



National Agency for the Prevention of Torture

Report to the Committee against Torture and other inhuman or degrading treatment or punishment

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Introduction

The National Agency for the Prevention of Torture is Germany's designated National Preventive Mechanism (NPM). By establishing this Agency, the Federal Republic of Germany abided by its obligations under international law following from the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT). The National Agency is responsible for places where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its explicit consent or acquiescence.

The following report focuses on structural challenges concerning the mandate of the National Agency as well as on major findings from its visits to places of detention.

I Institutional challenges

I.1 Funding of the National Agency

Currently, the National Office has an annual budget of 640,000 euros. Ten volunteer members, supported by an office with six full-time positions, carry out their mandate with responsibility for the entire federal territory. On this basis, the National Agency is able to carry out an average of 55 visits per year to the total of 13,000 places of detention in Germany, the majority of which are homes for the elderly.

According to a recent report by the Scientific Service of the German National Parliament (Bundestag), the National Agency is “weakly positioned” in comparison with the National Preventive Mechanisms of the European neighbouring countries.¹ This was also addressed in reports by CAT², the SPT³ and CPT⁴.

¹ Reference and Research Services of the German Bundestag (Wissenschaftliche Dienste des deutschen Bundestages) (2020): “Ausstattung und Kompetenzen der „Nationalen Stelle zur Verhütung von Folter“ in Deutschland im Vergleich zu ähnlichen Einrichtungen in ausgewählten europäischen Staaten, die im Zuge des Fakultativprotokolls zur Anti-Folter-Konvention der Vereinten Nationen (OPCAT) geschaffen wurden.”

In the coalition agreement between the Social Democratic Party of Germany (SPD), Alliance 90/The Greens and the Free Democrats (FDP) for the federal government, it was agreed in autumn 2021: “We will provide national human rights institutions, such as the German Institute for Human Rights and the National Agency for the Prevention of Torture, with better financial and personnel resources.”

Better funding and staffing, as envisaged in the coalition agreement, also will require a new organisational form of the National Agency.

Within the framework of its current resources, the National Agency has to rely on the acceptance and independent implementation and review of its standards and recommendations by the supervisory authorities. This rarely takes place. Even indications by the National Agency of high risks of violations of human dignity on site do not necessarily lead to their rapid elimination. The National Agency argues that the federal government and the state governments are also obliged to work more towards the implementation of its recommendations.

1.2 Legal basis for publication of reports concerning visits in privately run institutions

As it was already noted by the CAT in its concluding observations on the sixth periodic report of Germany⁵, the National Agency only publishes the names of the institutions it visited if these are state-funded. This applies to the publication of both the visit reports and the respective statements made by the competent ministries. The reason for this is that there are considerable doubts as to whether the legal basis for the National Agency's work (the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in conjunction with the ratifying legislation of 26 August 2008) is specific enough to justify the publication of information pertaining to privately run institutions, particularly in view of their rights under Article 14 of the German Basic Law [*Grundgesetz*]. Very often such institutions are homes for the elderly and psychiatric hospitals that act out of private economic interest.⁶ This impairs the National Agency's preventive work and reduces its effectiveness. A legal basis for publishing the names of private run institution has not been created since the last review of Germany by the CAT.

The National Agency therefore considers it necessary that a sufficient legal basis be established, allowing the National Agency to publish the names of all the institutions it visited as well as visit reports and statements, which would enable it to fulfil its mandate in terms of prevention as provided for in the Optional Protocol.

2 Findings from visits to places of deprivation of liberty

2.1 Deportations

Monitoring of Deportations

URL: <https://www.bundestag.de/resource/blob/695584/fd22265b74de7df9989fc439873c96e5/WD-2-021-20-pdf-data.pdf> (retrieved on 14.04.2022).

² CAT/C/DEU/CO/6, para. 13.

³ CAT/OP/DEU/1, para. 9.

⁴ CPT/Inf (2017) 13, para. 11.

⁵ CAT/C/DEU/CO/6, para. 15

⁶ In contrast, the names of private run institutions acting only on public order, such as forensic psychiatric hospitals can be made public by the National Agency.

As part of the Schengen evaluation of Germany, the National Agency met the European expert delegation on 18 February 2020 in Essen. Among other things, this delegation verified whether the EU Return Directive had been implemented effectively. Pursuant to Article 8 para. 6 of the Return Directive, Member States must provide an effective forced-return monitoring system. This monitoring should cover all activities from preparation for departure until reception in the state of return or – in the event of a failed deportation attempt – until return to the place of departure. Such monitoring by independent organisations is not guaranteed in Germany.

The National Agency has made clear that it is not the designated mechanism for the monitoring of forced returns. Even though the Agency regularly monitors forced deportations in accordance with its mandate from Article 4 of the OPCAT, it cannot additionally take on the task of monitoring returns in line with the Return Directive with the currently available resources.

Findings

The National Agency has observed that since the beginning of the Covid-19-pandemic, there has been a sharp increase in the pick-up of deportees at night. This also applies to affected families with children, for whom the well-being of the children is endangered and traumas can be caused.

Pick-up at night time is to be avoided. In the case of deportations of children, this is to be guaranteed without exception.

During the Covid-19-pandemic, deportations of sick persons and persons at increased risk of a severe course of corona disease were regularly carried out in 2020 and 2021. This concerned elderly people, pregnant women and people with diseases, including pre-diseased children. For example, the National Agency noted with concern that a child with Down syndrome (trisomy 21) was deported. The risk of a severe or fatal course of a Covid-19 infection is significantly increased in persons with Down syndrome.

In many cases, a prerequisite for the implementation of deportations was the existence of a negative test on Covid-19. Not all test results were always available at the airport. When, in the case of a deportation from Frankfurt to Baku, a test subsequently turned out to be positive, the deportation of the person concerned was cancelled, but the contact person's deportation continued.

The National Agency strongly recommends suspending deportation measures as long as there is a serious risk to the persons to be deported or a risk of the virus spreading. The recommendations of the RKI⁷ and corresponding quarantine obligations should be followed without fail.

In other cases, deportees refused to take the Covid-19-test, resulting in a forced execution.

The National Agency considers the use of direct physical coercion in conducting Covid-19-tests (through nasal and throat swabs or saliva samples) to be generally dangerous, as it can lead to serious injuries to the persons concerned.

2.2 Forensic psychiatric hospitals

In the course of the visits to forensic psychiatry in 2021, the National Agency criticised the overcrowding in several facilities. In many of the facilities visited, accommodation in double rooms is the rule; occupancy with three or four persons in one room was also found, which often leads to

⁷ Robert Koch Institute (German federal government agency and research institute responsible for disease control and prevention).

quarrels and stressful situations. To supplement the visits, the National Agency conducted a survey on the occupancy rates of the forensic psychiatric hospitals in all federal states (Länder). High occupancy rates of 94% or higher were found in all Länder. Several Länder had an occupancy rate of 100%, five Länder indicated occupancy rates of over 100% up to a maximum of 111%. This also leads to a loss of quality in the treatment of patients.

It is to be ensured that the occupancy of the rooms does not lead to difficulties in therapy and that the protection of the patients' privacy is always guaranteed. Furthermore, necessary measures are to be taken to counteract the structural overcrowding of the facilities.

The National Agency is of the opinion that regular accommodation in individual rooms should be provided for by law. Future building projects should also allow for single occupancy. In the context of renovations or new buildings, rooms should generally be designed for single occupancy.

During its visits to forensic psychiatric institutions, the National Agency regularly inquires whether there is a night lock-up on site. According to a survey from 2012, this was the case in about 50 % of the facilities nationwide.⁸

In several facilities visited, the National Agency demanded that night-time confinement, which was only carried out for organisational reasons, be dispensed with.

In addition, the National Agency examined the provisions of Land law on forensic psychiatric hospitals on the ordering and implementation of mechanical restraint for compatibility with the requirements of the Federal Constitutional Court's ruling of 24 July 2018. In order to be in line with the requirements of the case law of the Federal Constitutional Court, the laws of the Länder must contain the following: separate legal basis for mechanical restraints, reservation by a judge, permissible reasons for mechanical restraint, observance of the principle of proportionality (mechanical restraint as a last resort), medical order and supervision, one-to-one supervision by therapeutic or nursing staff for each person mechanically restrained, documentation and subsequent reference to a judicial review possibility.

In particular in Saarland, Thuringia, Berlin, Lower Saxony and Saxony-Anhalt, the statutory provisions do not meet the constitutional requirements even more than three years after the ruling.

2.3 Prisons

The National Agency often finds during visits to prisons that the psychiatric care of mentally ill prisoners is inadequate. In the absence of adequate care, prisoners remain segregated or confined for long periods of time, while certain medical conditions can deteriorate further if left untreated. The National Agency considers a comprehensive scientific study on this to be necessary.

During its follow-up visit in 2020, the National Agency had criticised the double occupancy of detention rooms with an area of 8 m² without a structurally separated and separately ventilated toilet at Karlsruhe Prison (Baden-Württemberg). If the toilet is not separated, the accommodation of several persons in one detention room violates their human dignity, which is protected in Article 1 (1) of the Basic Law. Under these circumstances, not even a minimum of privacy can be maintained. The occupancy situation would have made it possible to double occupy primarily those detention rooms that had a separate, but not separately ventilated, toilet.

⁸ Bulla/Hoffmann (2012), Der Nachteinschluss – eine Methode des modernen Maßregelvollzugs?, in: Forensische Psychiatrie und Psychotherapie vol. 19, S. 204-216.

In the statement of the Ministry of Justice and Europe of Baden-Württemberg, as was the case after the initial visit in 2017, no promise was made to end the double occupancy without a separate toilet immediately, instead, according to the statement, the construction of further detention building must be awaited. Prisoners must continue to use the toilet in the presence of other prisoners. Despite the now promised priority occupancy of double detention rooms with separate but not separately ventilated toilets, "double occupancy of detention rooms not equipped with structurally separated toilets is still unavoidable in order to be able to cope with existing occupancy narrowpass".

Double occupancy is only to be carried out in detention rooms with separately ventilated and structurally separated toilets.

In addition, the minimum size of the detention rooms for humane accommodation is undercut in Karlsruhe Prison (Baden-Württemberg) and Landsberg am Lech Prison (Bavaria). At Landsberg am Lech Prison, the smallest four-bed detention room has an area of 16.98 m², and the double detention rooms in the access building have an area of 9.92 m². At Schwäbisch-Hall Prison, the detention rooms used for double detention in the old building have an area of 9.13 m². In the view of the National Agency, the absolute minimum limit for humane accommodation is not met in these cases.

For humane accommodation, detention rooms must have a floor area of at least 6 m², excluding the sanitary area. In the case of multiple occupancy, an area of 4 m² must also be added for each additional person.

Measures are also to be taken to enable prisoners to be housed individually in detention rooms as a matter of principle.

Due to the overcrowding situation in the Schwäbisch-Hall and Karlsruhe prisons, the conditions of detention have deteriorated for all prisoners.

Measures are to be taken quickly to combat structural overcrowding in the Baden-Württemberg prison system.

For Tegel Prison (Berlin) the National Agency recommends the speedy implementation of the planned complete new construction of Prison II there. From the National Agency's point of view, there are doubts about the suitability of the current building for the accommodation of prisoners. The renovations or renewals requested during the National Agency's initial visit in 2017 have not taken place in Building II of Tegel Prison until a follow-up-visit in 2021. The demolition of another building on the grounds of Tegel Prison, which was necessary for a replacement building for Building II, has taken place and the planning for a new, modern building has been completed. However, the construction of the new building has been stopped by the Berlin Senate Administration for Justice. According to information from the prison, the accommodation situation for the prisoners had become even worse as a result of the demolition and the failure to construct a new building.

Due to the overall view of the structural deficiencies, the prison facilities, the lack of suitable sports and employment opportunities, as well as the continuing shortage of staff in the General Prison Service in Building II of Tegel Prison, the National Agency's doubts about the suitability of the building for housing prisoners could not be dispelled. The planned new building is to be constructed quickly.

The National Agency frequently recommends after visits to prisons, that searches that involve undressing should not be carried out routinely, irrespective of case-related grounds for suspicion. According to the findings of the Federal Constitutional Court, searches involving undressing and inspection of the pubic area constitute a serious injury to the general right of personality.⁹ The European Court of Human Rights also found that physical searches carried out without any reason constitute degrading treatment within the meaning of Article 3 of the ECHR.¹⁰

It must be ensured that orders for searches that involve undressing and inspection of the pubic area always open up a margin of discretion in individual cases with regard to the necessity of undressing. Staff must be made aware of this.

2.4 Detention at Customs

From the point of view of the National Agency, the practice of so-called "swallower toilets" in customs custody is a particular problem. In order to secure evidence, "body packers" taken into custody at the Customs Investigation Offices (Zollfahndungsamt) Frankfurt a. M. airport and Düsseldorf airport who have incorporated drug packets, are directed to a "swallower toilet", that can be observed by staff members at all times. However, there is no medical supervision during the detention. The so-called "bodypacker syndrome" can quickly lead to the death of the person concerned if the containers are damaged. Unlike in Frankfurt, medical supervision is provided in a clinic at the Munich Customs Investigation Office, Munich airport, which was also visited.

Due to the potential danger and in order to protect the right to life and physical integrity as best as possible, a person in custody who has incorporated drugs should in any case be under constant medical supervision before, during and after the excretion of the "body packs".

2.5 Police

During the visit to the detention centre at Düsseldorf Police Headquarters (North-Rhine-Westphalia), the National Agency once again recommended not to use physical restraints in police custody. The police in a large number of Länder as well as the Federal Police already refrain from this practice. As a rule, the requirements of the Federal Constitutional Court for physical restraints, such as one-to-one supervision by therapeutic or nursing staff, cannot be ensured in police custody.

The CPT also called on the Federal Republic of Germany to completely dispense with physical restraints in police custody. The Federal Police as well as the Länder police forces in Baden-Württemberg, Berlin, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia do not use restraints.

In the view of the National Agency, restraints in police custody should be completely abandoned. As long as restraints are carried out, constitutional requirements for their implementation must be observed.

⁹ BVerfG, Federal Constitutional Court, decision of 23. 09.2020, 2 BvR 1810/19.

¹⁰ ECHR, Roth ./ Germany, Judgement from 22.10.2020, Applications nos. 6780/18 and 30776/18.