GERMANY

Legal provisions and political practices put persons at risk of human rights violations

Amnesty International Submission to the UN Universal Periodic Review, October 2012

AMNESTY INTERNATIONAL

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INTRODUCTION

In this submission, prepared for the UN Universal Periodic Review of Germany in April 2013, Amnesty International evaluates the implementation of recommendations that Germany supported during its previous UPR.

Amnesty International then expresses its concern regarding Germany's inadequately resourced national preventative mechanism to combat and prevent torture; and about provisions still in force that allow for the use of diplomatic assurances to return individuals suspected of involvement in terrorism-related activities to states where they would face a real risk of torture or other ill-treatment.

The submission also highlights concerns regarding the treatment of refugees, asylum-seekers and migrants; and about the inadequacy of investigations into alleged human rights violations by police.

FOLLOW UP TO THE PREVIOUS REVIEW

At the time of its first UPR in February 2009, Germany accepted a number of recommendations on issues that are key to improving the human rights situation in the country, including on racism and discrimination;[1] on migrants, asylum-seekers and minority groups;[2] and on the ratification and implementation of international human rights law and standards.[3]

Some positive steps have been taken by the government to give effect to these recommendations, including the establishment in 2009 of a National Preventive Mechanism as required by the Optional Protocol to the Convention against Torture. However, Amnesty International is concerned that the inadequate resources provided to it may prevent the mechanism from functioning effectively.

In another positive move, Germany has recently withdrawn its reservations to the Convention on the Rights of the Child, despite having rejected a recommendation to do so during its first Universal Periodic Review.[4] Amnesty International remains concerned, however, that the Convention is not fully implemented as regards unaccompanied or separated asylum-seeking children.

Much remains to be done as regards other issues on which Germany accepted recommendations during the first review. Amnesty International is particularly concerned about the lack of progress on issues facing migrants and asylum-seekers, such as the lack of effective protection for some asylum-seekers, including as regards the right to remain; the accelerated asylum determination procedure (the "Airport Procedure"); and forcible returns.

In Amnesty International's view, the 2009 UPR did not adequately address a number of key human rights concerns on issues such as the situation of migrants in Germany and the use of diplomatic assurances for the purpose of deporting "terrorist" suspects.

Finally, Amnesty International regrets that during the 2009 review, Germany rejected a

recommendation to strengthen efforts to prevent law enforcement officials from using excessive force and to put in place independent complaints mechanisms.[5] At the time of the review, Germany claimed that excessive use of force by police was uncommon and that sufficient complaints mechanisms were already available.[6] However, although some federal states have improved the independence of investigations in cases of alleged excessive use of force by police, no federal state has established an independent body to investigate such cases.[7]

NORMATIVE AND INSTITUTIONAL FRAMEWORK IN GERMANY

Germany has yet to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

Germany actively contributed to the elaboration of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. In its fifth periodic report to the Committee on Economic Social and Cultural Rights, Germany highlighted its contribution and its support of the principle of an individual complaints mechanism.[8] However, Germany further "pointed out the need for swift clarification of the questions that remained outstanding in relation to the operation of the complaints mechanism".[9]

In June 2012, Germany recognized the competence of the Committee on Enforced Disappearances under the International Convention for the Protection of All Persons from Enforced Disappearance to receive and consider communications from or on behalf of individuals.

NATIONAL PREVENTIVE MECHANISM

Germany ratified the Optional Protocol to the Convention against Torture in 2008, and established a national preventive mechanism, the National Agency for the Prevention of Torture, which came into force in July 2009.[10]

In Amnesty International's view, the National Agency for the Prevention of Torture is not adequately resourced and therefore not able to carry out its functions effectively and in line with the obligations under the Optional Protocol. At the federal level, one honorary director working on a voluntary basis and one paid research assistant are tasked with monitoring all places of detention. A separate Commission, established in September 2010, is tasked with monitoring places of detention at the federal state level, with four volunteer members and one paid research assistant. In 2010, the UN Special Rapporteur on torture stated that "[the] mechanism is evidently unable to ensure complete geographic coverage of all places of detention. Such [an] approach to the implementation of OPCAT is counter-productive since it does not take the problem of torture and ill-treatment in detention seriously and sets a bad example for other States." [11]

In its annual report 2010/2011, the National Agency for the Prevention of Torture itself underlined that it is inadequately equipped to fulfill its functions and to regularly visit

the several thousand detention places in Germany. It further stated that in order to carry out its work adequately, it would need at least 16 additional voluntary workers and increased funding.[12] On 31 August 2012, Hansjörg Geiger resigned from his position as head of the National Agency's Commission for the federal states over the issue of inadequate resources.[13]

DIPLOMATIC ASSURANCES

In the context of the first UPR of Germany, Amnesty International expressed concern about Germany's requests for "diplomatic assurances" when seeking to return individuals suspected of involvement in terrorism-related activities to states where they would face a real risk of torture or other ill-treatment.[14] The organization remains concerned that the government has not disclosed whether it still continues the previous practice of requesting such "assurances". Amnesty International is also concerned that legal provisions allowing for the use of "diplomatic assurances" in national security deportations, carried out by the Federal Ministry of the Interior, still form part of the administrative regulations enacted to the Residence Act. Under these regulations, the authorities can legally rebut evidence about the risk of torture or other ill-treatment on return that the individuals concerned would face by asserting that they can verify that the receiving country is in turn capable of complying with "the diplomatic assurances".[15]

LACK OF PROTECTION FOR ASYLUM-SEEKERS

Under section 34a, paragraph 2, of the Asylum Procedure Act, asylum-seekers who are deemed to have come from a "safe country of origin" or from a "safe third-country" have no right to remain in Germany pending the court determination of their appeal.[16] This is the case, for example, for asylum applicants seeking to resist removal under the Dublin II Regulation to another Dublin II participating state.[17] Thus, they risk being removed to a country where they could face a real risk of serious human rights violations without having had access to a fair and effective asylum-determination procedure or to an otherwise effective remedy to challenge their deportation.[18]

Amnesty International continues to be concerned about the accelerated asylum determination procedure (the "Airport Procedure"), as provided for in Section 18a of the Asylum Procedure Act. In most circumstances, foreigners entering Germany via an airport and making an asylum claim on arrival can be detained in the transit area while their claims are being processed if the authorities deem the country they come from a "safe country of origin", or if they do not possess a valid passport or other means of identification.[19] Asylum applicants processed through the "Airport Procedure" have a very short period to prepare for their asylum interview with the Federal Office for Migration and Refugees and only three days to challenge a negative decision. Amnesty International is concerned that vulnerable groups, such as unaccompanied or separated asylum-seeking children, may be subject to these procedures.[20]

Unaccompanied asylum-seeking children's claims are often dismissed on the grounds that their testimonies are "unreliable". Concern has also been expressed about the adequacy of the age-assessment procedures in age-disputed cases. Furthermore, unaccompanied or separated asylum-seeking 16 and 17 year-olds are treated as adults as far as reception needs are concerned and housed with adults.

Amnesty International is also concerned that the Asylum Procedure Act may not, in certain circumstances, prevent the extradition of refugees to places where they have a well-founded fear of persecution.[21]

PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

REFUGEES, ASYLUM-SEEKERS AND MIGRANTS

Amnesty International is concerned about Germany's frequent resort to detention for asylum-seekers whose claims have been dismissed. In 2011, around 7,000 persons, including asylum-seekers, "Dublin cases", and rejected asylum-seekers, were held in custody, some for the maximum period of 18 months.[22] This is giving rise to concern that in the majority of cases their detention contravenes international refugee and human rights law and standards, including EU law, according to which detention should be used only as a measure of last resort.

Furthermore, there are inadequate procedures in place in a number of federal states for the identification of the most vulnerable asylum-seekers, such as traumatized individuals or unaccompanied or separated children, as required by the EU Reception Conditions Directive.[23] For example, there are no mandatory medical checks on arrival in detention, with the exception of checks for tuberculosis. Amnesty International is also concerned about the lack of adequate accommodation for detained asylum-seekers who are not held separately from remand prisoners. This is especially the case for women awaiting deportation, in violation of Article 16 of EU Directive 2008/115/EC.[24]

On 18 July 2012, the Federal Constitutional Court ruled that section 3, paragraph 2 of the Asylum Seekers Benefit Act contravened the right to a dignified minimum existence, as enshrined in article 1 of the Basic Law, because the benefits for asylum-seekers were not enough to enable a life in dignity.[25] The Court ordered the legislature to immediately enact new provisions as part of the Asylum Seekers Benefits Act to secure a dignified minimum existence. Because of the urgency to guarantee asylum-seekers livelihood through a minimum subsistence, the Federal Constitutional Court has ordered a transitional arrangement that will apply until new provisions enter into force.

Some positive steps have been taken regarding migrants in an irregular situation, including amendments to the Residence Act to exempt education staff from the obligation to report a person's immigration status to the Office of Alien Affairs.[26] Further amendments to the Residence Act have improved the access of foreign nationals in an irregular situation to health services, in that hospitals are no longer required to inform the Office of Alien Affairs if migrants in an irregular situation seek emergency healthcare. However, accessing other medical treatment remains difficult. Even though migrants in an irregular situation are entitled to free medical services in case of acute illness, according to section 4 of the Asylum Seekers Benefit Law, the public authority that covers the cost of the medical treatment is obliged to report their identity to the Office of Alien Affairs. Migrants in an irregular situation therefore often do not access such services for fear of being deported.

EXCESSIVE USE OF FORCE BY POLICE

Amnesty International is concerned that cases of alleged ill-treatment by police or excessive use of force are not always investigated promptly, impartially, independently, adequately and effectively as required by international human rights standards.

One reason for this is that the identification of the alleged perpetrators can be difficult to establish. Except in the federal state of Berlin, police officers are not obliged to wear identity badges with their name or number. The federal state of Brandenburg has enacted a law that requires the federal authorities to introduce individual identification in January 2013. Amnesty International is concerned that the lack of a requirement for officers to visibly display some form of identity badge has led to impunity for some perpetrators of ill-treatment, particularly in the context of demonstrations or when the police have deployed special commands in abduction or terrorism cases.[27] Amnesty International has documented a number of cases in which allegations of ill-treatment could not be investigated as it was not possible to identify the alleged perpetrator.[28] The uniforms worn in these situations have markings showing which unit or group the officer belongs to, but do not identify the individual officer.

Furthermore, investigations into alleged ill-treatment by police in some cases fall short of obligations to ensure that all allegations of torture and other ill-treatment are promptly, thoroughly and impartially investigated by an independent body, and that the results of these investigations are reported publicly. Amnesty International has received credible reports that police officers alleged to have committed ill-treatment have been summoned for questioning by police officers from their own unit. Because there are no effective, independent police oversight bodies, the Public Prosecution Office has to rely on the police itself to investigate cases of excessive use of force by police officers.

Complaints against the police are often not investigated or not filed in the first place. Paragraphs 153, 160 and 163 of the Criminal Procedure Code state that the police and the Public Prosecution Office should start criminal investigations in cases of suspected ill-treatment or excessive use of force, not only if they receive a complaint, but also on their own initiative. However, as documented in a 2010 Amnesty International report on police ill-treatment in Germany, this often does not happen in practice.[29] Instead, investigations are only initiated once a person has filed a criminal complaint against the police.

Victims allegedly fail to file complaints against the police, either because they have no faith in the process, or because they fear that their complaints will be subject to counter-complaints by police. In its 2010 report, Amnesty International documented cases where there were credible allegations of ill-treatment, but where the victims had declined to file a complaint against the police. Amnesty International was repeatedly told by alleged victims and lawyers that - although they felt they had legitimate grievances against police officers - they did not intend to make a complaint because they felt that any such complaint would be unsuccessful. As well as not trusting the system, some said they were too afraid of reprisals to file a criminal complaint.[30]

RECOMMENDATIONS FOR ACTION BY THE STATE UNDER REVIEW

Amnesty International calls on the government of Germany:

Ratification of international human rights treaties

- Sign and ratify the International Convention on the Rights of Migrant Workers and Their Families and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

National Preventive Mechanism

- Ensure that the National Preventive Mechanism established under the Optional Protocol to the Convention against Torture is able to carry out its functions effectively and in line with the obligations under the Optional Protocol, including by ensuring it is adequately resourced.

Diplomatic Assurances

- Refrain from seeking and accepting diplomatic assurances purporting to mitigate the risk of torture or other ill-treatment, both in the context of extradition and deportation, from states where there are substantial grounds for believing that a person would be at risk of torture or ill-treatment upon return to the state concerned;

- Prohibit in national law, including by amending the administrative regulations governing the Residence Act, the invocation of diplomatic assurances against torture or other cruel, inhuman or degrading treatment as a means of addressing the risk of such abuse that a person would face if transferred to another state;

- Publish updated information on whether diplomatic assurances have been applied.

Lack of protection for asylum-seekers

- Ensure that the best interest principle is taking into consideration in any decision concerning child asylum applicants, including unaccompanied or separated asylum-seeking children;

- Repeal article 18a of the Asylum Procedure Act (known as the "Airport Procedure");

- Repeal article 34a, paragraph 2 of the Asylum Procedure Act and grant an effective remedy against decisions taken purportedly in compliance with the Dublin II Regulation.

Refugees, asylum-seekers and migrants

- Strictly comply with international refugee and human rights law and standards, including EU law, when considering whether to detain and maintain the detention of asylum-seekers, including in Dublin II cases;

- As recommended by the Committee against Torture in its concluding observations following the examination of Germany's 12th periodic report in 2011:

- Ensure mandatory medical checks and systematic examination of mental illnesses or traumatization of all asylum-seekers including the "Dublin cases" by independent and qualified health professionals upon arrival in all federal states detention facilities;
- Provide adequate accommodation for detained asylum-seekers separate from remand prisoners in all detention facilities;

- Exempt all public authorities that provide medical services for migrants in an irregular situation from the requirement to report the identity of the individual concerned to the Office of Alien Affairs, pursuant to section 87, paragraph 2 of the Residence Act;
- Enact new provisions to ensure the right to a dignified minimum existence for people who continue to live in Germany after their asylum claims have been dismissed and for migrants in other circumstances.

Excessive use of force by police

- Ensure full compliance with the required standards of prompt, impartial, independent, adequate, and effective investigations, by establishing an independent police complaints' mechanism that carries out all investigations in case of serious allegations of ill-treatment by police officers;
- Introduce individual identification for uniformed police officers and those who wear special gear.

ENDNOTES

[1] Human Rights Council. *Report of the Working Group on the Universal Periodic Review on Germany*, A/HRC/11/15, recommendations 81.9 (Finland), 81.11 (Netherlands), 81.12 (Pakistan), 81.13 (Iran, Chad, Algeria, South Africa, Brazil), 81.14 (Malaysia, Qatar), 81.15 (Ghana, Saudi Arabia), 81.17 (Iran, Djibouti), 81.18 (Cuba), 81.19 (Pakistan), and 81.20 (Algeria).

[2] A/HRC/11/15, recommendations 81.32 (Italy, Canada, Saudi Arabia), 81.36 (Canada), 81.37 (Egypt, Malaysia), 81.38 (South Africa, Canada, Pakistan, Mexico), 81.39 (Russia), 81.40 (Egypt), and 81.41 (United Kingdom).

[3] A/HRC/11/15, recommendations 81.3 (France), 81.6 (Pakistan, Iran), 81.7 (Pakistan) and 81.8 (Benin, United Kingdom).

[4] A/HRC/11/15. recommendation 81.4 (Brazil).

[5] A/HRC/11/15, recommendation 81.23 (Netherlands, Djibouti).

[6] Human Rights Council. *Addendum to the Report of the Working Group of the Universal Periodic Review – Germany,* A/HRC/11/15/Add.1, paragraph 23.

[7] There are specialized units in the following federal states: Baden-Württemberg, Bavaria, Mecklenburg-Western-Pomerania, Northrhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony and Saxony-Anhalt.

[8] *Implementation of the Covenant on Economic, Social an d Cultural Rights; Fifth periodic report submitted Germany,* E/C.12/DEU/5, 27 July 2010, paragraph 8.

[9] E/C.12/DEU/5, 27 July 2010, paragraph 8.

[10] Germany ratified the Optional Protocol to the Convention against Torture in August 2008. See Bundesgesetzblatt II 2008, Nr. 32. The National Preventive Mechanism was established by an organizational decree of the Federal Ministry of Justice. See Bundesanzeiger Nr. 182, S. 4277.

[11] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/13/39/Add. 5, 5 February 2010, paragraph 164.

[12] Federal Agency for the Prevention of Torture, *Annual Report 2010/2011*, pages 8 and 12.

[13] National Agency for the Prevention of Torture, Press release 7.9.2012, http://www.antifolterstelle.de/

[14] Amnesty International, *Germany: Amnesty International submission to the UN Universal Periodic Review,* Index: EUR 23/004/2008, page 3.

[15] Administrative Regulations governing the Residence Act no. 60.0.4.8 and 60.2.3.

[16] See Asylum Procedure Act (AsylVfG) in the version promulgated on 2 September 2008 (Federal Law Gazette I, p. 1798), last amended by Article 4 of the Act of 22 November 2011 (Federal Law Gazette I, p. 2586), available at http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html

[17] The Dublin II Regulation (Council Regulation 343/2003) is European Union secondary legislation, which three non-

Member States, namely, Iceland, Norway and Switzerland are also applying. Among other things, it establishes the

criteria and mechanisms for determining which state is responsible for examining an asylum application in cases

where the asylum-seeker has entered more than one Dublin II participating state.

[18] This has been the case for asylum seekers who have been removed to Greece, for example, under the Dublin II system. The importance of an effective remedy to contest removal on asylum and/or human rights grounds has been underlined by the Grand Chambers of the European Court of Human Rights (see, e.g. M.S.S. v Belgium and Greece) and of the Court of Justice of the European Union in Decision C-411/10 and C-493/10 – N.S. and M.E. (21.12.2011).

[19] The European Court of Human Rights has made clear that holding a person in the transit area of this nature amounts to a deprivation of liberty. *Amuur v France* (no. 17/1995/523/609, 20 May 1996); *Nolan and K v Russia* (no. 2512/04, 12 February 2009); *Riad adn Idiab v Belgium* (nos. 29787/03 & 29810/03, 24 January 2008).

[20] Amnesty International, Germany: *Briefing to the UN Committee against Torture 2011*, AI Index EUR/23/002/2011, part V, page 34; and *Concluding Observations of the Committee against Torture, Germany*, CAT/C/DEU/CO/5, 12 December 2011, paragraph 27.

[21] Section 4, Asylum Procedure Act, http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html. For more information please see *Germany: Amnesty International Submission to the UN Universal Periodic* Review of February 2009, Index: EUR 23/004/2008, available at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-056en.html.

[22] The figures relevant to each federal state can be found in the official response of the German Government to a Parliamentary Request by the Green Party, 5.9.2012, Bundestags-Drs.("printed papers") Nr. 17/10596. On the general issue of the increase of detention of "Dublin-cases", see the report from the EU-Commission to the European Parliament and the Council on the evaluation of the Dublin system (COM 2007 (299) final, 6.6.2007), page 9: "Member States have increasingly introduced custodial measures for persons subject to a transfer decision in order to prevent them from absconding before the transfer is carried out."

[23] Council Directive 2003/9/EC, 27 January 2003.

[24] Survey of PROASYL (January 2012) on the conditions of persons in custody pending deportation in Germany. See also ; *Concluding Observations of the Committee against Torture, Germany*, CAT/C/DEU/CO/5, 12 December 2011, paragraph 24.

[25] Federal Constitutional Court, judgment of 18 July 2012, 1 BvL 10/10 and 1 BvL 2/11.

[26] See Amnesty International Report 2012, POL 10/001/2012, Germany, section Migrant's rights, p. 156.

[27] Special Deployment Commands exist in all federal states as well as within the federal police. They are deployed for operations requiring special training and/or equipment.

[28] For examples, see Amnesty International, *Unknown Assailant. Insufficient Investigation into Alleged Ill-treatment by Police in Germany*, EUR 23/002/2010, July 2010; section on failures in accountability, page 34.

[29] Amnesty International: *Unknown Assailant. Insufficient Investigation into Alleged Ill-treatment by Police in Germany*, EUR 23/002/2010, July 2010, section on failures in accountability, page 42.

[30] Amnesty International: *Unknown Assailant. Insufficient Investigation into Alleged Ill-treatment by Police in Germany*, EUR 23/002/2010, July 2010, section on failures in accountability, page 32.

ANNEX

AMNESTY INTERNATIONAL DOCUMENTS FOR FURTHER REFERENCE[1]

Germany: Briefing to the Committee against Torture (Index: EUR 23/002/2011).

[1] All of these documents are available on Amnesty International's website: http://www.amnesty.org/en/region/germany

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