recommendations:

"The Committee encourages the State party to consider the establishment of an independent national human rights institution, in accordance with the Paris Principles relating to the status of national institutions (General Assembly resolution 48/134) and taking into account the Committee's General Comment No. 2 on National Human Rights Institutions, to monitor and evaluate progress in the implementation of the Convention at the national and at the local level."

Background was the General Comment No. 2 (CRC/GC/2002/2, 15 November 2002):

"(1) Independent National Human Rights Institutions (NHRIs) are an important mechanism not only to promote the implementation of children's rights but also to secure them. The Convention on the Rights of the Child considered the establishment of such offices as part of the obligations, in order to ensure the implementation of the Convention and progress in the universal realization of children's rights."

"(12) Independent National Human Rights Institutions should ensure that their concept includes a pluralistic representation of the various elements of civil society detailing the protection and promotion of human rights... including human rights, anti-discrimination and children's rights organizations, non-governmental organizations (NGOs), including children and youth organizations."

The Committee makes clear that in addition to the normal duties of an independent monitoring body a comprehensive monitoring must include a representation of civil society through the involve of non-governmental organizations that should take the lead in representing the diversity of social aspects and reviews in the process of implementation of children's rights.

According to the NC, anchoring a comprehensive monitoring of the CRC requires Partners with two basic duties:

³in accordance to the so called Paris Principles of the United Nations

1. The evaluation of the implementation of the CRC from a civil societies perspective.

In terms of social aspects and value orientation, the Monitoring of the CRC has to ensure that civil society views are included in a comprehensive monitoring of the CRC. This is - already - the NC's central task.

2. The evaluation of the implementation of the UN Convention on the Rights of the Child from an independent point of view

Individually and in accordance with the requirements and expectations of the UN Committee on the Rights of the Child, the German NC demands the establishment of an "*Independent National Human Rights Institutions for the UN Convention on the Rights of the Child*" referring to the so called Paris Principles. According to the model of the "Monitoring body for the UN Convention on the Rights of Persons with Disabilities" such a "Monitoring body for Children's Rights" should also be established at the German Institute for Human Rights.

Furthermore, in the independent "Monitoring body for Children's Rights", participation of children and young people should be guaranteed.

According to the Paris Principles, the establishment of the "Monitoring body for Children's Rights" requires a parliamentary legitimation.

4. IMPLEMENTATION OF THE CRC FOR INTERSEXUAL⁴ CHILDREN BORN IN GERMANY

Paragraph 81. (22.) of the recommendations of the report of the Working Group on the UPR Germany 2009 (A/HCR/11/15, 4 March 2009) encourages the Federal Government to facilitate the sex change in official documents for transsexuals. In regard of this recommendation the German NC wants to draw attention to the situation of intersexual⁵ children born in Germany.

The Rights of intersexual children are violated by the assignment of gender in official documents and the performance of gender reassignment surgeries during their early childhood without the patients consent. Latest surveys made by the German Ethics Council confirm that the vast majority of intersexual children who are born in Germany are still operated on⁶. Operations, which are carried out without any medical indication. That is why the German Association of Pediatrics describes in its guidelines 'Disorders of sex development' to advise parents to postpone surgery

⁴ Intersexuals are people who do not fit into the medical and legal construct of two clearly distinguishable sexes, who can neither be defined as male nor as female.

⁵ Eventhough NC is aware of the discrimination of Intersexual people, the term Intersexual has to be seen on a critical manner, we choose to use the term Intersexual.

⁶ See Wunder, Michael (2012): „Intersexualität. Leben zwischen den Geschlechtern“, in: Aus Politik und Zeitgeschichte, 62. Jahrgang, 20-21, Mai 2012, herausgegeben von der Bundeszentrale für politische Bildung, Bonn

until their child is old enough to make the decision itself.⁷

It is estimated that, in Germany about 680,000⁸ children are born every year and from every 2,000 births one is born as an intersexual. Meaning that there are more than 340⁹ intersexual children born on a yearly basis. The information on the total number of intersexual people living in Germany varies from 80,000 to 120,000 people¹⁰.

During the reporting of Germany to the UN Women's Rights Convention in 2009 several Intersexual People Associations made clear that the Rights of Intersexual People are being violated in Germany. Furthermore, they successfully presented their situation during the reporting of Germany to the Convention on the Elimination of All Forms of Discrimination against Women (2009) and the UN Convention Against Torture (2011) and achieved recommendations on the situation of intersexual people in all Concluding Observations (CEDAW/C/DEU/CO/6, para. 61 und CAT/C/DEU/CO/5, para. 20.).

The NC for the implementation of the CRC in Germany takes the second review of Germany within the framework of the UPR process as an opportunity to highlight the situation of intersexual children from a child rights perspective and requests:

- a discrimination free recognition of intersexual born children

Since the change of civil status Act, 2009¹¹, upon request, a provisional birth registration without having to register the sex (gender) can be done. Consequently, only an "unsecure" birth certificate is issued, which excludes the affected families from obtaining benefits such as child support, parental leave, for which the "normal" birth certificate is necessary. A person receives a birth certificate only if the gender is registered.

From the perspective of the NC, the possibility of leaving the gender entry in the birth certificate unanswered is a groundbreaking development for all children until their 18th Birthday¹² or prior to marriage upon request at the age of 16. A possible intermediate step would be, as seen by the NC, to refrain from a legal sex reassignment, for intersexual children, and also to issue a birth certificate without gender entry but with "normal" Status¹³.

Entering the sex of their child as well as educating their child according to their social gender

⁷ See AWMF-Leitlinien-Register Nr. 027/022 in letzter Überarbeitung in 10/2010

⁸ See Statistisches Bundesamt, Geburten in Deutschland 2012

⁹ See Woweris, Jörg (2010): „Intersexualität: eine kinderrechtliche Perspektive“, in: frühe Kindheit 03/10, 12. Jahrgang, herausgegeben von der Deutschen Liga für das Kind, Berlin

¹⁰ There are no statistical surveys or public figures so far. However, based on the birth rate from the 1970s, it can be calculated that there number of affected people is significantly higher. See Intersexuellen Menschen (2008): "Parallel report on the 6 State report of the Federal Republic of Germany to the United Nations Convention on the Elimination of all forms of discrimination against women (CEDAW)"

¹¹ See Gesetz vom 19.02.2007, in: BGBl. I, 122,134

¹² CRC art.1

¹³ the same status as when a birth certificate should be given for supportive services for affected families (such as, for example, the child's benefit, parental leave allowance) can easily be requested.

assignment would be up to the parents.

- no gender reassignment medical operations unless with the expressed consent of the intersexual person itself (in person)

Affected children, parents and concerned professionals have the right to an independent counseling and advisory services, with the knowledge that intersexuality is not only a medical phenomenon but also allows an interdisciplinary consultation from a medical, psychological and social stand point, and if necessary with the involvement of Intersexual People Associations. It is important, that parents are particularly informed about the consequences of a surgery.

“The medical treatment usually consists of two elements based on the assignment of the, usually female, gender at birth: The child’s gonads are removed which are responsible for the production of sexual hormones, and their external genitals are surgically altered. The removal of the gonads leads to infertility and a severe hormonal deprivation which remains untreated at early childhood and is later addressed with lifelong hormone substitution, using products not developed for these patients. This leads to severe physical and psychological side effects. The operative feminisation of the body is effected by a reduction of the clitoris damaging erotic pleasure, as well as by constructing an artificial vagina which is then prepared for intercourse by traumatising and painful stretching. Patients and their parents or carers are often not properly informed about the procedure, especially not about the fact that they are medically unnecessary.”¹⁴

Such a type of consultation should be a mandatory precondition for gender reassignment interventions.

In addition, due to the continued physical and psychological consequences, the decisions on gender reassignment operations should be considered in Court including the participation of affected children, for example through the Childs Legal Representative (Verfahrensbeistand).

Anti Discrimination Agencies should be aware of intersexual people in order to secure their rights.

- a proper recognition and information for children about gender and gender identity in German educational institutions.

It would be extremely helpful if the Standing Conference of the Ministers of Education and Cultural Affairs of the *Länder* in the Federal Republic of Germany asked the *Länder* (because it affects an area for which the *Länder* have exclusive responsibility) to regularly revise their school material.

¹⁴ See Parallel Report to the 5th Periodic Report of the Federal Republic of Germany on the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), compiled by the Association of Intersexual People /XY Women and Humboldt Law Clinic: Human Rights, page 5.