

## German Institute for Human Rights:

Suggested topics to be taken into account for the preparation of a *list of issues* by the Committee against Torture on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Germany

Berlin, 28 August 2013

## **Introduction**

The German Institute for Human Rights (GIHR), the national human rights institution of Germany, has been invited by the Secretariat of the Committee against Torture (the Committee) to provide expert advice on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in preparation of the Committee's examination of the next periodical State report by Germany. The GIHR has therefore compiled the following proposals for potential issues to be raised by the Committee, each supplemented with short background information.

The proposals focus on those issues with relevance for the protection against torture and other cruel, inhuman or degrading treatment or punishment on which the GIHR has gathered information and gained expertise during the past years.

The GIHR will continue to attend and support the current State reporting cycle with regard to Germany and is prepared to provide the Committee with further expertise upon request.

As a standard in all state reporting procedures related to Germany, the GIHR will invite all stakeholders and the government to an exchange of opinion prior to submission of the next State report.

## **I. Detention facilities and other institutions restricting freedom of movement**

### **1. Closed and semi-closed institutions for children**

#### **Suggestion**

Please provide disaggregated data on the number of state-run and non-state closed and semi-closed institutions for children in Germany, how many children have been placed in these institutions during the last 10 years and children's length of stay in these institutions. Please also provide data on the number of complaints received by authorities on cases of ill-treatment, violence, abuse and negligence in the last ten years, and the outcomes of the complaints. Please provide information on the structure and practice of oversight over these institutions by public authorities and independent control mechanisms. Please also provide information on the allegations of ill-treatment in closed institutions for children run by the *Haasenburg GmbH* in the Federal state of Brandenburg, including steps taken by the public authorities in the wake of these allegations.

#### **Explanation**

On the one hand, the ill-treatment of children in closed and semi-closed institutions in Western Germany the 1950s and 1960s and the state-run closed institutions for children in Eastern Germany (so-called *Werkhöfe*) have been cleared by expert roundtables and research during the last years. On the other hand, little is known about the situation in today's closed and semi-closed institutions for children, and it is not apparent which consequences for the current situation have been drawn from the outcomes of those roundtables and research. Recently published testimonies of several children formerly placed in institutions run by the *Haasenburg GmbH* in the State of Brandenburg include allegations of physical and psychological violence, use of fixation beds and video-surveillance.

### **2. Inter-prisoner violence in prisons**

#### **Suggestion**

Please report on the Federal and Federal states' government analysis of the results of the 2012 study by the Kriminologische Forschungsinstitut Niedersachsen (Criminological Research Centre Lower Saxony) on violence experienced by prison inmates and the consequences the respective governments have drawn or intend to draw from these results.

#### **Explanation**

In 2012, the Kriminologische Forschungsinstitut Niedersachsen (Criminological Research Centre Lower Saxony) published a survey on the rate of violence in prisons in several German Federal States, based on questionnaires sent out to all prison inmates in these Federal states. The results showed a high prevalence of inter-prisoner violence. Only a minority of prisoners stated that they turn to prison wards and the authorities for help in such cases of violence.

### **3. Detention pending deportation**

#### **Suggestion**

Please report on measures taken both at the Federal as well as the Federal state (*Länder*) level towards guaranteeing the protection of persons detained pending deportation against inhuman or degrading treatment and conditions. Also, please give an assessment as to whether the practice of placing deportees in detention centers or prisons, in itself, is compatible with the Convention.

#### **Explanation**

There continues to be nationwide practice of holding deportees either directly in regular prisons or in facilities similar to prisons. Deportees are thus generally treated like criminal offenders and in some cases - as corroborated by recent reports - are facing inhuman and degrading conditions within detention facilities. In this context, it would be useful to receive information on how the State party guarantees that its policies and actions do not violate the Convention.

## **II. Access to justice / complaint mechanisms**

### **1. Identification of law enforcement officers**

#### **Suggestion**

Please update information on steps taken to ensure that police officers carry visible badges indicating their professional identity at all times when carrying out law enforcement functions and provide a brief assessment of these steps.

#### **Explanation**

As the identification of police officers responsible for ill-treatment is a precondition for an effective access to justice, visible identity badges are crucial. Since Germany replied to the list of issues during the 5<sup>th</sup> periodic reporting cycle in September 2011, some Federal states (*Länder*) have made carrying such identity badges mandatory, whereas other *Länder* and the Federal Police resist calls for introducing identity badges. Meanwhile, it should be possible to provide a preliminary assessment on the effects and implications of identity badges.

### **2. Prompt, independent and thorough investigations / fair trial**

#### **a. Independent complaint handling**

#### **Suggestion**

Please update information on steps taken to establish independent bodies responsible for investigating complaints of torture and ill-treatment by Federal and *Länder* police and provide a brief assessment of these steps.

## **Explanation**

Both at the Federal as well as the Federal state level, complaints of alleged torture, excessive violence or other ill-treatment by police officers continue to be handled by entities or bodies directly belonging to police or law enforcement authorities (including ministries for internal security). As a result, the level of independence of investigations is clearly insufficient. A specialized independent complaint mechanism, e.g. in the form of a “civil” complaints commission, would be able to look at allegations impartially and without bias generated by close affiliation towards police structures and culture.

### **b. Handling of cases with counter-complaints**

#### **Suggestion**

Please also provide information on measures taken to avoid intimidation of alleged victims of irregular police violence when investigating counter-complaints by police officers suspected of ill-treatment.

#### **Explanation**

Human rights organizations report that alleged victims of irregular police violence, who lodge a complaint, frequently face counter-complaints by accused police officers. The risk of facing counter-complaints, often taken more seriously by public prosecution than the original complaints against the police, may prevent victims of police ill-treatment from seeking access to justice. Thus, it is of importance to learn how thorough investigations and fair trials are guaranteed in such cases.

## **III. Rights of persons with disabilities**

### **1. Involuntary treatment**

#### **a. Implementation of recommendations by UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment**

##### **Suggestion:**

Please report on steps taken by the State party to implement the recommendations of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concerning the rights of people with disabilities.

##### **Explanation:**

In his latest report from 2013, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment calls upon all states to “impose an absolute ban on all forced and non-consensual medical interventions against persons with disabilities, including the non-consensual administration of psychosurgery, electroshock and mind-altering drugs such as neuroleptics, the use of restraint and solitary confinement, for both long- and short-term application” (A/HRC/22/53, para. 89b, see also paras. 63, 64, 68 and 85a) .

## **b. Psychiatric care**

### **Suggestion:**

Please report on steps taken by the State party to establish a practice of psychiatric care that is based on free and informed consent in all situations.

### **Explanation:**

The decision of the Federal Constitutional Court of 23 March 2011 (2 BvR 882/09) which precluded the use of force as a last resort in forensic psychiatric hospitals, but held force exceptionally admissible under strict requirements for patients who, because of an illness, are held incapable of giving consent, and the above mentioned recommendation of the United Nations Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/22/53, para. 89b) imply fundamental criticism towards the existence of widespread practice with regard to the use of force in Germany.

## **c. Data on involuntary treatment at the Federal state (*Länder*) level**

### **Suggestion:**

Please provide latest information on steps taken by the State party to gather reliable and comparable data on involuntary treatment. Please report on steps taken by the State party to scrutinize and explain differences between the Federal states (*Länder*) concerning the number of cases of involuntary treatments.

### **Explanation:**

Reliable data on the extent of involuntary treatment in psychiatric hospitals are lacking. The number of involuntary placements differs from federal state to federal state. For example, it is six times more likely to be involuntarily placed in the federal state of Schleswig-Holstein than in the federal state of Brandenburg. In addition, involuntary placements take place two and a half times more often in the old Federal States than in the new Federal States (see reply of the Federal Ministry of Justice to the parliamentary request of the parliamentary group of DIE LINKE of 13 September 2012, *Bundestagsdrucksache* [official document of the Federal Parliament] 17/10712, pp. 2 et seqq.).<sup>1</sup>

## **d. Participation of affected groups of persons / civil society in legislative processes**

### **Suggestion:**

Please report on steps taken by the State party to ensure the active inclusion and full participation of persons with disabilities in legislative processes in the future.

### **Explanation:**

With respect to the federal laws on custodianship ("*Betreuungsrecht*"), the Federal German Parliament (*Deutscher Bundestag*) enacted the "*Gesetz zur Regelung der betreuungsrechtlichen Einwilligung in eine ärztliche Zwangsmaßnahme*" in February 2013. With the exception of a public consultation in December 2012, the legislative process was not

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<sup>1</sup> See <http://dip21.bundestag.de/dip21/btd/17/107/1710712.pdf>.

accompanied by broad involvement of civil society, particularly users and former users of psychiatry.

## **e. Involuntary placements**

### **Suggestion:**

Please report on steps taken by the State party to decrease the number of involuntary placements.

### **Explanation:**

The number of involuntary placements increased from 2000 to 2011 by 63 per cent (Federal law on support, “*Betreuungsrecht*”) and 37 per cent (so-called laws on mentally sick persons, “*Psychisch-Kranken-Gesetze*”, and laws on placements, “*Unterbringungsgesetze*”, enacted by the Federal states) (see reply of the Federal Ministry of Justice to the parliamentary request of the parliamentary group of DIE LINKE of 13 September 2012, *Bundestagsdrucksache* [official document of the Federal Parliament] 17/10712, pp. 2 et seqq.).<sup>2</sup>

## **2. Sterilisation**

### **Suggestion:**

Please provide detailed data on sterilisations of persons under custodianship and in particular on those sterilisations that have been carried out without free and informed consent. Please report if any steps are taken by the State party to amend Section 1905 of the German Civil Code.

### **Explanation:**

In 2012, 32 cases of sterilisation of persons under custodianship were approved according to Section 1905 Civil Code, in 36 cases approval was denied.<sup>3</sup> Sterilisation of persons with disabilities who are under custodianship is authorised under certain cumulative conditions - however, without the free and informed consent of the person concerned.<sup>4</sup> It is thus highly

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<sup>2</sup> See supra note 1.

<sup>3</sup> See Bundesamt für Justiz (2013): *Betreuungsverfahren. Zusammenstellung der Bundesergebnisse für die Jahre 1922-2012*, available at: [https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Verfahren\\_Betreuungsgesetz.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Verfahren_Betreuungsgesetz.pdf?__blob=publicationFile&v=3)

<sup>4</sup> German Civil Code (“*Bürgerliches Gesetzbuch*”, “BGB”), Section 1905: Sterilisation

(1) Where the operation is a sterilisation of the person under custodianship to which the person may not consent, the custodian may consent only if

1. the sterilisation is not inconsistent with the intention of the person under custodianship,
2. the person under custodianship will permanently remain incapable of consenting,
3. it is to be assumed that without the sterilisation there would be a pregnancy,
4. as a result of this pregnancy a danger for the life of the pregnant woman or the danger of a serious adverse effect on her physical or psychological state of health were to be expected which could not be prevented in a reasonable way, and
5. the pregnancy cannot be prevented by other reasonable means.

doubtful that Section 1905 of the German Civil Code is compatible with the Convention on the Rights of Persons with Disabilities, especially its articles 12, 17, 23 and 25.<sup>5</sup> This assessment is corroborated in the above mentioned report by the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (see A/HRC/22/53, para. 88; see also A/HRC/22/53, paras. 32 et seq., 46, 48, 76 et seqq.).

#### IV. Children's rights - intersexual minors

##### Suggestion:

Please provide information on measures taken by the State party to prohibit irreversible, non-life-saving surgeries on intersexual children as long as they cannot give consent. Please provide information on how many irreversible, non-life-saving surgeries on intersexual children took place since 2010. Please inform the Committee of the State party's position regarding the statement on Intersexuality of the German Ethics Council (*Deutscher Ethikrat*).

##### Explanation:

Intersexual children are children who cannot be categorized as "male" or "female". Their exact number in Germany is unknown<sup>6</sup>, but according to scientific estimations approximately 150 to 340 intersexual children are being born in Germany each year.<sup>7</sup> Through medical procedures on the genitals, removal of gonads, ovaries or testicles, or through other forms of irreversible medical treatment, in particular hormone therapy, bodily appearance is aligned to the "male" or "female" sex. Such treatment is performed on infants, children and adolescents, depending on the discovery of their intersexuality. The parents' consent is required for such treatment. In view of the irreversibility of medical procedures and the severity of their physical, psychological and sexual consequences, substituted decision-making is irreconcilable with General Comment No. 12 of the Committee on the Rights of the Child, unless there is medical evidence that a surgery or treatment is necessary to save the child's life. The situation of intersexual persons in Germany was first brought before a UN treaty body through parallel reports by organizations of intersexual persons to the Committee on the Elimination of Discrimination against Women. In 2009, this body recommended that the German government enter into a dialogue with intersexual persons (CEDAW/C/DEU/CO/6, para. 62). The government delegated this dialogue to the German Ethics Council. In 2011, the Committee on Economic, Social and Cultural Rights (E/C.12/DEU/CO/5, para. 26) called

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A serious danger for the psychological state of health of the pregnant woman also includes the danger of serious and persistent suffering which would threaten her because custodianship court measures which would entail separating her from her child (sections 1666 and 1666a) would have to be taken against her.

(2) The consent must be approved by the custodianship court. The sterilisation may not be carried out until two weeks after the approval takes effect. In the sterilisation, preference is always to be given to the method that permits a re-fertilisation.

<sup>5</sup> See for example Tolmein, Oliver (2013): Die Regelung zur Einwilligung Betreuender in die Sterilisation als Verstoß gegen die UN-BRK, in: Aichele, Valentin (ed.): Das Menschenrecht auf gleiche Anerkennung. Artikel 12 der UN-Behindertenrechtskonvention, Baden-Baden: Nomos, pp. 273-301.

<sup>6</sup> Deutscher Ethikrat, Intersexualität, Stellungnahme, Berlin 2012, p. 66; available at:

<http://www.ethikrat.org/dateien/pdf/stellungnahme-intersexualitaet.pdf>.

<sup>7</sup> Woweris, Jörg (2010): „Intersexualität: eine kinderrechtliche Perspektive“, in: Frühe Kindheit 03/10, available at: [http://liga-kind.de/fruehe/310\\_woweries.php](http://liga-kind.de/fruehe/310_woweries.php).



upon the German government “to step up measures” to ensure intersexual persons’ personal integrity, and later that year, the Committee against Torture expressed concern about the continuance of medical procedures “without effective informed consent of the individuals concerned or their legal guardians” and recommended to ensure such consent (CAT/C/DEU/CO/5, para. 20 a). In 2012, the German Ethics Council recommended that an irreversible medical procedure be performed on “children not yet capable of making decisions” only when “irrefutable reasons of the best interest of the child” require it.<sup>8</sup> To date, the government has not introduced a draft law on the issue, nor is there any systematic approach to improve knowledge and awareness among medical professionals, nor is there full access to competent advice for intersexual children and their parents. In February 2013, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment “calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, [...] when enforced or administered without the free informed consent of the person concerned” (A/HRC/22/53, para. 88; see also A/HRC/22/53 paras. 38, 77).

## V. Rights of older persons - protection against harmful treatment in care facilities

### **Suggestion:**

Please provide updated and detailed information concerning the measures taken to guarantee the rights of older persons in care facilities in all cases and to reduce the extent of liberty-restricting measures. Please report how many cases of liberty-restricting measures have occurred in Germany during the past years, disaggregated by federal states.

### **Explanation:**

Liberty-restricting measures in care facilities for older persons are widespread and have increased significantly.<sup>9</sup> These include restrictions on mobility, such as fixations in beds or wheelchairs, and sedation. Academic surveys have shown that such measures do not protect older persons from falls or other accidents<sup>10</sup>, but rather constitute additional risks of injury.<sup>11</sup>

It is necessary for the state to take measures limiting and regulating liberty-restricting measures and practices in order to protect the rights of residents in care facilities.

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<sup>8</sup> *Supra* note 6, p. 174 (translation from German).

<sup>9</sup> Meyer, Gabriele / Köpke, Sascha / Haastert, Burkhard et al (2009): Restraint use among nursing home residents: cross-sectional study and prospective cohort study, in *Journal of Clinical Nursing* 18, 981-990. Zwischen 1998 und 2009 hat die Zahl betreuungsgerichtlicher Legitimationen solcher Maßnahmen nahezu um das Zweieinhalbfache zugenommen, siehe Brucker, Uwe (2011): Pflegefachliche Fürsorge oder verselbständigte Routine. Freiheitseinschränkende Maßnahmen in Heimen und Genehmigungspraxis der Betreuungsgerichte, in: *Pro Alter*, Januar/Februar S.47-53.

<sup>10</sup> Köpke, Sascha / Mühlhauser, Ingrid / Gerlach, Anja et al. (2012): Effect of a guideline-based multicomponent intervention on use of physical restraints in nursing homes. A randomized controlled trial, in: *Journal of the American Medical Association (JAMA)* Bd. 307(20), S. 2177-2184.

<sup>11</sup> Meyer, Gabriele / Köpke, Sascha / Haastert, Burkhard et al (2009): Restraint use among nursing home residents: cross-sectional study and prospective cohort study, in *Journal of Clinical Nursing* 18, 981-990. Zwischen 1998 und 2009 hat die Zahl betreuungsgerichtlicher Legitimationen solcher Maßnahmen nahezu um das Zweieinhalbfache zugenommen, siehe Brucker, Uwe (2011): Pflegefachliche Fürsorge oder verselbständigte Routine. Freiheitseinschränkende Maßnahmen in Heimen und Genehmigungspraxis der Betreuungsgerichte, in: *Pro Alter*, Januar/Februar S.47-53.