Deutsches Institut
für Menschenrechte

German Institute for Human Rights

Parallel Report

to the 133th session of the Human Rights Committee in the context of the examination of the 7th State Report of Germany

September 2021

Contents

1 Preliminary observations

The German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) is the independent human rights institution in Germany. The Institute is accredited according to the Paris Principles of the United Nations (A status). The Institute's tasks include public policy research, education, information and documentation on human rights, application-oriented research on issues related to human rights and cooperation with international organisations. It also monitors the application of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established the monitoring mechanisms for these purposes.

With this submission the German Institute for Human Rights wishes to highlight selected issues of relevance to the implementation of civil and political rights in and by Germany. The main areas of the Institute's work strongly influenced the selection of issues discussed herein, as it is in those areas that the Institute has built up expertise and knowledge bases in recent years.

2 Right to effective remedy (art. 2)

Access to justice in the case of human rights abuses by or involving German companies; implementation of the National Action Plan on Business and Human Rights and its impact in ensuring access to effective remedy

cf. State Report, pp. 11-12

Background

The overall success of The National Action Plan on Business and Human Rights (NAP) as a tool for the implementation of the UN Guiding Principles on Business and Human Rights (UNGP) was evaluated in 2020. However, a representative monitoring exercise commissioned by the government has established that only less than 20 percent of companies domiciled in Germany with more than 500 employees have met the UNGPs human rights due diligence standard.[1] The NAP's target was for at least 50 per cent by the end of 2020.[2] The coalition agreement stipulates a statuary provision, in case the NAP target was not reached, and that the federal government will in addition advocate for an EU-wide regulation.[3] In March 2021, Germany's Federal Cabinet approved the draft legislation on corporate due diligence in supply chains. In June 2021, the German Bundestag adopted the legislation, which was followed by the authorisation of the German Bundesrat. On 22 July 2021, the Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in

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1 For an overview of the monitoring process 2018-2020, see https://www.auswaertiges-amt.de/en/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2131054 (accessed 03.09.2021), Federal Foreign Office, Final Report: Monitoring of the status of implementation of the human rights due diligence obligations of enterprises set out in the National Action Plan for Business and Human Rights 2016-2020.https://www.auswaertiges-amt.de/blob/2417212/9c8158fe4c737426fa4d7217436accc7/201013-nap-monitoring-abschlussbericht-data.pdf.

2 NAP Section III, p.10: https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf (accessed 03.09.2021).

3 Coalition agreement between the parties CDU, CSU und SPD, 19th election period, March 12, 2018, paras. 7382-7385.

Supply Chains (*Lieferkettensorgfaltspflichtengesetz* – LkSG)[4] was published in the Federal Law Gazette. The Act enters into force on 1 January 2023.

The German Institute for Human Rights has expressed its expectations in two opinions during the drafting process of the Act, demanding that it shall be in line with the UNGPs.[5] To ensure effective access to remedy for victims of human rights abuses, particularly foreign plaintiffs, the Institute recommended to include a civil liability provision in the Act on Corporate Due Diligence and to provide a shift or relaxation of the burden of proof.[6]

The term of the first NAP expired in December 2020 (2016-2020), activities were continued during 2021. A second NAP is expected to be adopted in 2022.

Assessment by the German Institute for Human Rights
The Institute welcomes the adaptation of the Act on Corporate Due Diligence Obligations. It is a first step towards the regulation of corporate due diligence obligations in Germany. The Act in its adopted version is a political compromise. Its strength is the enforcement mechanism; its key weakness relates to the third pillar of the UNGPs, since it does not improve access to justice in the case of human rights abuses by or involving German companies abroad. The main reason for this shortcoming is that the Act covers indirect suppliers only, if the company "has actual indications that suggest that a violation of a human rights-related or an environment-related obligation at indirect suppliers may be possible (substantiated knowledge)" (section 9 para. 3). The other reason is the provision in section 3 para 3 which stipulates that "a violation under this Act does not give rise to any liability under civil law." Thus, the possibilities of those affected by human rights abuses to sue for damages have not been extended. Overall, the legal situation for victims of corporate human rights abuse remains unchanged, making redress for those affected in transnational cases practically impossible.

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4 Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains of 16 July 2021, https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3 (accessed 03.09.2021).

5 German Institute for Human Rights (2020), Regulate compliance with human rights standards by companies. Expectations regarding a human rights due diligence Act [Die Einhaltung menschenrechtlicher Standards durch Unternehmen gesetzlich regeln. Erwartungen an ein Sorgfaltspflichtengesetz], available in German only: https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Stellungnahme_Die_Einhaltung_menschenrechtlicher_Standards_durch_Unternehmen_gesetzlich_regeln.pdf; German Institute for Human Rights (2021), Opinion in the context of the hearing of associations regarding the Federal Ministry of Labour and Social Affairs' draft legislation on corporate due diligence in supply chains of 28 February 2021 [Stellungnahme im Rahmen der Verbändeanhörung zum Referentenentwurf des Bundesministeriums für Arbeit und Soziales. Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten vom 28. Februar 2021], available in German only: https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Stellungnahme_im_Rahmen_der_Verbaendeanhoerung_zum_Referentenentwurf_des_BMAS.pdf (both accessed 03.09.2021).

6 German Institute for Human Rights (2020), Regulate compliance with human rights standards by companies. Expectations regarding a human rights due diligence Act [Die Einhaltung menschenrechtlicher Standards durch Unternehmen gesetzlich regeln. Erwartungen an ein Sorgfaltspflichtengesetz], pp. 6-8; German Institute for Human Rights (2021), Opinion in the context of the hearing of associations regarding the Federal Ministry of Labour and Social Affairs' draft legislation on corporate due diligence in supply chains of 28 February 2021 [Stellungnahme im Rahmen der Verbändeanhörung zum Referentenentwurf des Bundesministeriums für Arbeit und Soziales. Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten vom 28. Februar 2021], pp. 16-17 (both accessed 03.09.2021).

To improve access to effective remedy for affected individuals and groups, the German government should now advocate for a strong EU regulation to include civil liability of companies involved or linked to in human rights abuses. In addition, an EU regulation should contain possibilities to shift or facilitate the burden of proof, which currently is a major obstacle for access to effective remedy.

The third pillar of the UNGP has been consistently treated as a low priority in the NAP as well. Measures to improve access to remedy for victims of human rights abuses by or involving German companies have been limited to

- a comprehensive, but rather hard-to-find brochure[7] in English and French on the Ministry's website informing potential plaintiffs about access to German courts;
- a research project on the potential of alternative dispute resolution in the field of business and human rights; and
- the establishment of a working group in the industry-wide dialogue of the automotive industry with the goal to establish a cross-company grievance mechanism, currently developing a mechanism in Mexico.

Proposed recommendations

- Improve access to effective remedy for victims of human rights abuses caused by or contributed to by companies throughout their value and supply chain by advocating for a strong EU regulation, ensuring that the regulation removes obstacles to access to justice, including civil liability of companies and redress for human rights abuses for those affected.

- Set aside sufficient resources for the designated enforcement authority (Federal Office for Economic Affairs and Export Control, BAFA) and ensure transparency in BAFAs handling of their enforcement duties.

- Evaluate the implementation of the German Act on Corporate Due Diligence Obligations and assess its contribution to the implementation of the UNGPs; involve all relevant stakeholders and consider successive adjustments, including the expansion of due diligence obligations.

- Design an ambitious second NAP to accompany the implementation of the Act on Corporate Due Diligence Obligations.

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[7] Ministry for Justice and Consumer Protection (2020), The responsibility of business enterprises for human rights violations: Access to justice and the courts. https://www.bmjv.de/SharedDocs/Publikationen/DE/Menschenrechtsverletzungen_Wirtschaftsunternehmen_engl.pdf?__blob=publicationFile&v=3 (accessed 03.09.2021).

3 Non-discrimination and prohibition of advocacy of national, racial or religious hatred (arts. 2, 3, 20 and 26)

Racial profiling

cf. State Report, pp. 22-23

Background

In 2015, the Committee on the Elimination of Racial Discrimination (CERD) criticized the 'extremely broad scope' of section 22 (1a) of the Federal Police Act (*Bundespolizeigesetz*). The Committee was concerned that the provision leads *de facto* to racial discrimination, especially as the German delegation had explained that the criteria used by the police when applying the provision "involves notions such as a 'feel for a certain situation' or 'the person's external appearance'."[8] On occasion of its 6th visit to Germany in 2019, the European Commission against Racism and Intolerance (ECRI) renewed its concern about the broad powers of the Federal Police to stop people without any suspicion and recommended that the police authorities of the Federation and the *Länder* commission and participate in a study on racial profiling with the aim of developing and implementing measures that eliminate existing and prevent future racial profiling. Moreover, ECRI recalled that in the recent years also the Council of Europe's Commissioner for Human Rights and the UN Expert Group on People of African Descent had voiced concerns about the numerous reports of racial profiling by the German police.[9] In a 2017 survey conducted by the European Union Agency for Fundamental Rights, 34 per cent of the responding immigrants or descendants of immigrants from Sub-Saharan Africa reported having been stopped by the police in the five years prior to the survey, and over 40 per cent of them (14 per cent of all responding immigrants or descendants of immigrants from Sub-Saharan Africa) believed they were stopped because of their immigrant or ethnic minority background.[10]

Section 22 (1a) of the Federal Police Act allows the Federal Police to stop and question, demand to see the identity papers of, and visually inspect any items carried by any person at an airport, or on a train or within the territory of a railway station, provided that knowledge of the situation or border police experience afford grounds for the assumption that the respective facility is used for unauthorized entry into the federal territory. This provision already came under criticism while it was being enacted in 1998, at a public hearing at the Bundestag. Experts at the hearing argued that the provision creates an indefinite non-judiciable authorization that would allow police to carry out 'selective' checks on individuals based on external characteristics such as skin colour, particularly as the wording of the provision contained no

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8 Committee on the Elimination of Racial Discrimination (2015): Concluding observations on the combined nineteenth to twenty-second periodic reports of German, no. 11, online: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsv4qujPA8qSE3O3exJU3P3wgutKMsq%2b7wnmDaL0QG%2bCrqz3WvutmtVfB6y0GzXGYzlb14Z8mkSN66F26sFOGGKy4FLsqrYqhqFFqEI2aUrdXdlmlBMqnWzLzyypNzGqRUw%3d%3d

9 European Commission against Racism and Intolerance (2020): ECRI Report on Germany, Sixth Monitoring Cycle, p. 33, online: https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle-/16809ce4be

10 EU FRA (2017): Second European Union Minorities and Discrimination Survey, Main Results, p. 69ff., online: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf

restrictions in this regard.[11] In 2020, the Federal Police is reported of having carried out around 263,000 checks of persons on ground of section 22 (1a) of the Federal Police Act by which only 1,760 instances of alleged illegal entry or illegal residence were detected.[12]

Assessment by the German Institute for Human Rights

The protection afforded by the prohibition of discrimination under German constitutional law and international human rights law is not limited to protection against legal provisions which, by their very wording, implement unequal treatment. It also takes effect when legal provisions ultimately lead to discrimination. Under the case law of the Federal Constitutional Court[13] and of the European Court of Human Rights (ECHR)[14], the legislature has an obligation to protect against de-facto discrimination. ICERD, too, makes it clear that at issue is whether laws "have the effect of creating or perpetuating racial discrimination".[15] Analogously, checks carried out by police forces can violate German and human rights law even if those checks are not motivated by racist views.[16]

With regard to section 22 (1a) of the Federal Police Act, German courts have held that checks conducted by police without reasonable suspicion on the basis of skin colour can never be justified. What is more, courts have found that a violation of German constitutional law does not only arises when the unequal treatment is exclusively or overwhelmingly linked to the person's sex, parentage, race, language, homeland and origin, faith or religious or political opinion but also when an impermissible differentiating characteristic is just one of a number of factors whose consideration motivates a decision to treat persons unequally.[17]

Similarly, CERD's recently published General Recommendation No. 36 defines racial profiling as "the practice of law enforcement relying, to any degree" [emphasis added] on such characteristics,[18] thus, specifying its earlier recommendation "to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion".[19]

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11 Hendrik Cremer (2013): Racial Profiling – Menschenrechtswidrige Personenkontrollen nach § 22 Abs. 1a BPolG, p. 17, online: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Studie/Racial_Profiling_Menschenrechtswidrige_Personenkontrollen_nach_Bundespolizeigesetz.pdf.

12 Deutscher Bundestag (2021): Problematik des Racial Profiling und anlasslose Kontrollen der Bundespolizei im Jahr 2020. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Dr. André Hahn, Gökay Akbulut, weiterer Abgeordneter und der Fraktion DIE LINKE, Drucksache 19/28335, pp.3-4, online: https://dip21.bundestag.de/dip21/btd/19/283/1928335.pdf

13 BVerfG (2008): Beschluss vom 18.06.2008, Az. 2 BvL 6/07, Rn. 48f.

14 EGMR, Große Kammer (2007): Urteil vom 13.11.2007, Antragsnummer 57325/00 (D.H. und andere gegen Tschechien), insbesondere Ziffer 175, 185, 193.

15 Art. 2 Para 1 c) ICERD

16 Deutsches Institut für Menschenrechte (2020): Racial Profiling: Bund und Länder müssen polizeiliche Praxis überprüfen. Zum Verbot rassistischer Diskriminierung. https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Stellungnahme_Racial_Profiling_Bund_Laender_muessen_polizeil_Praxis_ueberpruefen.pdf.

17 Judgments of Koblenz Higher Administrative Court of 21 April 2016 – 7 a 11108/14, North Rhine-Westphalia Higher Administrative Court of 7 August 2018 – 5 A 294/16.

18 Committee on the Elimination of Racial Discrimination (2020): General recommendation No. 36: Preventing and combating racial profiling by law enforcement officials, CERD/C/GC/36, para. 18, online: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/CERD_C_GC_36_9291_E.pdf

19 Committee on the Elimination of Racial Discrimination (2005): General recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, pp. 98-108 from A/60/18, para. 20. Online: http://www2.ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf (Stand: 11.11.2015).

The German provision in question governs police checks conducted to prevent or stop the illegal entry of persons to the country. The law implies that a person's residence status can be determined on the basis of that person's phenotypic characteristics, even if this relies on a combination with other characteristics. Seen in this light, the provision itself is worded in a way that gives rise to discrimination. The message that it sends to the police runs counter to the prohibition of racist discrimination.

Proposed recommendations

- Repeal section 22 (1a) of the Federal Police Act and enact legislation banning racial profiling.
- Review similar legal provisions in the police acts of the *Länder* with respect to whether their application leads to racial profiling.
- Establish independent police complaint bodies to deal with allegations of racist discrimination and ill-treatment.

4 Intersex Children (arts. 7, 9, 17, 24 and 26)

cf. State Report, pp. 37-38

Background

In Germany, the medical practice of performing sex-assignment or sex-"normalisation" surgery on children, often shortly after birth, to modify the appearance and the function of the child's sex characteristics to fit into a binary sex classification system was permissible even in the absence of a medical indication for the procedure until the beginning of 2021. After clear criticism from UN treaty bodies,[20] the German Institute for Human Rights[21] and civil society organisations, the German legislator adopted a new law in May 2021: the Act for the Protection of Children with Variations of Sex Characteristics.[22] With a few exceptions, the new legislation bans the performance of targeted sex-adaption procedures on intersex children.

Assessment by the German Institute for Human Rights

The Institute welcomes the new law, as it reinforces the right of children to gender self-determination and the legal position of children as own rights holders. Still, there is need for improvement in some areas in order to strengthen the protection of intersex children. For the few exceptional cases, in which surgery is still legal, the law provides for a hearing by an interdisciplinary commission. However, this commission

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[20] UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Germany, 09 Mar. 2017, para. 24 (d) and (e) (CEDAW/C/DEU/CO/7-8); UN Committee against Torture, Concluding observations: Germany, 12 Dec. 2011, para. 20 (CAT/C/DEU/CO/5); UN Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Germany, 13 May 2015, para. 38 (d) (CRPD/C/DEU/CO1); UN Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Germany, 27 Nov. 2018, paras. 24 and 25 (E/C.12/DEU/CO/6); European Parliament, B8-0101/2019.

[21] See for more details Parallel Report to the Committee on the Rights of the Child on the Combined 5th and 6th Periodic Reports of the Federal Republic of Germany, pp. 26 and following. (https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/BERICHT/Parallel_Report_CRC_October_2019.pdf)

[22] Gesetz zum Schutz von Kindern mit Varianten der Geschlechtsentwicklung, Bundesgesetzblatt Teil I 2021 Nr. 24 vom 21.05.2021, https://www.bgbl.de/xaver/bgbl/start.xav?start=//*%5B@attr_id=%27bgbl121s1082.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s1082.pdf%27%5D__1629469403841.

so far includes neither persons who represent the interests of the affected child nor qualified intersex persons. Moreover, the law does not yet take into account the need for a central register that would facilitate access to patient records for affected persons, even after years or decades. Also, the so-called bougienage has still not been banned.

Proposed recommendations

- Specify the individual steps currently being taken – in view of the gravity of the irreversible interventions on children with variations in sex characteristics – to ensure that the interests of children who are born intersex are represented in all cases.
- Inform the Committee when and through what measures – aside from the extension of the retention period for patient records – the State party plans to ensure that persons affected can obtain access to their patient records.
- Include the prohibition of bougienage as a method of treatment for children who are incapable of giving consent must urgently be explicitly standardised in the law.

5 Right to life, prohibition of torture and other cruel, inhuman or degrading treatment or punishment, liberty and security of person, and treatment of persons deprived of their liberty (arts. 6, 7, 9, 10 and 24)

Children deprived of liberty

New issue - no details in State Report or LOIPR

Background

About 250,000 children residing in Germany do not live with their family of origin.[23] Recent years have seen a proliferation of alternative care arrangements and an increase in the use of deprivation-of-liberty measures (DoLM). Under the United Nations' Convention on the Rights of the Child (UNCRC), no child may be deprived of their liberty unlawfully or arbitrarily. DoLM must be used in conformity with the law and only as a measure of last resort and of the shortest appropriate duration. Article 41 of the UNCRC also clearly states that nothing within its own provisions can be taken as limiting provisions of national or international law more conducive to the realisation of children's rights. This is of particular importance here, as Article 14 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) stipulates an absolute prohibition of DoLM on the grounds of disability.

The provision of services supporting the upbringing of children is addressed in sections 27–35 of the Eighth Book of the Social Code (SGB VIII), which governs

[23] Number encompasses support services under SGB VIII §33–35, for a breakdown see Destatis (2021): Familie, Lebensformen und Kinder 2021, p. 70, Fig. 1.

children and youth services. This Book's purpose is to protect the well-being of children (*Kindeswohl*) (section 8a SGB VIII) and their right to the promotion of their development and to education to become be self-determined, responsible and socially competent individual (section 1 (1) SGB VIII). An entitlement to educational support services exists if a child's upbringing is not conducive to their well-being (section 27 SGB VIII).[24]

A Civil Code provision (section 1631b BGB) introduced in 2017 made DoLM (*freiheitsentziehende Maßnahmen*) against children not living with their families subject to family court approval.[25] Previously, family court approval was necessary only upon placement in a custodial or locked facility (*freiheitsentziehende Unterbringung)*. A guardian ad litem must be appointed in either case.

The explanatory memorandum for the amending legislation defines DoLM as "…[measures] that, for a prolonged period or regularly, deprive persons of liberty by means of a mechanical apparatus, medication or otherwise. As generally understood, this term might cover physically holding someone, restraints, sedation, the use of chair-mounted lap-trays, bedrails, straps, preventative clothing, or confinement in so-called time-out rooms, i.e. protective spaces intended to reduce aggression and avoid any intensifying stimuli."[26] The memorandum also says "...a variety of types [of DoLM] are used in a variety of ways both in child and youth psychiatric clinics and in institutions of children and youth services and disability services."[27] Court approval is normally limited to six months but can extend to twelve in exceptional cases.[28]

Section 1631b BGB establishes a link between the child's well-being and the DoLM and identifies the use of a DoLM to avert a danger to the child or another person as permissible. It also indicates that other purposes may be permissible though, without specifying these. As a result, we have seen considerable variation in the provision's implementation in practice depending on the understanding of *Kindeswohl* (best interests vs. well-being) and attitudes of the professionals involved.

Assessment by the German Institute for Human Rights

A review of the legality of various aspects relating to custodial sentences and closed custodial settings custodial sentences (deprivation of liberty) and closed custodial settings is decidedly necessary. In 2014, the UN Committee on the Rights of the Child emphasised in its Concluding Observations on Germany's third and fourth state report that deprivation of liberty should be used with children only as a measure of last resort and for the shortest possible time. In that regard, the Committee recommended that Germany should take all necessary steps to expand the possibilities for alternative

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[24] Author's note: under a May 2021 amendment of the SGB VIII, children with and without disabilities will fall within the competence of the same authorities as of 2027.

[25] cf. Deutsches Institut für Menschenrechte (2016): Stellungnahme zum Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz eines Gesetzes zur Einführung eines familiengerichtlichen Genehmigungsvorbehaltes für freiheitsentziehende Maßnahmen bei Kindern.

[26] For the original German see: Deutscher Bundestag (2017): Entwurf eines Gesetzes zur Einführung eines familiengerichtlichen Genehmigungsvorbehaltes für freiheitsentziehende Maßnahmen bei Kindern, Drucksache 18/11278, p. 14. A 2015 federal court ruling held periods over 30 minutes to constitute deprivation of liberty: BGH (2015): Beschluss vom 7. Januar 2015, XII ZB 394/14, para. 22; c.f. this Higher Regional Court ruling: OLG Hamburg (2020): Beschluss vom 17.11.2020, 12 UF 101/20, paras. 21-25.

[27] Deutscher Bundestag (2017): Entwurf eines Gesetzes zur Einführung eines familiengerichtlichenGenehmigungsvorbehaltes für freiheitsentziehende Maßnahmen bei Kindern, Drucksache 18/11278, 22 February 2017, p. 14, https://dserver.bundestag.de/btd/18/112/1811278.pdf

[28] For original German, see https://www.gesetze-im-internet.de/bgb/__1631b.html (06 Jun. 2021).

sentences, such as probation or community service.[29] General Comment No. 35 of the CCPR also states that deprivation of liberty should be used only as last resort.[30] However, this has not led to a decline of the number of children and adolescents, with or without disabilities, who are restrained or deprived from their liberty.

Proposed recommendations

- Take immediate action to end deprivation of liberty within private and/or social institutions, such as child and youth welfare institutions, institutions for children with disabilities and child and youth psychiatry.[31]
- Children in care must have access to (and must know about) effective and impartial mechanisms for complaints or concerns regarding their treatment or the conditions of placement. Complaints should be dealt with in a consultative and confidential manner, with feedback, implementation and further consultation.
- Take action to ensure the provision and involvement of a guardian ad litem (*Verfahrensbeistand*) for the child.
- Ensure the protection of all children against wrongful deprivation of liberty by third parties, including through preventive institutional frameworks, including education.
- Ensure binding professional standards securing the participation of all children (including children with disabilities) in all actions concerning children.
- Develop and implement comprehensive data collection systems in relation to the placement of children in custodial and custodial measures and ensure that any violations of children's rights are addressed at the federal and Länder level.
- Engage in awareness raising and training on this issue for all persons who work with children as well as awareness raising for children and their families.
- Taken action at the political level to strengthen the rights of children to participate and have their complaints be heard. Children have the right to express their views as to what high-quality care involves and, should their rights be violated, they should be able to bring complaints to an appropriate body; children must be included in all stages of legal and systemic/structural change processes. DoLM must not be employed as a means of discipline whose use is a priori acceptable across entire structures, for instance, in social work.

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29 UN Doc CRC/C/DEU/CO/3-4, para. 75. See also National CRC Monitoring Mechanism (2021): Children´s Rights and Alternative Care. Day of General Discussion, September 2021 .2021). https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/PDF/Sonstiges/National_CRC_Monitoring_Mechanism_Childrens_Rights_and_Alternative_Care.pdf

30 UN Doc CCPR/C/GC/35, para. 19.

31 Following UN-Doc A/HRC/40/54, para. 69.

Residential care homes for older persons, institutions for persons with disabilities and psychiatric institutions

cf. State Report p. 45-52

Background

Involuntary hospitalisation as well as measures involving physical or medical restraints can be based on guardianship law which is embedded in the German Civil Code (*Bürgerliches Gesetzbuch*); with approval of a court, a person's guardian (*Betreuer*) may consent to such measures if the person concerned is considered to pose a danger to her/himself and to lack free will. The imposition of measures of deprivation of liberty can also be based on the mental health laws of the 16 German *Länder* (known collectively as the *Psychisch-Kranken-Gesetze*) if the person concerned is considered to pose a danger to themself or to others. Whilst the *Länder* are revising their mental health laws in the light of the judgment of the Federal Constitutional Court of 24 July 2018, which held that provisions on restraint in the states of Baden-Württemberg and Bavaria violated the fundamental right to freedom of the person,[32] the Federal Government reformed guardianship law, but has not included a substantial revision of either the provisions concerning involuntary hospitalisation and involuntary treatment (inter alia seclusion and restraint) or those concerning sterilisation.

In January 2020, the results of a research project funded by the Federal Ministry of Health entitled "Avoiding coercive measures in the psychiatric care system" were published. Key recommendations include – inter alia – systematic data collection, education and training of personnel, involvement/deployment of peers and the conclusion of treatment agreements, as well as person-centred, individualised support that transcends service providers.[33]

Assessment of the German Institute for Human Rights

The provisions on involuntary hospitalisation and treatment in guardianship law are discriminatory towards persons with disabilities and do not provide for the will and preferences of the person concerned to be sufficiently taken into account. The mental health laws of the *Länder* still have to be scrutinized with regard to their insufficient conformity with the UN-CRPD with active participation of persons with disabilities. Although the UN Committee on the Rights of Persons with Disabilities has recommended that Germany prohibit the use of physical and chemical restraints in care settings for older persons and in institutions for persons with disabilities,[34] these practices continue.[35] There are de facto structural deficits in health and psychiatric care that effect the degree of compliance with the principle that coercion should be used only as a last resort:[36] alternative measures are not sufficiently available, support is not sufficiently person-centred and often the various services are not interlinked,

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[32] Federal Constitutional Court (Bundesverfassungsgericht) (2018): Judgment, 2 BvR 309/15, 24 July 208. English translation online at: http://www.bverfg.de/e/rs20180724_2bvr030915en.html.
[33] https://www.bag-gpv.de/fileadmin/downloads/ZVP_Gesamtbericht_final.pdf
[34] UN Doc. CRPD/C/DEU/CO/1: para. 34.
[35] With regard to psychiatric facilities, see: Deutsches Institut für Menschenrechte (2018): Entwicklung der Menschenrechtssituation in Deutschland Juli 2017 – Juni 2018. Bericht an den Deutschen Bundestag gemäß § 2 Absatz 5 DIMRG, Kapitel 3: Zwang in der allgemeinen Psychiatrie für Erwachsene, S. 57-93: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Menschenrechtsbericht_2018/Menschenrechtsbericht_2018.pdf
[36] UN Doc. CCPR/C/GC/35, para 19.

due to the fragmentation of the social legislation.[37] Older persons and persons with disabilities are not given accessible and comprehensible information on their treatment, and the interpretation of “danger to oneself or others” and “medical necessity” varies widely,[38] particularly when it comes to persons with psychosocial disabilities. Additionally, there is a lack of complaint mechanisms for inpatient and outpatient care. From a human rights angle, it is important to establish a system of supported decision-making which is centred on the person concerned.

Proposed Recommendations

- Systematically collect data differentiated according to type of restraint/other involuntary treatment, duration, facility, age and gender.
- Include human rights approach as a topic in obligatory educational curriculum for medical and legal professionals and nationwide/comprehensive/systematic training provided for current staff.
- Ensure that treatment is carried out only with the fully informed consent of the person concerned.
- Ensure that all facilities designed to serve persons with disabilities are effectively monitored by independent authorities, which should have a legal basis in regional care home legislation and guarantee for a human rights approach according to Art. 16 (3) CRPD.
- Establish an independent complaint mechanism for persons who receive care at home or in institutions.
- Review the existing guardianship-law provisions governing involuntary commitment, restraint and other forms of involuntary treatment and sterilisation with respect to their conformity with human rights law
- Develop and implement measures as recommended by the project “Avoiding coercive measures in the psychiatric care system“.
- Strengthen community-based services.

6 Treatment of aliens, including refugees and asylum seekers (arts. 7, 9, 10, 13, 17)

The placement of detainees in prisons pending deportation

New issue - no details in State Report or LOIPR

[37] See for reports from practice from medical associations: written submission to draft bill in guardianship law by „ackpa“ and „Bundesdirektorenkonferenz“ (2020): https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Reform_Betreuungsrecht_Vormundschaft.html

[38] UN Doc. A/HRC/44/48, para. 32.

Background

In August 2019, the German legislator amended section 62a (1) of the German Residence Act (*Aufenthaltsgesetz*), which governs the detention of persons awaiting deportation.[39] Until then, this subsection provided that detention of persons pending deportation should take place as a rule in specialised detention facilities. The amended subsection now stipulates that persons awaiting deportation must be accommodated separately from prisoners serving sentences for criminal offences. This means that it is possible to detain migrants in ordinary prisons provided that they are spatially separated from the other detainees. This is in contradiction with what is known as the separation requirement from article 16 (1) of the EU Return Directive 2008/115/EC, the wording of which is essentially identical to that in the previous version of the German provision. The amending legislation cited above suspended this separation requirement for a period of nearly three years, at the end of which, on 1 July 2022, the former version of the law will come back into effect.[40]

The rapid increase in the number of persons seeking asylum in 2015 was cited as the reason for amending the law.[41] Accordingly, the existing capacities of facilities for detention pending deportation is significantly overburdened due to the disparity between the number of persons under a final deportation order and the number of places in such facilities. This overcrowding is seen as a major bottleneck that prevents the enforcement of the obligation to leave the country. The German government believes that the suspension of the separation requirement will allow for the provision of an additional 500 places to be made available in prisons until specialised facilities can be expanded to provide sufficient capacity.

Assessment by the German Institute for Human Rights

In the view of the German Institute for Human Rights, the suspension of the separation requirement and the ensuing detention of migrants in prisons does not comply with European law and human rights obligations. The separation requirement stems from the principle that detention pending deportation does not constitute a punishment and therefore should not take place in prisons.

From the perspective of international human rights law, the separation requirement is derived in particular from articles 9 and 10 of the ICCPR. General Comment No. 35, on article 9 of the ICCPR, states that any necessary immigration detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons.[42]

The UN Working Group on Arbitrary Detention emphasised that the detention of asylum seekers or other irregular migrants must not take place in facilities such as

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39 Second Law on Improved Enforcement of the Obligation to Leave the Country (*Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht*), 15 August 2019, Art. 1 Nr. 22, available at https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl119s1294.pdf%27%5D__1570018239150

40 Second Law on Improved Enforcement of the Obligation to Leave the Country (*Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht*), 15 August 2019, Art. 6, 8 (see fn 42)

41 Deutscher Bundestag (2019): Entwurf eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht, Drucksache 19/10047, 10 May 2019, pp. 44-45, available at https://dip21.bundestag.de/dip21/btd/19/100/1910047.pdf

42 Human Rights Committee, General Comment No. 35, 16 December 2014, CCPR/C/GC/35, para 18.

police stations, remand institutions, prisons and comparable facilities, since these are designed for those within the realm of the criminal justice system.[43]

The Twenty Guidelines on Forced Return of the Council of Europe[44] call for specialised detention facilities that are equipped with trained staff, clean facilities, a freely accessible telephone, medical devices, educational and leisure rooms and the possibility for outdoor walks. The design and arrangement of the facilities must avoid giving the impression of a prison environment. The detention of migrants in ordinary prisons is not in line with these standards.

Proposed recommendations

- Repeal section 62a (1) of the German Residence Act and re-establish the separation requirement.
- Maintain the principle that placement in administrative detention is a measure of last resort when no other alternative is available.

Centralised facilities for the reception of asylum-seekers, the processing of their asylum claims and deportation after rejection of claims ("AnkER-Zentren")

New issue - no details in State Report or LOIPR

Background

In its responses to questions from the Committee, Germany described the measures taken to strengthen the protection of women, children and other vulnerable refugees in accommodation centres.[45] This must be seen in the context of the simultaneous expansion of mass accommodation and the impacts of this on persons living in these centres, especially the most vulnerable among them. According to the coalition agreement of March 2018, the German government aims at creating so-called AnkER[46] centres in order to centralise the relevant authorities and facilitate and speed up asylum and return procedures.[47] In 2021, the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge - BAMF*) reported the existence of 17 AnkER centres or comparable facilities, most of them in Bavaria.[48] The largest of these centres can accommodate up to 3,400 persons;[49] they are intended to accommodate asylum-seekers whose claims are being processed or have been rejected. Persons can be obliged to remain in these centres for up to 18 months and

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43 UN Working Group on Arbitrary Detention, Revised deliberation No. 5 on deprivation of liberty of migrants, 02. July 2018, A/HRC/39/45, para. 44.
44 Council of Europe, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 10, p. 34.
45 Response to the questions (CCPR/C/DEU/QPR/7) of the UN Human Rights Committee prior to the presentation of the seventh periodic report of Germany, 31 December 2019, p. 30f.
46 AnkER; derives from *Ankommen–Entscheidung–Rückkehr*, arrival–decision–return.
47 Coalition Agreement, 2018, p. 107, available at https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1 and Masterplan Migration, Federal Ministry of the Interior, Building and Community (BMI), 4 July 2018, Nr. 32, https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/migration/masterplan-migration.pdf?__blob=publicationFile&v=7
48 BAMF (2021): Evaluation der AnkER-Einrichtungen und der funktionsgleichen Einrichtungen,p. 17, https://www.bamf.de/SharedDocs/Anlagen/DE/Forschung/Forschungsberichte/fb37-evaluation-anker-fg-einrichtungen.pdf;jsessionid=31E466ADAAA35E987D39EB60E3961578.internet562?__blob=publicationFile&v=15
49 The AnkER centre in Bamberg has the largest capacity, https://www.regierung.oberfranken.bayern.de/aufgaben/192162/192168/156313/gebaeude/133234/index.html

under certain conditions, for as long as 24 months. For families, the maximum period is six months.[50]

Assessment by the German Institute for Human Rights

The German Institute for Human Rights is concerned about the length of stay and the conditions of accommodation in the AnkER centres. Mass accommodation facilities like the AnkER centres are often situated at the periphery of urban areas.[51] They are surrounded by fences, access is usually controlled by a security service, and visitors require permission to enter the premises.[52] There is therefore a risk that the access of persons living in the centres to education and health care and to legal and social services from outside the centres may be limited.

In July 2019, the Committee against Torture expressed its concerns about the AnkER centres, characterising them as institutions in which liberty is restricted. It noted a lack of information about how these centres are inspected and monitored to prevent torture and ill-treatment.[53]

The high number of persons and lack of privacy at these centres fuels conflicts and violence, putting persons at risk, especially women, children, and other vulnerable persons. There is also a risk that the living conditions and the lack of occupation and perspectives may have detrimental effects on the mental and physical health of the residents.[54] Outbreaks of contagious diseases, such as the Covid-19 pandemic, put the people in mass accommodation facilities at a high risk of infection because mandatory hygiene and distance rules cannot be observed. Entire facilities have been placed under quarantine when cases of infection are confirmed, with no individual assessment.[55] As well as amounting to a severe restriction on freedom of movement – and any such restriction must meet strict requirements – this also puts persons at a high risk of disease, endangering their lives and health.[56]

Proposed recommendations

- Avoid the use of mass accommodation facilities like the AnkER centres, and reduce the maximum length of obligatory stay in shared accommodations.

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50 § 47 of the Asylum Act (*Asylgesetz*)

51 According to an analysis of the Federal Office for Migration and Refugees from 2018, 31 % of shared accommodation centres are situated in rural areas, 23% of in industrial areas S. 8 https://www.bamf.de/SharedDocs/Anlagen/DE/Forschung/Kurzanalysen/kurzanalyse11_iab-bamf-soep-befragung-gefluechtete-wohnsituation.pdf%3F__blob%3DpublicationFile%26v%3D11; see also ECRE report, The AnkER Centres, p. 15f, https://www.asylumineurope.org/sites/default/files/anker_centres_report.pdf

52 See for example https://www.refugio-muenchen.de/ueber-uns/einblicke/ankerzentren/manching/

53 Committee against Torture, Concluding Observations on the sixth periodic report of Germany, 11 July 2019, CAT/C/DEU/CO/6, para. 28

54 See for example https://www.aerztederwelt.org/presse-und-publikationen/presseinformationen/2019/07/22/aerzte-der-welt-fordert-ende-des-pilotprojekts-ankerzentren

55 The Federal Institute for the Prevention and Control of Infectious Diseases (*Robert Koch-Institut*) strongly advises to create the spatial conditions at an early stage in order to avoid the quarantine of the entire accommodation and to separate persons with a higher risk of becoming seriously ill. https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/AE-GU/Aufnahmeeinrichtungen.html;jsessionid=F2DC32963DA3FB3DF6C51AFBD48C5523.internet101#doc14256998bodyText13

56 See for example Kießing, Andrea, Offene Fragen der (Massen) Quarantäne, July 2020, available at https://verfassungsblog.de/offene-fragen-der-massenquarantaene/

- Avoid quarantining an entire reception centre in the event of an outbreak of an infectious disease, and instead develop appropriate solutions for each case.

Family reunification for refugees and beneficiaries of subsidiary protection

cf. para. 23 LOIPR – no answer in State Report

Background

As outlined in the written submission of the German Institute for Human Rights for adoption of the "List of Issues Prior to Reporting" for Germany,[57] visas issued to members of the core family of beneficiaries of subsidiary protection on family reunification grounds are subject to a quota: since August 2018 their numbers have been limited to 1,000 per month. This follows a period of two and a half years in which the right to family reunification was completely suspended for this group of persons. Currently, the issuing of visas is linked to humanitarian factors, such as long separation of the family members or the involvement of children. Spousal reunification is generally excluded if the marriage took place after the beneficiary of subsidiary protection fled the home country.

Furthermore, unaccompanied minors recognised as refugees under the Geneva Convention still face restrictions with respect to family reunification. Under German law, the nuclear family of unaccompanied minors with refugee status does not include their siblings. A resident permit on family reunification grounds can only be granted to such siblings if necessary in order to prevent exceptional hardship and if accommodation is provided and living expenses are covered.[58] In cases of family reunification involving parents who bring along other minor children, many immigration offices expect the minor refugee to provide evidence that they have sufficient resources to maintain and accommodate the entire family. This leads to an increased number of visa refusals for underage siblings, often with the result that one parent is forced to stay abroad with the other children. In addition, if an unaccompanied minor refugee reaches the age of 18 during their asylum procedure or a subsequent visa procedure for parents and siblings, the refugee immediately loses the right to reunification with those family members.

Assessment of the German Institute for Human Rights

Even though approximately 11,400 persons were still awaiting reunification with their family members in Germany in December 2020,[59] the quota was and still is often not exhausted due to practical and administrative barriers and lacking procedural transparency.[60] In 2019, 11,133 family reunification visas were issued. In 2020, visa procedures were suspended from March until July due to the outbreak of the Covid-19

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57 Written submission of the German Institute for Human Rights to the 123th session of the Human Rights Committee for adoption of the "List of Issues Prior to Reporting" for the Federal Republic of Germany, April 2018, p. 10-11, available at https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICCPR/iccpr_state_report_germany_7_DIMR_Submission_LOIPR_en.pdf

58 § 36 (2) in conjunction with §§ 5 (1) No 1, 29 (1) No 2 of the Residence Act (*Aufenthaltsgesetz*).

59 https://dserver.bundestag.de/btp/19/19203.pdf, p. 25618.

60 Pro Asyl / Jumen (2021): Zerissene Familien- Praxisbericht und Rechtsgutachten zum Familiennachzug zu subsidiär Schutzberechtigten, https://www.proasyl.de/wp-content/uploads/PRO-ASYL_JUMEN_Gutachten_Familiennachzug_subSchutz_03-2021.pdf; Matthies, Verfahrensrechtliche Hürden im Familiennachzug für subsidiär Schutzberechtigte, JuWissBlog Nr. 2/2019 v. 10.1.2019, https://www.juwiss.de/2-2019/; https://www.proasyl.de/hintergrund/verweigerter-familiennachzug-ein-grundrecht-wird-buerokratisch-entstellt/

pandemic,[61] with the result that only 5,311 family reunification visas were issued throughout the year 2020.[62]

Moreover, the German government fails to answer the Human Rights Committee's question as to whether it has considered extending the understanding of "family" for the purpose of family reunification, especially with regard to siblings of unaccompanied minor refugees.

The Committee on Economic, Cultural and Social Rights already expressed concerns about the quota in 2018, as well as about the restrictions concerning family reunification for persons entitled to subsidiary protection and the hurdles that unaccompanied minors with refugee status had to overcome in order to reunite with their families.[63]

In April 2018, the European Court of Justice ruled in a case concerning the Netherlands that persons who arrive as unaccompanied minors and are recognised as refugees and reach the age of 18 during their asylum procedures have not lost their right to family reunification.[64] The court emphasised that the claim to family reunification must not depend on the duration of the proceedings, over which the persons concerned have no influence. Nevertheless, Germany did not change its regulations to allow family reunification for family members of persons arriving as unaccompanied minor refugees who turned 18 during the asylum or visa procedure.

Proposed recommendations

- Lift the quota on family reunification visas for family members of persons with subsidiary protection, increase the number of visas issued, and accelerate the procedures by reducing practical and administrative barriers.
- Define the siblings of unaccompanied minor refugees as members of the core family and allow them to be reunited with their siblings under the same conditions as their parents.
- Allow persons arriving as unaccompanied minor refugees who turn 18 during the asylum or the visa procedure to reunite with their family in accordance with the case law of the European Court of Justice

Registration of births

cf. State Report, p. 64

Background

Problems with the registration of the births of children born to refugees in Germany still exist. It is not unusual for registry offices to refuse to issue birth certificates for

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61 https://www.bmi.bund.de/SharedDocs/faqs/DE/themen/bevoelkerungsschutz/coronavirus/reisebeschraenkungen-grenzkontrollen/reisebeschraenkungen-grenzkontrollen-liste.html

62 https://dserver.bundestag.de/btp/19/19203.pdf, S. 25617.

63 Concluding Observations on the sixth periodic report of Germany, November 2018, para. 28 and 29, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuWx2r5QgrDoHhDa4HdzLZSD2zbo%2fzew8fG%2f%2fJWzgaIqrl%2fpQdKVEU%2beWBy15OCs%2f%2bnkU3s6ayod026StGVH8b0gDad0d4wZZ5%2fvp6F1W5k%2bvv

64 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0550&from=DE

such children if their parents are not able to present official documents as proof of identity. Furthermore, there are often long delays before such certificates are issued.

Assessment by the German Institute for Human Rights

Information obtained by the Institute indicates that problems with the issuance of birth certificates for children born to refugees occur throughout Germany.[65] Lengthy procedures can lead to significant problems regarding access to social and health services. The registry offices do not exhaust the available legal options: if parents are unable to present official documents as proof of identity, the offices can issue birth certificate on the basis of a legal affirmation by the parents. The German Institute for Human Rights is currently developing a website for this purpose, on which all relevant information on the right to immediate birth registration is collected and sensitively processed, especially for social workers and civil registrars.[66] Other barriers are, for example, the cost burden associated with requirement for certified translations of official documents. A specific barrier constitutes the legal requirement under section 87 (2) of the Residence Act (*Aufenthaltsgesetz*) that requires registry offices to transfer information about irregular migrants to immigration authorities.[67]

Proposed recommendations

- Ensure that every new-born child receives a birth certificate without delay and not later than four months after birth and that a certified register print-out is issued immediately for use in the interim period.

- Ensure that access to birth registration is free of discrimination, specifically by eliminating the requirement that authorities transfer personal data relating to foreign nationals to immigration authorities and by introducing a statutory basis for a needs-based entitlement to have the state assume the costs of required officially certified translations.

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65 The findings are based on problem reports from those affected and social counselling centres, exchange with medical associations and other NGOs, evaluation of literature and the press, and evaluation of public documents at state and local level.

66 See for more details: https://www.institut-fuer-menschenrechte.de/das-institut/gefoerderte-projekte/papiere-von-anfang-an (in German).

67 See for more details No papers - no birth certificate? Recommendations for registering children of refugees born in Germany, https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/POSITION/Position_Paper_18_No_Papers_No_Birth_Certificate_bf.pdf.