



**Deutsches Institut  
für Menschenrechte**

**National CRC Monitoring Mechanism**

## **Parallel Report**

to the Committee on the Rights of the Child  
on the Combined 5<sup>th</sup> and 6<sup>th</sup> Periodic Reports  
of the Federal Republic of Germany

**October 2019**

## **German Institute for Human Rights**

The **German Institute for Human Rights** is the independent National Human Rights Institution of Germany. It is accredited according to the Paris Principles of the United Nations (A-status). The Institute's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organizations. It is financed by the German Federal Parliament (Deutscher Bundestag). In addition, the Institute is specifically mandated to monitor the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established Monitoring Bodies for these purposes.

## **Preparation of the report**

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## National CRC Monitoring Mechanism

By ratifying the United Nations Convention on the Rights of the Child and its Optional Protocols, Germany committed itself to upholding the rights of the child. The German Institute for Human Rights, in its role as Germany's National Human Rights Institution, monitors and assesses the implementation of this United Nations convention in Germany. Thus in 2015, the Institute set up the National CRC Monitoring Mechanism, which is supported with funds from the Federal Child and Youth Plan by way of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth.

A major focus of the National CRC Monitoring Mechanism's work is on efforts to increase awareness of children's rights. When necessary, it also reminds individuals and institutions that work with children and youth of their obligation to comply with the terms of the Convention on the Rights of the Child. It provides advice on the interpretation of the Convention and its child-oriented implementation to political decision-makers at the federal and federal-state (Länder) levels, as well as courts, the legal profession, and civil society. It also acts to encourage and promote children's rights-based research.

The National CRC Monitoring Mechanism shares information and experience with the National Human Rights Institutions of other countries and informs the UN Committee on the Rights of the Child about the implementation of children's rights in Germany. It works closely with civil society organisations, government bodies, research institutions and, last but certainly not least, directly with children and young people themselves.

Further information about the about the work of the National CRC Monitoring Mechanism is available here:

- Website of the National CRC Monitoring Mechanism:  
<https://www.institut-fuer-menschenrechte.de/monitoring-stelle-un-krk/> (Deutsch)  
<https://www.institut-fuer-menschenrechte.de/en/national-crc-monitoring-mechanism/> (English)
- Short film "Was macht die Monitoring-Stelle":  
<https://www.institut-fuer-menschenrechte.de/v/322/> (Deutsch)  
<https://www.institut-fuer-menschenrechte.de/en/v/384/> (Englisch)



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# Introduction

## Significance of the Convention in Germany

The United Nations Convention on the Rights of the Child (also referred to as “the Convention” herein) entered into force in Germany 27 years ago. Those 27 years have seen numerous changes for the better in the ordinary federal law of this country, such as the adoption of legislation ensuring that children born in and out of wedlock have the same rights (1998), the Act to Prohibit Violence in the Upbringing of a Child (2000: *Gesetz zur Ächtung der Gewalt in der Erziehung*) and the Child Protection Act (2012: BKiSchG), to name just a few. The “image of the child” is changing. Children<sup>1</sup> are increasingly seen as autonomous rights-holders, no longer merely as the objects of adults’ decisions about upbringing. In some areas, children’s participation rights have even been enshrined in binding legislation at the federal, Länder and local level.

One important motor for these developments has been the dialogues between the United Nations and the Government of the Federal Republic of Germany prior to the current state-party reporting process,<sup>2</sup> in 1995, 2004 and 2014<sup>3</sup> Public awareness of children’s rights has strengthened the ability and resolve of civil society organisations, associations and initiatives in Germany to work towards their realisation. Numerous inquiries addressed to the National CRC Monitoring Mechanism (often shortened to the “Monitoring Mechanism” in this report) testify to the fact that political decision-makers and specialists are actively engaging with the Convention’s requirements and the protection, provision and participation rights of children.

In their coalition agreement, the parties forming current Federal Government announced their intent to incorporate the rights of the child into the Basic Law of the Federal Republic of Germany (*Grundgesetz*). As this would place children’s rights at the highest level in the hierarchy of laws, it has fuelled expectations that the legal foundation necessary in order for the circa 13 million<sup>4</sup> children in Germany to assert their rights is finally going to obtain the strength it needs to ensure that they can do so effectively and that they will in fact be recognised as the holders of their own rights – at least with respect to jurisprudence. Germany needs this, but it also needs, at long last, to have a clear policy on children’s rights combined with measures that clearly demonstrate the Government’s commitment to the realisation of the Convention.

This report, therefore, begins with a discussion of structures and institutions involved in the fulfilment of children’s rights, before turning to concrete examples of implementation – each touching on a general principle of the Convention – drawn from the real-life situations of children.

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<sup>1</sup> In this parallel report, the words “child” and “children” mean every human being below the age of 18, as defined in article 1 of the UN Convention on the Rights of the Child (CRC).

<sup>2</sup> The CRC Monitoring Mechanism produced an explanatory video and a publication that present the different phases of the State-party reporting procedure. Both of these can be retrieved by way of the following link: <https://www.institut-fuer-menschenrechte.de/monitoring-stelle-un-krk/staatenberichtsverfahren/> (German language only).

<sup>3</sup> A compilation of information and links to documents relating to the State-party reporting procedures is available on the website of the German Institute for Human Rights here: <https://www.institut-fuer-menschenrechte.de/menschenrechtsinstrumente/vereinte-nationen/menschenrechtsabkommen/kinderrechtskonvention-crc/>

<sup>4</sup> Cf. Statistisches Bundesamt (2019): Anzahl der minderjährigen Kinder in Familien in Deutschland von 2000 bis 2018. <https://de.statista.com/statistik/daten/studie/197783/umfrage/minderjaehrige-kinder-in-deutschland/> (retrieved: 29 Aug. 2019).

## Structures for the realisation of the Convention in Germany

This is the first parallel report to be submitted by the National CRC Monitoring Mechanism. The Monitoring Mechanism was set up within the German Institute for Human Rights in late 2015 following the Germany's last state reporting procedure at the United Nations. Other institutions dedicated to realising children's rights – the subject of a 2004 recommendation by the United Nations Committee on the Rights of the Child that was reiterated in 2014 – have still not been established in Germany. Yet such institutions/structures are essential to strengthening the impact of children's rights outside the world of the courts and their rulings. They include:

- a body at the national level to coordinate all government activities relating to children's rights, and corresponding structures at the Länder level
- a system for the regular collection of data on children's rights, making the assessment of progress in the implementation of individual children's rights possible
- child-friendly participation and complaint mechanisms for children throughout Germany to ensure that problems become visible, that children are heard and that due consideration is given to their concerns.

## General principles of the Convention on the Rights of the Child

In its combined fifth and sixth periodic reports on the United Nations Convention on the Rights of the Child, the Federal Government describes the realisation and strengthening of children's rights as a "central point of reference for state policy in Germany." A look at the realities of many children's lives makes it clear that there is still much to be done to complete the Convention's implementation.

The UN Committee on the Rights of the Child has singled out four articles in the Convention as providing general principles that express with particular clarity the recognition of children as the holders of their own rights. Our report presents four examples, each relating to one of these general principles of the Convention, that illustrate the fact that policymaking in Germany still attaches too little significance and pays too little attention to these principles:

- Article 2 "Principle of non-discrimination":  
Children of refugees whose parents cannot provide proof of identify often do not receive either a birth certificate or the, legally equivalent, certified registry extract (print-out).
- Article 3 "Principle of the best interests of the child":  
Opportunities for children to have contact with parents in prisons are not appropriate to their needs in most cases.
- Article 6 "Right of the child to life, survival and development":  
Children who are born intersex are not protected from medically unnecessary surgeries aimed at sex "normalisation" or sex assignment.
- Article 12 "Children's right to be heard and have their views taken into account" (participation):  
There are still no standards for the child-sensitive implementation of the requirement that children's views must be heard in family court proceedings, although a requirement of this kind has been established by statute.

## Children's policy challenges for Germany

Inclusion is a task for all of society. In our view, implementing inclusion as a policy goal to be fulfilled holds out great potential as a way of tackling the inequalities in the living conditions and opportunities of children that disadvantage some at the start of their lives and limit their prospects as adults. We have identified the following areas as among those posing policy challenges relating to children for Germany:

- Protection of children from violence
- Inclusive education
- Child poverty
- Protection of refugee children
- Participation in political and social life

Realising the Convention's requirements will require a resolute policy on children's rights that does not stop at incorporating children's rights into the Basic Law but also establishes structures that will strengthen the impact of children's rights in all areas of life. Providing and improving children's opportunities for social and political participation in this way can strengthen children in their role as holders of human rights.

## Structure of this report

This Parallel Report points up issues with the Convention's implementation deserving of special attention from the UN Committee on the Rights of the Child in the context of its upcoming constructive dialogue with Germany. Taken together, these issues underscore the necessity that all levels of government – the federal, the Länder and the local – take responsibility for the Convention's implementation.

Due to the Monitoring Mechanism's limited resources, this parallel report addresses only a limited selection of areas of implementation. The sections on specific areas of implementation share the same internal structure:

- Recommendations of the United Nations:  
Consisting of a brief presentation of relevant recommendations previously addressed to Germany by the Committee on the Rights of the Child (also referred to as "the Committee" in this report) or another treaty body.
- Depiction in the report submitted by Germany:  
Consisting of a brief summary of the information provided by Germany in its combined 5th and 6th periodic reports.
- Responses from civil society:  
Presenting the positions of the Network for the Implementation of the UN Convention on the Rights of the Child (referred to hereinafter by its shorter name, the National Coalition) or of other parallel reports. Wherever possible, reference is made to voices or initiatives of children and youth.
- Suggestions by the Monitoring Mechanism:  
Each section concludes with an assessment by the Monitoring Mechanism followed by suggestions of recommendations that the Committee might consider addressing to Germany.

# 1 Significance of the Convention in Germany

## 1.1 Legal status of the Convention

### Recommendations of the United Nations

Germany should ensure that the UN Convention on the Rights of the Child (also referred to below as “the Convention”) takes precedence over simple federal laws by incorporating it into the Basic Law.<sup>5</sup>

### Depiction in the reports submitted by Germany

In its reports, Germany refers to the principle of openness to international law in the jurisprudence of the Federal Constitutional Court and to the agreement in the coalition agreement between the parties forming the current Federal Government to create “an explicit fundamental right for children” in the Basic Law. According to the Government’s reports, a federal-Länder working group will submit a proposal as to the precise form of this by the end of 2019. There is no plan to incorporate the entire Convention into the Basic Law.<sup>6</sup>

### Responses from civil society

The National Coalition calls for the incorporation of the Convention’s general principles into the Basic Law.<sup>7</sup>

### Assessment of the Monitoring Mechanism

The German Bundestag and Bundesrat should incorporate children’s rights into the Basic Law. This would raise the level of awareness of the Convention and ensure that children’s rights would take precedence over non-constitutional law in Germany.

In the current debate, some of the federal states (Länder) have argued against an incorporation of children’s right to be heard and have their views taken into account (participation) (equivalent to Article 12 CRC) into the Basic Law, asserting that this right is already adequately reflected in Article 103, Section 1 of the Basic Law. This view has its origins in the erroneous assumption that the right contained in article 12 of the Convention is limited to a right to be heard in judicial or administrative proceedings.

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<sup>5</sup> UN, Committee on the Rights of the Child (2014): Concluding Observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 10; UN, Committee on the Rights of the Child (2004): Concluding Observations: Germany, UN Doc. CRC/C/15/Add.226, para. 10.

<sup>6</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), pp. 3–4.

<sup>7</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlung 1.

## SUGGESTIONS FROM THE MONITORING MECHANISM

1. The Committee should strongly urge Germany to incorporate the four general principles of the Convention into the Basic Law. In this context, the Committee should remind Germany that article 3, paragraph 1 of the Convention, on the best interests of the child as a primary consideration, and article 12 of the Convention, on the child's right to be heard and respect for the views of the child, are inextricably linked.
2. The Committee should call on the federal and Länder governments to take direct action to introduce the necessary changes in non-constitutional law once children's rights have been incorporated into the Basic Law.

## 1.2 A comprehensive policy for children's rights in Germany

### Recommendations of the United Nations

The Committee has urged Germany to take measures to formulate a comprehensive policy on children's rights, set up relevant bodies to develop programmes and projects and to ensure their evaluation and monitoring at the federal and Länder levels.<sup>8</sup>

### Depiction in the reports submitted by Germany

The Federal Government describes the realisation and strengthening of children's rights as a "central point of reference for state policy in Germany" and draws attention to the fact that policy responsibility can lie at the federal or Länder level depending on the policy area in question.

With regard to policy at the federal level, the Government's reports highlight the comprehensive concept of the Ministry for Family Affairs (GMFSFJ) for the protection of children from sexual violence, its "Youth strategy: Taking action for a youth-appropriate society" and the action plan of the Federal Ministry for Economic Cooperation and Development (BMZ) entitled "Agents of change – Children and youth rights in German development cooperation activities".<sup>9</sup> With regard to the Länder level, the Government refers the Committee to the first annex of its report for a description of relevant strategies. The annex in question contains information provided by all 16 Länder in response to a request from the Federal Government in connection with this reporting process. This was the first time such a request had been made. Three of the 16 Länder (Hesse, Rhineland-Westphalia and Schleswig-Holstein) reported having a charter or action plans for this issue.<sup>10</sup>

### Responses from civil society

The National Coalition calls for a comprehensive political implementation of the Convention encompassing both a "vertical" and "horizontal" dimension: vertical, in the sense of an effective implementation of children's rights in law on the federal and

<sup>8</sup> UN, Committee on the Rights of the Child (2014): Concluding Observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 11–12.

<sup>9</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), pp. 4–5.

<sup>10</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), Annex I, p. 6.

Länder and local level and horizontal, in the sense of implementation as cross-cutting task requiring action across ministries, rather than only within the portfolio for children, youth and family affairs. The National Coalition calls on the Committee to recommend that the federal government facilitate the development of relevant programmes and projects.<sup>11</sup>

### Assessment of the Monitoring Mechanism

Requesting the Länder to provide information on the strategies and measures they are employing to realise the Convention – which the Federal Government did for the first time in the context of Germany’s combined 5<sup>th</sup> and 6<sup>th</sup> periodic reports to the Committee – is a good way of reminding them of their implementation obligations. The Federal Government should make use of this possibility more often as part of a comprehensive policy for children’s rights. At present, however, there is no sign of any political will on the part of the Government to do so. The progress report “Child Rights Now”, published in June of 2019, goes so far as to speak of a lack of “common strategy and coordination among State actors”.<sup>12</sup>

#### SUGGESTIONS FROM THE MONITORING MECHANISM

3. The Committee should urge the federal and Länder governments once again to take targeted measures to adopt, evaluate, improve and update a comprehensive policy on children’s rights. In this context, the federal government should actively remind the Länder of their obligation in this respect.
4. In addition, the federal government should continue and expand its support of local initiatives such as *BAG Kommunale Kinderinteressenvertretungen*, a national association of institutions and individuals involved in children’s advocacy at the local level, and the programme Child-Friendly Communities which is a project of UNICEF and the German Children’s Fund.

## 1.3 Awareness-raising

### Recommendations of the United Nations

Germany has repeatedly been urged by the UN Committee to take steps to make the Convention more widely known, e.g. through dissemination activities and through training activities for parents and children, in schools and for professionals who work with children directly.<sup>13</sup>

### Depiction in the report submitted by Germany

In the current reports, Germany provides information about the dissemination of the Convention and its Optional Protocols – over the Internet and in printed form, for various target groups – and reports on its cooperation with the German Federal Agency for Civic Education and the campaign “*Starkmachen für Kinderrechte*” (Championing children’s rights). The reports emphasise that in Germany’s federal

<sup>11</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlung 2.

<sup>12</sup> ChildFund Alliance et al (pub.) (2019): “Child Rights Now!” Nationaler Kinderrechte-Fortschrittsbericht zu Deutschland, p. 14.

<sup>13</sup> UN, Committee on the Rights of the Child (2014): Concluding Observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 19

system responsibility for school education lies with the Länder and points out that children are taught about their rights at all levels of school, in instruction modules and in connection with numerous initiatives. The section of the Government's reports on raising awareness of children's rights among professional groups focuses on cooperation with the Länder and the training of judges and public prosecutors.<sup>14</sup>

### Responses from civil society

The National Coalition lists a broad range of professionals who, in their daily work with children, should respect and promote children's rights and protect them vis-à-vis third parties. The National Coalition finds fault with an inadequate incorporation of children's rights and human rights education into the programmes of training and study for these professions as well as the fact that the statutes regulating state recognition of such programmes make no reference to such an obligation. It also recommends that the Committee call on the federal government to partner with other state institutions at the Länder and local level as well as with independent organisations to take systematic action to establish programmes offering continuing and advanced professional training on children's rights.<sup>15</sup>

### Assessment of the Monitoring Mechanism

The Federal Government has been urged on a number of occasions to incorporate human rights education and children's rights into the education and training of professionals. The representations in the State's reports notwithstanding, this has not yet been achieved.<sup>16</sup> Even the legislation on improving the quality of and on participation in child day-care facilities, known as the "Good Childcare Act" (Gute-KiTa Gesetz, adopted Dec. 2018, in force as of Jan. 2019) fails to provide for this.<sup>17</sup>

#### SUGGESTIONS FROM THE MONITORING MECHANISM

5. The Committee should reiterate its previous recommendations to the federal and Länder governments, calling on them to make the Convention better known in Germany, and to actively move forward with awareness raising and training for all persons who work with children. This applies in particular to media, education, justice-system and health-sector professionals. Children and their parents should be actively involved in these efforts.

<sup>14</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), pp. 9–11.

<sup>15</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 15–18.

<sup>16</sup> Reitz, Sandra / Rudolf, Beate (2014): Menschenrechtsbildung für Kinder und Jugendliche. Befunde und Empfehlungen für die deutsche Bildungspolitik. Berlin: Deutsches Institut für Menschenrechte, p. 36; Günnewig, Kathrin / Reitz, Sandra (2017): Bewusstsein wecken, Haltung stärken, Verantwortung übernehmen. Menschenrechtsbildung in der frühen Kindheit. Position Nr. 9. Berlin: Deutsches Institut für Menschenrechte, p. 2.

<sup>17</sup> Further information from the press release issued by the CRC Monitoring Mechanism: Kinderrechte als Maßstab für gute Kitas unter <https://www.institut-fuer-menschenrechte.de/aktuell/news/meldung/article/pressemitteilung-kinderrechte-als-massstab-fuer-gute-kitas/> (retrieved: 26 Aug. 2019).

## 2 Structures for the realisation of the Convention in Germany

In the context of Germany's last reporting procedure in 2014, the UN Committee on the Rights of the Child pointed to four key structural elements necessary for a comprehensive implementation of children's rights in the States parties.

1. An effective coordination body monitors and evaluates activities government-wide – political and legislative measures – with respect to their compatibility with the Convention.
2. A system for the regular collection of data using children's rights indicators makes it possible to arrive at a sound assessment of the status of implementation of the Convention in the lived reality of children. Such a system also facilitates the identification of areas where political action is needed and the measurement of progress in effecting intended changes.
3. Independent monitoring provides the necessary scrutiny of all efforts to implement the Convention.
4. Effective complaint mechanisms ensure the systematic availability of procedures within which children's complaints of rights violations can be heard and addressed – from the daily routine in child day-care facilities all the way to the chambers of the competent courts.

While some individual structures of this kind have been implemented since the last reporting procedure, the political will and commitment at the federal and Länder level for a general implementation of these structures is still not there, 27 years after the Convention entered into force in Germany. Those mechanisms that do exist, sporadically, tend to lack adequate resources and a strong mandate.

### 2.1 Coordination of government action

#### Recommendations of the United Nations

The Committee has repeatedly called on Germany to establish a permanent national body with adequate authority and sufficient human, technical and financial resources to coordinate the implementation of the Convention across the different federal ministries and between the federal and Länder levels.<sup>18</sup>

#### Depiction in the reports submitted by Germany

The Federal Government does not consider the establishment of a new national body to coordinate children's rights policy at the federal level to be necessary. Referring to statements it made in previous reports to the Committee, it points to the lead responsibility of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) for implementation of the Convention within State-party activities at the federal level and the "tried-and-tested structures for the coordination of child and youth policy in Germany's federal system" on the Länder level. As examples of such structures, Government's report cites the Conference of Youth and Family Ministers of the Länder (JFMK), the federal association of Länder youth welfare offices BAGLJLÄ, and the Commission for Children's Concerns of the German Bundestag. A new element is the reference to the children's commissions in Länder parliaments (in 2 of

<sup>18</sup> UN, Committee on the Rights of the Child (2014): Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 13–14.

the 16 Länder) and the children's commissioners of individual Länder (in 2 of the 16 Länder).<sup>19</sup>

### Responses from civil society

The National Coalition supports the establishment of a central coordinating body at the federal level that would engage in a dialogue with Länder and local governments to create the conditions for the establishment of coordinating bodies at those levels too, with analogous resources and mandates.<sup>20</sup>

### Assessment of the Monitoring Mechanism

Germany does not have a body within its federal government that has authority at the federal and Länder level and effectively coordinates the Convention's implementation. Whether a federal children's Ombudsperson might fulfil this role is the subject of considerable debate in Germany.

A look at the structures already existing at the federal and Länder level, which vary greatly with respect to their mandates and possibilities to exert their influence, makes it apparent that clear responsibility for the implementation of children's rights has not yet been established. The offices of commissioner for children's rights, in the Länder that have such posts, lack both sufficient capacities and a mandate. The commissioner for children's rights post in Hesse, for example, is only an honorary position (see also [www.landkarte-kinderrechte.de](http://www.landkarte-kinderrechte.de)<sup>21</sup>). Comparable difficulties exist for the Commission for Children's Concerns in the German Bundestag and comparable commissions within the Länder parliaments: The Bundestag Commission for Children's Concerns is a subcommittee of the Committee on Family Affairs, Senior Citizens, Women and Youth and does not have an autonomous right to make motions in the Bundestag. As another example, the children's commission of the State Parliament of Lower Saxony has only a right to consult.

The Federal Government's extension of the funding for the legislative impact assessment project Youth-Check (Jugend-Check), which was launched in 2017, is welcome news. A legislative impact assessment – expanded to include the assessment of legislative impacts on children under 12 and in conjunction with central coordinating body at the federal level – could constitute an important tool for coordinating the implementation of children's rights at the federal level.

<sup>19</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), pp. 5, 6, 9

<sup>20</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 4–6.

<sup>21</sup> The map charting children's rights in Germany *Landkarte Kinderrechte* is an online tool of the CRC Monitoring Mechanism intended to allow people to see and compare the implementation of individual children's rights in the German Länder. For more information, see: <https://www.institut-fuer-menschenrechte.de/monitoring-stelle-un-krk/landkarte-kinderrechte/>

## SUGGESTIONS FROM THE MONITORING MECHANISM

6. The Committee should reiterate its recommendation that the Federal Government establish a permanent national body with adequate capacities at the federal level and promote the establishment of corresponding Länder-level structures, for the purposes of coordinating the implementation of the Convention in the State party.
7. The legislative impact assessment project Youth-Check, which was set up in 2017, should be expanded to include the assessment of legislative impacts on children under 12 years of age and should be put on a statutory basis.

## 2.2 Data collection and children's rights indicators

### Recommendations of the United Nations

The Committee on the Rights of the Child has expressed concern more than once about Germany's lack of a system for collecting data on all areas covered by the Convention. Such a system would, the Committee has pointed out, provide a basis for the effective planning, monitoring and evaluation of political measures, programmes and projects for children. In this context, the Committee has recommended that the State party develop indicators on children's rights.<sup>22</sup>

### Depiction in the reports submitted by Germany

In its reports, the Federal Government stresses that it plans to develop a children's rights monitoring system that will be based on better data. It also refers to the process of developing examples of children's rights indicators underway at the independent Monitoring Mechanism.<sup>23</sup> In addition, the introduction to Annex 2 of the State party's reports points out that the annex contains a "large number of indicators", in accordance with the Committee's guidelines.<sup>24</sup> It goes on to say that although the Government's aim with the current State-party reports was to provide data relating to all rights under the Convention, adequate data were not available for all key indicators.<sup>25</sup>

### Responses from civil society

The National Coalitions calls for the establishment of a comprehensive and integrated data collection system and the development of children's rights indicators.<sup>26</sup>

### Assessment of the Monitoring Mechanism

One cannot arrive at generally valid and robust findings concerning implementation of children's rights if one does not have children's rights data with which to do so. A comprehensive data collection system could make it possible to arrive at policy

<sup>22</sup> UN, Committee on the Rights of the Child (2014): Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 16.

<sup>23</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), pp. 6.

<sup>24</sup> UN, Committee on the Rights of the Child (2015): Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child, UN Doc. CRC/C/58/Rev.3.

<sup>25</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), Annex 2, pp. 9.

<sup>26</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 7–8.

decisions that are based on evidence rather than “intuited realities” (“*gefühlte Realitäten*”).<sup>27</sup> Thus far, reporting on children and youth in Germany has usually been carried out from the perspective of the existing institutions and has not been focussed on the areas of activity described in the Convention.

The development of children’s rights indicators is a basic requirement for the collection of children’s rights data. Currently, the Monitoring Mechanism, in partnership with the German Youth Institute (DJI), is preparing a set of indicators for the right to be heard in (family) court proceedings (art. 12, para. 2 CRC) in line with the guidelines issued by the UN Office of the High Commissioner for Human Rights.<sup>28</sup> This should be understood as a pilot process intended to illustrate the value of children’s rights indicators that could serve as preparation for a comprehensive process to develop a full set of children’s rights indicators.<sup>29</sup> Such a process would entail the comprehensive collection of both objective and subjective and both qualitative and quantitative data.

#### SUGGESTIONS FROM THE MONITORING MECHANISM

8. The Committee should recommend that Germany develop and implement a comprehensive system for the collection of data on children’s rights at the federal and Länder level.
9. Among other things, this entails the development of children’s rights indicators for all of the Convention rights – a task which should be undertaken by the Federal Government in cooperation with the German Youth Institute and the Monitoring Mechanism and with the participation of civil society – and the allocation of the resources necessary to support this.

## 2.3 Independent monitoring

### Recommendations of the United Nations

In its 2014 Concluding Observations on Germany, the Committee recommended that the German Institute for Human Rights be given a mandate to carry out independent monitoring of the implementation of the Convention and to receive complaints of violations of children’s right, investigate them in a child-sensitive manner and address them effectively.<sup>30</sup>

<sup>27</sup> Cf. Bundesjugendkuratorium (2013): Von gefühlten zu gelebten Realitäten. Plädoyer für einen Datenbericht zur Entwicklung der Kinderrechte in Deutschland: [https://www.bundesjugendkuratorium.de/assets/pdf/press/BJK\\_Plaedoyer\\_Kinderrechte\\_030913.pdf](https://www.bundesjugendkuratorium.de/assets/pdf/press/BJK_Plaedoyer_Kinderrechte_030913.pdf) (retrieved: 25 Sept. 2017). And Schutter, Sabina (2016): Von gefühlten zu empirischen Realitäten: Überlegungen zu einem indikatorenbasierten Datenbericht zur Entwicklung der Kinderrechte in Deutschland.

In: Mennen, Gerald / Schraper, Christian (eds): Kinderrechte als Fixstern moderner Pädagogik – Grundlagen, Praxis, Perspektiven. Weinheim and Basel: Beltz Juventa, pp. 290–299.

<sup>28</sup> UN, Human Rights Office of the High Commissioner (2012): Human Rights Indicators. A Guide to Measurement and Implementation, UN Doc. HR/PUB/12/5.

<sup>29</sup> A description of the process in English is posted at <https://www.institut-fuer-menschenrechte.de/en/national-crc-monitoring-mechanism/topics/childrens-rights-indicators/>

<sup>30</sup> UN, Committee on the Rights of the Child (2014): Concluding Observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 17–18.

### Depiction in the reports submitted by Germany

The Federal Government took up the Committee's recommendation. In 2015, the German Institute for Human Rights set up an independent National Monitoring Mechanism for the Convention. The Government has announced its intent to secure the long-term funding of this body, which is currently supported by project funding from the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth. The Federal Government did not see a need to expand the mandate of the Monitoring Mechanism to include receiving and addressing complaints of children's rights violations. In the view of the Government, entities which receive individual complaints from children and their representatives should be located in children's immediate living environment. The Federal Government's reports also mention the development of ombuds offices in the field of child and youth services (*Jugendhilfe*), the children's commissioners and child and youth offices at the local level.<sup>31</sup>

### Responses from civil society

The National Coalition refers to what is still the limited-term basis of the Monitoring Mechanism's funding and to the inadequacy of its human and financial resources and authorities relative to its mandate, calling for the Monitoring Mechanism at the German Institute of Human Rights to be placed on a statutory basis and for it to be provided with sufficient resources and capacities. It also proposes that the Monitoring Mechanism should report to the German Bundestag on an annual basis and suggests that the Committee recommend that the Federal Government should facilitate and promote the establishment of independent complaint bodies at the federal, Länder and local level.<sup>32</sup>

### Assessment of the Monitoring Mechanism

A monitoring body that is independent does not fall within the portfolio of one ministry. As a basic principle, it addresses its offerings to all ministries, to the German Federal Government and to the Länder. Thus the National CRC Monitoring Mechanism should be included in the financing of the German Institute for Human Rights from funds of the German Bundestag (parallel to the National CRPD Monitoring Mechanism) and not – as is presently the case – be paid for from project funding of the Federal Ministry for Family Affairs, Senior Citizens Women and Youth.

Due to its independence, an independent monitoring body does not take instructions, but is guided in its actions by a clear orientation towards offerings aimed at the promotion and protection of human rights. Its mandate and the manner in which it is to be fulfilled arise from the human rights requirements of the 1993 Paris Principles<sup>33</sup> and the internationally recognised standards therein concerning the role and functioning of National Human Rights Institutions, and in particular their independence. The activities of the National CRC Monitoring Mechanism encompass both independent research and the provision of evidence-based research services (policy advising and information provision). To work effectively in this manner, the National CRC Monitoring Mechanism would require a considerable increase in its human and financial resources. In the view of the Monitoring Mechanism, it would be wise to postpone the

<sup>31</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 8f.

<sup>32</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 12–14.

<sup>33</sup> UN, General Assembly (1993): Principles relating to the Status of National Institutions (The Paris Principles), Resolution 48/134 of 20 December 1993.

establishment of a national complaint body until such time as corresponding structures have been established in the direct living environments of children. A “bottom up” approach is needed here (see also the section on complaint mechanisms, p. 20, in this report).

#### SUGGESTIONS FROM THE MONITORING MECHANISM

10. The Committee should call on Germany’s federal government to secure the funding of the National CRC Monitoring Mechanism in the Bundestag by increasing funding for the German Institute for Human Rights, thus ensuring independent monitoring of the Convention, analogous to that carried out by the National CRPD Monitoring Mechanism.
11. The federal government should augment the financial resources of the National CRC Monitoring Mechanism to enable it to live up to its mandate for the comprehensive monitoring of children’s rights in Germany.
12. The federal government should work towards an independent monitoring of children’s rights at the Länder level.

## 2.4 Complaint mechanisms

### Recommendations of the United Nations

In its 2014 Concluding Observations, the Committee expressed its continuing concern about (a) the continued absence of an independent body to monitor the implementation of the Convention at the federal, Länder and local levels (see section 2.3 of this report). The Committee also expressed concern about (b) the absence of a national body to receive complaints about children’s rights violations.<sup>34</sup> In line with its recommendations from 2004 and the guidance provided in General Comment No. 2,<sup>35</sup> the Committee called on Germany to allocate the resources necessary for both tasks to the German Institute for Human Rights.<sup>36</sup>

Article 12 of the CRC, on children’s right to be heard and have their views receive due consideration (participation), creates, inter alia, requirements for the provision and constitution of complaint mechanisms. According to the Committee’s General Comment on article 12, States parties’ obligations include making complaint procedures available to children. Further, these procedures must ensure that children have access to all necessary information and support and be able to provide remedies for violations.<sup>37</sup> The UN resolution<sup>38</sup> concerning the alternative care of children describes the necessity for children to have access to child-friendly complaint mechanisms.

<sup>34</sup> UN, Committee on the Rights of the Child (2014): Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 17.

<sup>35</sup> UN, Committee on the Rights of the Child: General Comment No. 2, The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, CRC/GC/2002/2.

<sup>36</sup> UN, Committee on the Rights of the Child (2014): Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para.

<sup>37</sup> UN, Committee on the Rights of the Child: General Comment No. 12: The Rights of the Child to be heard, CRC/C/GC/12, para. 97.

<sup>38</sup> UN, General Assembly (2010): Guidelines for the Alternative Care of Children, UN Doc. A/Res/64/142.

### Depiction in the reports submitted by Germany

The Federal Government considers it unnecessary to broaden the mandate of the Monitoring Mechanism to include acting as a national complaints body. In its view, bodies that receive complaints from children or their representatives and that support and advise them should be easily accessible to children and located in their immediate living environment.<sup>39</sup> According to the Federal Government, a large number of such contact or advisory bodies already exist at the local level.<sup>40</sup> The Government's report also mentions the pilot project funded by Federal Ministry for Family Affairs, Senior Citizens Women and Youth to develop a federal office to coordinate ombudship within child and youth services as well as the children's commissioners at the Länder level<sup>41</sup> and children's commissions in Länder parliaments. In addition, the report refers to the statutory provisions in section 45 of Book VIII of the Social Code, which, back in 2012, made participation procedures and complaint mechanisms a requirement for obtaining a permit to operate as an institution providing child and youth services.<sup>42</sup>

### Responses from civil society

The progress report "Child Rights Now!"<sup>43</sup> released in June of 2019 criticises the absence of a national complaints body accessible to all children. The National Coalition finds fault in its report with the absence of a general obligation to establish complaint procedures that are easily accessible to children and young people. It also criticises the fact that the only statutory provisions addressing such procedures are those in section 45 of Book VIII of the Social Code, which apply only to institutions that provide child and youth services. The National Coalition recommends that the Committee call on the German Federal Government to initiate legislation providing for easily accessible and non-discriminatory complaints procedures in all institutions for children.<sup>44</sup>

### Assessment of the Monitoring Mechanism

Germany does not provide a complaint mechanism at the national level that is comparable with the individual complaints procedures under the third Optional Protocol<sup>45</sup> or in line with the recommendations in General Comment No. 2 of the Committee on the Rights of the Child,<sup>46</sup> in which children of any age are entitled to lodge a complaint regardless of whether it is supported by their parents or legal guardians. Nor are the structures at the local level mentioned by the Government in line with these guidelines. In addition, given that there are circa 11,000 municipalities in Germany, the combined total of 134 child and youth commissioners plus child and youth offices is very low. Moreover, most of these commissioners and offices work for

<sup>39</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 8.

<sup>40</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 28.

<sup>41</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), Annex 2, pp. 28–29. See also the CRC Monitoring Mechanism site [www.landkarte-kinderrechte.de](http://www.landkarte-kinderrechte.de)

<sup>42</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 8.

<sup>43</sup> ChildFund Alliance et al (pub.) (2019): "Child Rights Now!" Nationaler Kinderrechte-Fortschrittsbericht zu Deutschland, p. 28.

<sup>44</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 42–43.

<sup>45</sup> The Optional Protocol to the Convention on the Rights of the Child on a communications procedure, UN DOC A/RES/66/138, ratified by Germany on 28 Feb. 2013.

<sup>46</sup> UN, Committee on the Rights of the Child: General Comment No. 2, The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, CRC/GC/2002/2.

children only in an advisory and/or advocate capacity; they are not independent and do not have a mandate granting them the authority to inspect files or other powers.

Independent complaint bodies must have an appropriate mandate in order to be able to take decisions on matters in dispute that are respected by both parties. Such bodies could be based at the Länder level, in the view of the Monitoring Mechanism. The Monitoring Mechanism also believes that there should be a clear distinction between such a complaint structures, which should have two levels (contact points in the immediate environment and independent complaint bodies at the Länder level), and the complaint procedures at all institutions that provide child and youth services which are required under federal legislation.<sup>47</sup> This latter type of procedure should be made mandatory for all children's institutions in Germany. The federal government should also amend the provisions governing institutions that provide child and youth services so that the provision calling for complaint procedures in child and youth services institutions in section 45 of Book VIII of the Social Code applies to all such institutions in Germany, including those which began operating before the provision in question went into effect.

#### SUGGESTIONS FROM THE MONITORING MECHANISM

13. The Committee should urge the federal and Länder governments to take swift and targeted action to encourage the development and establishment of child-friendly complaint mechanisms: contact points/advisory bodies for children in their immediate environment and independent complaint bodies at the Länder level.
14. The federal and Länder governments should enact legislation requiring all public institutions that work with children – such as institutions providing child and youth services, educational institutions, refugee accommodation facilities, cultural institutions and children's wards in hospitals – to have child-friendly complaint mechanisms in place.

<sup>47</sup> Cf. Kittel, Claudia (2018): Beschwerdemöglichkeiten von Kindern in Einrichtungen der Kinder- und Jugendhilfe aus Perspektive der UN-Kinderrechtskonvention. In: Spatscheck, Christian / Steckelberg, Claudia (eds): Menschenrechte und Soziale Arbeit, Opladen/Berlin/Toronto: Verlag Barbara-Budrich, pp. 257–267.

### 3 General principles of the Convention

The four general principles of the Convention are the principle of non-discrimination (art. 2 CRC), children's right to life, survival and development (art. 6 CRC), the best interests of a child as a primary consideration (art. 3, para. 1 CRC) and respect for the views of the child (participation) (art. 12 CRC). These principles reinforce the child's status as holders of the full range of human rights.

According to article 3, paragraph 1 of the Convention, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The creators of the official German translation of the Convention decided to translate the term "best interests of the child" with the German term *Kindeswohl*, although a more literal English equivalent of the latter would be "child's welfare" or "child's well-being".

In German law, the term *Kindeswohl* was introduced as a central legal concept when the Civil Code (BGB: *Bürgerliches Gesetzbuch*) came into force in 1900, and it has since come into use in other areas of law, particularly in the law governing child and youth services (SGB VIII). Thus, the notion of *Kindeswohl* has established itself in German legal language. In its General Comment No. 14, the UN Committee for the Rights of the Child emphasised that the child's best interests cannot be correctly determined if the requirements of article 12 of the Convention – the right to be heard and respect for the views of the child – are not met.<sup>48</sup>

Common to all four general principles is a tendency for policy actors to underestimate the extent of the consequences they entail with respect to the realities in which children live. In this section, the Monitoring Mechanism focusses on four examples, in the form of four topics, each touching on one of four general principles, which make it clear that these principles are not adequately considered in Germany.

#### 3.1 Right to non-discrimination Focus: registration of births

##### Recommendations of the United Nations

The Committee has repeatedly called on the State party to ensure that that birth registration is available as soon as possible for all children, regardless of their parents' origin or legal status.<sup>49</sup>

##### Depiction in the reports submitted by Germany

In its reports, the State party emphasises that federal legislation that applies throughout Germany guarantees the swiftest possible issue of a birth certificate or of a certified register print-out, an official document attesting to civil status, for all children

<sup>48</sup> German translations of both General Comments were published by the CRC Monitoring Mechanism with the support of the BMSFJ and in collaboration with an editorial group made up of recognised children's rights experts which guided and edited the translation.

<sup>49</sup> UN, Committee on the Rights of the Child (2014): Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 29; UN, Committee on the Rights of the Child (2004): Concluding observations: Germany, UN Doc. CRC/C/15/Add.226, para. 55e.

born in Germany. The reports then limit themselves to a description of the statutory framework.<sup>50</sup>

### Responses from civil society

The Monitoring Mechanism is not aware of any texts or sections relating to birth registration in parallel reports to the combined 5<sup>th</sup> and 6<sup>th</sup> periodic reports of Germany.

### Assessment of the Monitoring Mechanism

The Monitoring Mechanism regularly receives first-hand reports, from the fields of obstetrics/mid-wifery and social work with refugees, about problems with the registration of births of children born to refugees in Germany. It is not unusual for registry offices to refuse to issue birth certificates for such children if their parents are not able present official documents as proof of identity. A key problem in this respect is the failure in administrative practice to take advantage of the existing legal alternatives – particularly that of issuing a birth certificate on the basis of an affirmation by the parents or that of the immediate issue of a certified registry print-out, which is legally equivalent to a birth certificate. Furthermore, the high indirect costs, e.g. the costs for the required translations of certified documents, make non-discriminatory access to birth registration more difficult; so, too, do the obligations to transfer data to the foreigner registration authorities.<sup>51</sup>

#### SUGGESTIONS FROM THE MONITORING MECHANISM

15. The Committee should recommend that Germany ensure that every new-born child receives a birth certificate without delay and no later than 4 months after birth<sup>52</sup> and that a certified register print-out is issued immediately for use in the intervening period.
16. Action should be taken to ensure that access to birth registration is free of discrimination, specifically by eliminating the obligation of authorities to transfer personal data relating to foreign nationals to immigration authorities (*Ausländerbehörden*) and by introducing a statutory basis for a needs-based entitlement to have costs of required officially certified translations assumed by the state.
17. The Conference of Interior Ministers of the Länder should address the issue of birth registration, particularly with respect to the situation of children of refugees. The Länder interior ministries should direct registry office officials to make full use of the existing legal options.

<sup>50</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), pp. 17.

<sup>51</sup> Deutsches Institut für Menschenrechte (pub.) (2018): Keine Papiere - keine Geburtsurkunde? Empfehlungen für die Registrierung von in Deutschland geborenen Kindern Geflüchteter. Position Nr. 18. See also the English version at <https://www.institut-fuer-menschenrechte.de/publikationen/show/no-papers-no-birth-certificate/>

<sup>52</sup> Cf. UN, Committee on the Rights of the Child (2000): Concluding observations of the Committee on the Rights of the Child: Grenada, UN Doc. CRC/C/15/Add.121, para. 16.

## 3.2 Primary consideration of the best interest of the child – Focus: children of incarcerated parents

### Recommendations of the United Nations

The right of the child to contact with both parents is laid down in article 9 of the Convention. This right applies even when action initiated by the state, such as the imprisonment of a parent, has rendered such contact difficult. According to the UN Committee on the Rights of the Child, the principle of the best interests of the child (art. 3 CRC) imposes an obligation on States parties to pay particular attention to the policies governing contact between incarcerated parents and their minor children. The Committee emphasised that when parent(s) or primary caregivers are being sentenced, “alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren)”. The Committee also emphasised that children of incarcerated parents have the same rights that all other children do.<sup>53</sup>

### Depiction in the reports submitted by Germany

The Government emphasises that in cases where a child is separated from a parent due to the parent’s incarceration, the principle of the best interests of the child demands the possibility of contacts that are regular according to the child’s perception of time. After pointing out that the Länder are responsible for the prison system, the State-party reports go on to refer to examples of Länder prison legislation and specific assistance and support measures for families with an imprisoned parent, which are listed in the first annex of the report.<sup>54</sup> This annex also contains more detailed information about prison facilities which allow incarcerated mothers to live with their children.<sup>55</sup>

### Responses from civil society

The Monitoring Mechanism is not aware of any passages relating to children of incarcerated persons in parallel reports to the combined 5<sup>th</sup> and 6<sup>th</sup> periodic reports of Germany.

### Assessment of the Monitoring Mechanism

The incarceration of a parent often has a powerful impact on children’s lives. This is because incarceration severely limits the scope for direct contact between parent and child: this can be as little as one visit per month, for instance, and even then, only for a few hours and not under child-sensitive conditions.

In Germany, the Länder are responsible for regulating and implementing the policies on children’s visits to and contact with their imprisoned parents. In many cases, there are no child-oriented visitation/contact rules. It would seem necessary to make it clear that Länder law is bound by the Convention just as federal law is. The situation of children with an incarcerated parent has been a focus of the Monitoring Mechanism

<sup>53</sup> UN, Committee on the Rights of the Child (2011): Report and Recommendations of the Day of General Discussion on “Children of Incarcerated Parents”.

<sup>54</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 34.

<sup>55</sup> Fünfter und Sechster Staatenbericht der Bundesrepublik Deutschland zu dem Übereinkommen der Vereinten Nationen über die Rechte des Kindes (2019), Anhang I, p. 45.

since 2016.<sup>56</sup> The Monitoring Mechanism is committed to making sure that children are able to assert their rights vis-à-vis state bodies in reality, rather than being considered human rights-holders merely in theory.

#### SUGGESTIONS FROM THE MONITORING MECHANISM<sup>57</sup>

18. The Committee should strongly urge the Conference of Justice Ministers of the Länder to take prompt action to implement the Council of Europe recommendations regarding children of imprisoned parents with respect to taking the Convention into account in all phases of the criminal justice process.
19. The Länder should take swift action to amend their regulations on visitation rules to include individual entitlements for children in line with the Council of Europe recommendations. The use of telephones, video-conferencing and chat functions for parent-child contacts should be understood as supplementing visitation rules and be extended and made more flexible accordingly.
20. The federal government should support civil society actors working to promote contacts between children and imprisoned parents. Child and youth services providers should provide targeted support offerings for the children of imprisoned parents. Already existing measures relating to contacts between children and their incarcerated parents should be evaluated, and good practices be identified, disseminated and placed on a permanent footing. Children, families and prison inmates should be involved in these activities.
21. The Committee should recommend that Germany ensure the collection of statistics on the number and age of children of prisoners in a manner sensitive to discrimination.

### 3.3 Right to life, survival and development – Focus: children born intersex

#### Recommendations of the United Nations

The medical practice in Germany 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 – i.e. the assumption that there are only two sexes, male and female and that these are mutually exclusive – has been criticised by UN treaty bodies in the past,<sup>58</sup> most recently in 2018 in the Concluding Observations of the UN Committee on Economic,

<sup>56</sup> Deutsches Institut für Menschenrechte (2017): Das Recht von Kindern auf Kontakt zu ihrem inhaftierten Elternteil. In: Deutsches Institut für Menschenrechte (pub.): Entwicklungen der Menschenrechtssituation in Deutschland Juli 2016 – Juni 2017. Bericht an den Deutschen Bundestag gemäß §2 Absatz 5 DIMRG, pp. 79–91; and the English-language summary of the report at <https://www.institut-fuer-menschenrechte.de/publikationen/show/development-of-the-human-rights-situation-in-germany-july-2016-june-2017/>

<sup>57</sup> The recommendations is presented in detail in Feige, Judith (2019): Kontakt von Kindern zu ihren inhaftierten Eltern – Einblicke in den deutschen Justizvollzug. Berlin: Deutsches Institut für Menschenrechte, pp. 35–37.

<sup>58</sup> The practice in Germany had previously been criticised in concluding observations associated with reporting procedures under the Convention on the Rights of Persons with Disabilities (2015), the Convention on the Elimination of All Forms of Discrimination against Women (2017) and the Convention against Torture (2012).

Social and Cultural Rights.<sup>59</sup> The Committee on the Rights of the Child has not yet issued a recommendation on this topic.

### Depiction in the reports submitted by Germany

In response to a ruling by the Federal Constitutional Court, the parties now forming the Federal Government announced in their current coalition agreement the aim of having statutory provisions that would make it clear that sex assignment surgery on children is permissible only if it cannot be postponed and the child's life is at risk.<sup>60</sup> This reflects a shared recognition of the right of intersex persons to self-determination with respect to their sex and the position that medically unnecessary treatment should be postponed until the person concerned is in a position to exercise that right and make a decision. The planned statutory provision should serve to ensure legal certainty for the children concerned about the protection of their human rights in accordance with the guidelines of the medical profession.<sup>61</sup>

### Responses from civil society

In its parallel report, the National Coalition stresses that the informed consent of the child, as a rights holder, must always come first and that no decision taken by a parent can be a substitute for the child's consent. It recommends incorporating a provision to this effect into the Civil Code and making its violation punishable.<sup>62</sup>

### Assessment of the Monitoring Mechanism

While a trend towards greater sensitivity for and awareness of the situation of children born intersex in Germany can be observed (most recently in the 2018 reform of the civil status law with the introduction of the "third option" and in deliberations of the German Ethics Council since 2010<sup>63</sup>), medical practice in these cases has not changed in Germany. This has been confirmed by a study commissioned on behalf of the Federal Ministry for Family Affairs, Senior Citizens Women and Youth that investigated the 2004-2019 period.<sup>64</sup> Therefore, the Monitoring Mechanism believes that medically unnecessary, irreversible sex assignment operations on children born intersex should be prohibited by law and that such procedures should be performed only with the consent of the person concerned.

To implement the undertaking in the coalition agreement, the German Bundestag should amend the Civil Code with a provision barring consent by the child's legal guardians and establishing a procedural safeguard in the form of a family-court review

<sup>59</sup> UN Committee on Economic, Social and Cultural Rights (2018): Concluding Observations on the sixth periodic report of Germany, UN Doc. E/C.12/DEU/CO/6.

<sup>60</sup> Coalition agreement between CDU/CSU and SPD, 19<sup>th</sup> legislative term (2018): "Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land. Koalitionsvertrag zwischen CDU, SRU und SPD" <https://www.bundesregierung.de/breg-de/themen/koalitionsvertrag-zwischen-cdu-csu-und-spd-195906> (retrieved: 25 Apr. 2019), lines 796–799.

<sup>61</sup> Bundesärztekammer (German Medical Association) (2015): "Stellungnahme zur Versorgung von Kindern, Jugendlichen und Erwachsenen mit Varianten/Störungen der Geschlechtsentwicklung", revised in July 2017.

<sup>62</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 28–32.

<sup>63</sup> As a conclusion to the preceding discussions, the German Ethics Council published a statement on the topic of intersexuality in February of 2012: Intersexualität. <https://www.ethikrat.org/themen/gesellschaft-und-recht/intersexualitaet/> (retrieved 24 Apr. 2019).

<sup>64</sup> Ulrike Klöppel (2016): Zur Aktualität kosmetischer Operationen „uneindeutiger“ Genitalien im Kindesalter. [https://www.gender.hu-berlin.de/de/publikationen/gender-bulletins/texte-42/kloepfel-2016\\_zur%20aktualitaet-kosmetischer-genitaloperationen](https://www.gender.hu-berlin.de/de/publikationen/gender-bulletins/texte-42/kloepfel-2016_zur%20aktualitaet-kosmetischer-genitaloperationen) (retrieved: 24 Apr. 2019) and the follow-up study Klöppel, Ulrike / Hoenes, Josch / Januschke Eugen (2019): Häufigkeit normangleichender Operationen „uneindeutiger“ Genitalien im Kindesalter. Published by the Centre for Transdisciplinary Gender Studies. Bulletintexte 44, Humboldt Universität zu Berlin. Cf. also: Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 16.

of the medical necessity of a surgical intervention affecting the internal or external sex characteristics of a child.<sup>65</sup> Such a procedure is not completely alien to the legislature: the Civil Code already provides for a similar limitation of the scope of parental care with respect to the sterilisation of minors (sect. 1631c BGB).

#### SUGGESTIONS FROM THE MONITORING MECHANISM

22. The Committee should call on the federal legislature to take direct action to protect children born intersex from medically unnecessary, irreversible sex assignment operations by adopting a statutory provision making any such procedure subject to a decision taken by the intersex person, exercising the right to self-determination with respect to one's sex, to have it performed.
23. The federal legislature should establish a procedural safeguard in the form of review by a family court of assessments as to the medical necessity of such a procedure and of whether the child in question has issued valid consent.
24. Further, Germany should ensure that medical practitioners are made more sensitive to this issue through suitable continuing and advanced professional training measures.

### 3.4 The right to be heard and respect for the views of the child (participation) – Focus: child sensitive justice system

#### Recommendations of the United Nations

The Committee has not yet issued any systematic recommendations regarding the establishment of a child-sensitive justice system.

#### Depiction in the reports submitted by Germany

The State party addresses the topic of a child-sensitive justice system at various points<sup>66</sup> but does not combine these under a heading like “child-sensitive justice system”.

#### Responses from civil society

The National Coalition addresses participation by children in administrative actions and in court proceedings in the section of its report concerning the general principles and respect for the views of the child. In this context, it stresses the need for qualification of the professionals involved and the necessity of cooperation across ministries and disciplines. It also recommends the promotion of research projects integrating the experiences of children and professionals.<sup>67</sup>

<sup>65</sup> Follmar-Otto, Petra (2018): Stellungnahme. Zu einem Verbot medizinischer nicht notwendiger geschlechtsverändernder Operationen an Minderjährigen. Symposium “Schutz intersexueller Kinder” at BMJV on 16 October 2018. Berlin: Deutsches Institut für Menschenrechte.

<sup>66</sup> Fünfter und Sechster Staatenbericht der Bundesrepublik Deutschland zu dem Übereinkommen der Vereinten Nationen über die Rechte des Kindes (2019), p. 10 and 62–63.

<sup>67</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 44–48.

### Assessment of the Monitoring Mechanism

How the principle of the child's best interests should be applied in the context of hearings of children in judicial and administrative proceedings has been specified in greater detail in the Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice,<sup>68</sup> which are fully in accord with the aims of the Convention. Now these guidelines should be implemented on the domestic level.

Interviews conducted by the German Institute for Human Rights on behalf of the EU Agency for Fundamental Rights revealed that children who come into contact with the justice system often perceive the proceedings as stressful.<sup>69</sup> In particular, children complained that the communication on the part of judges and the setting in the courtroom were not child-oriented, and many reported that they had not been adequately informed about the proceedings and that support was not provided throughout the process. These findings are from a first study on this topic, not results drawn from basic research, because that kind of research simply does not exist: there is a significant gap in research on this area in Germany.<sup>70</sup>

Essentially, German procedural law lacks a coherent approach to children's involvement in court hearings. For instance, the law provides no standards for appearances by children in hearings in administrative court proceedings or asylum proceedings. There are rules for family-court proceedings: concerning the age at which children acquire the right to be heard in court, providing for the child-sensitive provision of information and ensuring that children have the right to a guardian ad litem (*Verfahrensbeistand*). The further arrangement of the hearing is left to the court's discretion (sect. 159 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction, FamFG). With regard to criminal proceedings, the legislature has introduced some individual child-sensitive elements, e.g. the possibility of audio-visual transmission of testimony by a child victim who is not present in the courtroom (sect. 247a of the German Code of Criminal Procedure, StPO) or the "psychosocial assistance" in court proceedings (sect. 406g StPO). However, a basic regulation of the standards for child-sensitive court hearings is lacking.

A question arises as to how to incorporate the obligation to take the child's views into account into standards that can be operationalised. In the view of the Monitoring Mechanism, this obligation can only be met when the views of the child and a consideration of them can be found in the grounds for the decision.

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<sup>68</sup> The Council of Europe programme "Building a Europe for and with children" (2011): Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice. Strasbourg: Council of Europe Publishing.

<sup>69</sup> Graf-van Kesteren, Annemarie (2015): *Kindgerechte Justiz. Wie der Zugang zum Recht für Kinder und Jugendliche verbessert werden kann*. Berlin: Deutsches Institut für Menschenrechte.

<sup>70</sup> Partly to highlight such gaps, the CRC Monitoring Mechanism is currently developing, according to UNHCHR guidelines, an indicator matrix for the child's right to be heard in (family-)court proceedings.

## SUGGESTIONS FROM THE MONITORING MECHANISM

These recommendations relate to judicial and to administrative proceedings.

25. The Committee should recommend that the federal legislature enshrine a non-exhaustive catalogue of rights that presents, in a uniform manner, the special rights arising to children relating to their access to proceedings and during proceedings.
26. The Federal Government should also work towards establishing low-threshold, child-friendly offerings in the immediate environment in which children live informing them about their rights and about how they can assert them in court.
27. Germany should ensure that children can, if they wish, be heard in any proceedings that concern them.
28. Germany should introduce legal standards for child-sensitive hearings and define child-specific criteria that courts and administrative authorities must consider.
29. Germany should ensure that children involved in court hearings receive sufficient information, delivered in a child-sensitive manner, about their rights, and about the proceedings, and their progress and background, before, during and after they take place.
30. Germany should create an unconditional statutory entitlement to the support (before, during and after proceedings) of an independent, professionally qualified representative who has a duty to further the interests of the child.
31. Germany should introduce standards setting out entry and quality requirements for those judges and state prosecutors serving solely or primarily in proceedings involving or concerning minors, in particular for family court judges, judges in chambers dealing with crimes against minors (Jugendschutzkammer), juvenile court judges (Jugendrichter) as well as juvenile court prosecutors and administrative court judges. These standards should be ensured through federal legislation imposing a corresponding requirement for judges and state prosecutors to engage in continuing education.
32. The federal and Länder governments should ensure that the bodies involved in the administration of justice have appropriate resources enabling them to make infrastructural changes conducive to a child-sensitive justice system, for instance the video examinations of child victims.
33. Germany should initiate and fund basic research on child-sensitive justice.

## 4 Children's policy challenges for Germany

The children's rights issues discussed here serve to illustrate the inequalities in the living conditions and opportunities of children that disadvantage some children in Germany at the start of their lives and limit their prospects as adults. This consideration of (1) protection of children from violence, (2) inclusive education, (3) child poverty, (4) protection of refugee children and (5) children's right to participate in political and social life is intended to demonstrate the necessity of a broadly conceived approach to social inclusion.<sup>71</sup>

An inclusive perspective must consider basic concepts of intersectionality and cumulative discrimination. These concepts assume that power relationships that evolved over the course of history, processes of "subjectivation" and social inequalities, such as those associated with gender, disability or socio-economic origin, cannot be viewed in isolation, but interact with one another in everyday situations. When associated with a human rights-based, broadly conceived approach to inclusion, barriers to participation and mechanisms of exclusion can be understood and addressed in a targeted manner.

A look at children and the school system makes this particularly clear.<sup>72</sup> Studies have long indicated that both access to and leaving schools in Germany, and particularly secondary education and thus the access to occupational life, are too often influenced by extraneous criteria: along with disability, these include social background or racist stereotypes on the part of teachers. Often, more than one dimension is involved at a time and these interact with one another.<sup>73</sup> The Federal Government's combined 5<sup>th</sup> and 6<sup>th</sup> reports notes that the percentage of persons with "migration backgrounds"<sup>74</sup> who obtain school-leaving certificates from Gymnasium (grammar-school) programmes is particularly low.<sup>75</sup>

The 2014 monitoring report on Germany issued by the Council of Europe's Commission against Racism and Intolerance revealed that children from families of

<sup>71</sup> No human rights perspective on inclusion is possible without the UN Convention on the Rights of the Child: the issue is the interaction between impairments and barriers, which causes human beings to be disabled with respect to their participation. The concept of inclusion envisages structures and mechanism that must be available in order that human beings not be excluded. Inclusion is not primarily about individual adaptations by groups of human beings or individual human beings to cope with existing barriers/structures, but about improving the structures themselves.

<sup>72</sup> An example of a broad approach to the concept of inclusion is contained in the UNESCO Salamanca Statement, adopted by the World Conference on Special Needs Education in 1994, which is seen as a milestone for the international cooperation on inclusive education: "The guiding principle that informs this Framework is that schools should accommodate all children regardless of their physical, intellectual, social, emotional, linguistic or other conditions. This should include disabled and gifted children, street and working children, children from remote or nomadic populations, children from linguistic, ethnic or cultural minorities and children from other disadvantaged or marginalized areas or groups." See UNESCO World Conference on Special Needs Education: Access and Quality (1994), para. 3.

<sup>73</sup> Bonefeld/Dickhäuser (2018), (Biased) Grading of Students' Performance: Students' Names, Performance Level, and Implicit Attitudes. <https://www.frontiersin.org/articles/10.3389/fpsyg.2018.00481/full>; Bildung in Deutschland 2016. <https://www.bildungsbericht.de/de/bildungsberichte-seit-2006/bildungsbericht-2016/pdf-bildungsbericht-2016/bildungsbericht-2016>; Bildung in Deutschland 2018, <https://www.bildungsbericht.de/de/bildungsberichte-seit-2006/bildungsbericht-2018/pdf-bildungsbericht-2018/wichtige-ergebnisse-2018.pdf> (retrieved: 30 Jul. 2019).

<sup>74</sup> The term *Migrationshintergrund* ("migration background" in the translation of the State-party report; the Federal Statistics Office uses "migrant background") has a stigmatising effect and negative connotations. In addition, it is used inconsistently. Nonetheless, this report uses it in the interests of consistency in presentation with the State-party report. *Mit Migrationshintergrund* ("with migrant backgrounds") as the term is used in official German statistics, describes foreign nationals, naturalised German citizens who immigrated to Germany after 1949, and all children with German passports and born in Germany who have at least one parent from whom the migrant background derives.

<sup>75</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 15.

higher socio-economic status are three times more likely to receive a recommendation to attend grammar school than are children with migrant backgrounds. As a result, the percentage of women with migrant backgrounds at universities and other institutions of higher education, and thus among persons who earn degrees associated with advantageous career prospects, is relatively low.<sup>76</sup>

The Monitoring Mechanism therefore wishes to emphasise that the State party's human rights obligation to implement inclusive education is one that applies to the entire society. Targeted action must be taken to eliminate all barriers to access and participation. This entails the careful scrutiny of existing institutions and structures as well as of discursive attributions and social constructs. As the Monitoring Mechanism understands the inclusion mandate not as one restricted to the domain of education, but as a human rights principle that must be considered and implemented in the context of all children's rights.

## 4.1 Protection of children from violence

### Recommendations of the United Nations

The UN Committee on the Elimination of Discrimination against Women has recommended that Germany enhance its efforts to combat all forms of gender-based violence against women and girls and establish an independent mechanism to monitor cases of violence and abuse affecting persons with disabilities in institutions. It has also urged Germany to carry out measures to raise public awareness of sexual violence and to strengthen capacity-building for the relevant groups of professionals.<sup>77</sup>

The UN Committee on the Rights of the Child has recommended that Germany develop a comprehensive national strategy to prevent and address all forms of violence against children as well as to adopt a national coordinating framework.<sup>78</sup>

### Depiction in the reports submitted by Germany

Germany's reports refer to the establishment of the Federal Foundation for Early Childhood Intervention, the Federal Child Protection Act, an "Overall Concept to Protect Children and Juveniles Against Sexual Violence" and numerous newly introduced advising services.<sup>79</sup>

### Responses from civil society

The National Coalition recommends that a national prevention strategy be developed through a process integrating Länder and local governments, the continuation of the action plan for protecting children and young people from sexual violence and the introduction of a statutory obligation to provide appropriate mechanisms for participation and complaints in institutions that are already providing child and youth

<sup>76</sup> European Commission Against Racism (2014): Fifth Report on Germany. <https://rm.coe.int/fifth-report-on-germany/16808b5683>, cited in the report *Bildung in Deutschland 2018*. <https://www.bildungsbericht.de/de/bildungsberichte-seit-2006/bildungsbericht-2018/pdf-bildungsbericht-2018/bildungsbericht-2018.pdf> (retrieved: 30 Jul. 2019), pp. 4–6.

<sup>77</sup> UN, Committee on the Elimination of Discrimination against Women (2017): Concluding observations on the combined seventh and eighth periodic reports of Germany, UN Doc. CEDAW/C/DEU/CO/7-8, para. 26.

<sup>78</sup> UN, Committee on the Rights of the Child (2014): Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 41.

<sup>79</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p.5.

services, analogous to the requirement which applies for institutions seeking a license.<sup>80</sup>

### Assessment of the Monitoring Mechanism

Germany continues to lack a comprehensive concept for combatting all forms of violence against children. The only such concept developed thus far relates only to sexual violence. Effective protection against violence must address all forms of violence, however. Achieving this will necessitate a considerable increase in the human, technical and financial resources available for organisations and institutions active in child protection and a greater degree of coordination among organisations and institutions in different fields. Moreover, effective protection also requires that all institutions in which children live or which children visit provide a comparable level of protection.

#### SUGGESTIONS FROM THE MONITORING MECHANISM

34. The Committee should strongly urge the Federal Government to draw up, with the participation of Länder and local governments, a national strategy of interdisciplinary design to protect against violence, that will develop approaches for use in the areas of prevention, intervention and rehabilitation. The strategy should address all facets of violence, including psychological violence, self-inflicted violence by children, violence inflicted by children on other children and cyber violence.
35. Germany should require all institutions in which children live or which children visit to draw up a violence protection concept and should introduce statutory minimum requirements for the content of such concepts.
36. Germany should strengthen and expand its efforts in the areas of information provision, education and awareness-raising aimed at children, their parents or guardians and professionals who work with children. This includes national, free, anonymous and low-threshold assistance and advising services for children and training programmes for professionals.

## 4.2 Inclusive education

### Recommendations of the United Nations

The UN Committee on the Rights of the Child has strongly urged Germany to pursue the establishment of state-wide inclusive education and to ensure that the resources necessary for this are available and that all necessary legislative and structural reforms are carried out. The Committee has noted that needs for individual support and reasonable accommodation frequently go unrecognised and that in some Länder, children at the primary level are assigned to special schools despite parental opposition. The Committee has also voiced concern about the prevalence of violence

<sup>80</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland 5./6 ergänzender Bericht an die Vereinten Nationen Empfehlungen 55–56 and 71.

inflicted on girls with disabilities and about the differences in the level of support provided to families with and without migrant backgrounds.<sup>81</sup>

The UN Committee on the Rights of Persons with Disabilities has emphasised that States that maintain a separate special-needs school system alongside the regular school system are not fulfilling their obligation to create an inclusive school system.<sup>82</sup>

### Depiction in the reports submitted by Germany

The State-party reports describe further improving the situation with respect to children learning together as the declared aim of the federal and Länder governments.<sup>83</sup> Referring to the data provided by the Länder, the Federal Government points to the significantly decreased percentage of students attending special needs schools as a positive development while identifying a need for action in the continuingly high percentage of pupils who leave special needs schools without a leaving certificate. With regard to discrimination against children with disabilities, the reports refer to the revised National Action Plan 2.0 on the UN Convention on the Rights of Persons with Disabilities and to the guidelines in the document entitled “Educating Teachers to Embrace Diversity – Joint Recommendations by the German Rectors’ Conference and the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany”<sup>84</sup> (2015) as laying the foundations for changes in the teacher training system.

### Responses from civil society

In its report, the National Coalition criticises the wide variation in the extent and form of inclusive education across the individual federal states and the strikingly low inclusion rate at grammar schools (*Gymnasien*), as well as the high percentage of pupils who leave special needs schools without a leaving certificate. In addition to inclusion at schools, the report cites a need for an inclusion-oriented reform of Book VIII of the Social Code (SGB VIII) and for the systematic establishment of protections for girls with disabilities.<sup>85</sup>

### Assessment of the Monitoring Mechanism

Thirty years after the United Nations Convention on the Rights of the Child came into force and ten years after the United Nations Convention on the Rights of Persons with Disabilities did so, inclusive education has still not been systematically established in Germany. There are still children with disabilities being taught in the separate structures of special-needs education. Only a handful of federal states (Berlin, Bremen, Hamburg and Schleswig-Holstein) can point to a declining rate of exclusion coupled with a clear increase in the rate of inclusion. What is more, the slow pace of the transition away from special-needs schools makes it likely that exclusion and

<sup>81</sup> UN, Committee on the Rights of the Child (2014): Concluding Observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4 paras 53 and 54.

<sup>82</sup> In its understanding of inclusion, the UN Committee is guided by the right to inclusive education in the UN Convention on the Rights of Persons with Disabilities. UN, Committee on the Rights of Persons with Disabilities, General comment No. 4 (2016) Article 24: Right to inclusive education, CRPD/C/GC/4

<sup>83</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 35. Remark by the CRC Monitoring Mechanism: No joint declaration presenting a common understanding of the term “inclusion” has been issued by the federal and Länder governments

<sup>84</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), pp. 14 and 36.

<sup>85</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland 5./6 ergänzender Bericht an die Vereinten Nationen Empfehlungen 87 and 89.

inclusion rates will remain unchanged or perhaps even deteriorate.<sup>86</sup> The Monitoring Mechanism wishes to emphasise that it stands with civil society in calling for an inclusion-oriented reform of Book VIII of the Social Code and the systematic establishment of protections for girls with disabilities.

#### SUGGESTIONS FROM THE MONITORING MECHANISM

37. The Committee should recommend that Germany develop effective measures to provide access to a high-quality, inclusive education system in all Länder and scale down the segregated school system.
38. Each of the federal states should develop its own comprehensive concept for developing an inclusive school system. The concepts should accord with General Comment No. 4 of the UN Committee on the Rights of Persons with Disabilities. Persons with disabilities should be involved in their development.
39. All federal states should create a statutory entitlement to access to a regular school in which students are taught together. At the same time, the provisions which make the education of children who need special educational support in the regular school system subject to the condition that the school has the necessary resources, which still exist in the legislation of some Länder, should be revoked and steps be taken to ensure the provision of reasonable accommodation, in the meaning of article 5, paragraph 2 in conjunction with article 2, paragraph 4 of the UN Convention on the Rights of Persons with Disabilities.<sup>87</sup>
40. The Länder should be urged to ensure that education, school development plans and teacher training programmes are designed in a manner sensitive to discrimination and take an intersectional perspective. Pedagogical training should address the complexity and subtlety of levels and experiences of discrimination. This entails the further development of concepts for high-quality inclusive initial and continuing and advance professional training.
41. The federal and Länder governments should enact legislation providing for child-friendly complaints procedures in all educational institutions.
42. As the Istanbul Convention has entered into force in Germany, the Federal Government will have to intensify its efforts to protect girls from violence. Robust legislative action is needed to provide protections against violence and abuse, above all to girls and women with disabilities, in the institutional context in particular – i.e. in residential facilities.<sup>88</sup>

<sup>86</sup> Cf. Aichele, Valentin et al. (2019): *Wer Inklusion will, sucht Wege. Zehn Jahre UN-Behindertenrechtskonvention in Deutschland*. Berlin: Deutsches Institut für Menschenrechte.

<sup>87</sup> Article 5, paragraph 2 of the Convention on the Rights of Persons with Disabilities: "States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds". Article 2 paragraph 4 of the same convention: "'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

<sup>88</sup> Cf. on the claims overall: Rabe, Heike / Leisering, Britta (2018): *Die Istanbul-Konvention. Neue Impulse für die Bekämpfung von geschlechtsspezifischer Gewalt*. Berlin: Deutsches Institut für Menschenrechte.

### 4.3 Child poverty

#### Recommendations of the United Nations

The Committee on the Rights of the Child has recommended that Germany strengthen its efforts to tackle the causes of child poverty and conduct a comprehensive evaluation of the areas in which families are particularly vulnerable to poverty.<sup>89</sup> This should then be used as a basis for developing and implementing appropriate remedial strategies.

The UN Committee for Economic, Social and Cultural Rights recently identified child poverty as a priority issue and requested Germany to submit an interim report detailing relevant measures,<sup>90</sup> and specifically recommended that Germany continuously review existing policies and collect data relating to child benefit schemes.<sup>91</sup>

#### Depiction in the reports submitted by Germany

Germany refers to a package of anti-poverty measures that includes a reform of the benefits scheme and an increase in the supplementary child allowance as well as improvements to the scheme of purpose-specific benefits called the “Education and Participation Package”. The reports also refer to the extension of entitlements under the Advance Maintenance Payment Act (UHVorshG), the Good Childcare Act (Gute-KiTa-Gesetz), which entered into force on 1 Jan. 2019, and to the coalition-agreement undertaking to create a legal entitlement to full-time childcare for school children.<sup>92</sup>

#### Responses from civil society

The National Coalition details various forms of child poverty in Germany and calls for a stronger orientation towards the actual needs of children and young people in the determination of benefits. It also calls for the packaging of benefits relating to children.<sup>93</sup>

#### Assessment of the Monitoring Mechanism

Important statutory provisions, such as that extending entitlements under the Advance Maintenance Payment Act, have been put in place. Nonetheless, there remain grounds to fear that the measures mentioned by the Government will contribute in only a very selective scope to the prevention of child poverty, particularly in relation to structurally disadvantaged population groups, such as families with migrant or refugee backgrounds. In addition, persons entitled to benefits in Germany often are not well informed about eligibility for social benefits, and access to existing entitlements is de facto impaired by high bureaucratic hurdles and confusion about the competing claims for benefits under social law.<sup>94</sup> The great number of different types of benefit claims

<sup>89</sup> UN, Committee on the Rights of the Child (2014): Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 65.

<sup>90</sup> UN Committee on Economic, Social and Cultural Rights (2018): Concluding Observations on the sixth periodic report of Germany, UN Doc. E/C.12/DEU/CO/6, para. 66.

<sup>91</sup> UN Committee on Economic, Social and Cultural Rights (2018): Concluding Observations on the sixth periodic report of Germany, UN Doc. E/C.12/DEU/CO/6, para. 51.

<sup>92</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 44- 45.

<sup>93</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland 5./6 ergänzender Bericht an die Vereinten Nationen Empfehlungen 106–111.

<sup>94</sup> Cf. Bertelsmann-Stiftung (2018): Politik vom Kind aus denken – Konzept für eine Teilhabe gewährleistende Existenzsicherung für Kinder und Jugendliche, pp. 6 and 15.

administered by different state bodies may cause families at risk of poverty to fall through the cracks in the social benefits system.

Child poverty in Germany is still a growing problem and one that is by no means limited to aspects of education, participation and childcare. In this area, the Monitoring Mechanism sees a need for a complete realignment<sup>95</sup> in the current political strategy that shifts the focus to the elimination of bureaucratic hurdles and of incompatibilities among provisions of the law governing benefits and to guaranteeing a reasonable standard of living to all children without any discrimination.

#### SUGGESTIONS FROM THE MONITORING MECHANISM

43. The Committee should strongly urge the Federal Government to put in place a national strategy to combat poverty that prioritises child poverty. A coherent policy to combat child poverty should be based on children's rights and should be sensitive to discrimination; it should place children as persons with entitlement in the focus and create the possibility for participation of children's self-organisations.

## 4.4 Protection of refugee children

### Recommendations of the United Nations

In the most recent Concluding Observations that the Committee on the Rights of the Child issued to Germany, the Committee reiterated its praise for the State party's withdrawal of its reservations to the Convention and lauded its efforts in accepting thousands of children seeking asylum from many countries. The Committee continued to be concerned, though, about the recognition of legal capacity at the age of 16, about the age assessment practices being employed, the failure to recognise child-specific grounds for protection (child soldiers/ child trafficking) in asylum proceedings and the practice of imposing custody pending deportation on minor children in Germany.<sup>96</sup> The Committee noted with appreciation that the best interests of the child are a guiding principle in the German legal system and one whose application is increasingly common, but expressed concern about the fact that the principle of the best interests of the child had not yet been fully incorporated in to federal law, that the prioritisation of the child's best interests had not yet been integrated into all areas of the legislative, executive and judicial branches and that it was frequently disregarding in cases involving refugee children and children seeking asylum.<sup>97</sup>

### Depiction in the reports submitted by Germany

The Government's reports refer to legal reforms implementing individual Committee recommendations, specifically, by raising the age of legal capacity of migrant children in proceedings under asylum and residence law, and through the introduction of section 42f of the Book VIII of the Social Code, which regulates age assessments in

<sup>95</sup> Cf. Der Paritätische Gesamtverband (2019): Verschlussene Türen. Eine Untersuchung zu Einkommensungleichheit und Teilhabe von Kindern und Jugendlichen, p. 22.

<sup>96</sup> UN, Committee on the Rights of the Child (2014): Concluding Observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para.68 a),b),c),d).

<sup>97</sup> UN, Committee on the Rights of the Child (2014): Concluding Observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, para. 26.

administrative proceedings of the Youth Welfare Office.<sup>98</sup> The reports list various federal programmes and projects in the areas of access to education, school integration and fostering language proficiency, as well as in the area of accommodation and protection of children entering Germany with their families.<sup>99</sup> Regarding the latter, the reports highlight the federal initiative to protect refugees in refugee accommodations, which is jointly led by the Federal Ministry for Family Affairs, Senior Citizens Women and Youth and UNICEF. According to the reports the initiative led to the development of the first minimum standards for the protection of women and children against violence.<sup>100</sup> The Government's reports also refer to the possibility for family reunification, which exists in principle, in the form of a discretionary regulation that limits the number of family reunification visas that can be issued in one month to 1,000.<sup>101</sup>

### Responses from civil society

The National Coalition acknowledges the increase in the age of legal capacity to 18 years and the introduction of statutory provisions addressing age assessment procedures under child and youth services law.<sup>102</sup> It criticises the numerous amendments affecting minor refugees enacted during the reporting period, noting that, in its view, the legislature had failed to adequately live up to the obligations that arise to it from article 3 of the Convention when drafting this legislation. Addressing unaccompanied and accompanied minors separately, the report goes on to criticise the age assessment procedure, the still inadequate consideration of child-specific grounds for protection in asylum proceedings, the absence of a statutory prohibition against holding minors in detention pending deportation (*Abschiebungshaft*) or custody pending departure (*Ausreisegewahrsam*), the considerable negative impacts of the practice of issuing repeated renewal of stays of deportation and of the extension of the length of stay in reception centres in the reporting period as well as the restriction of the implementation of rights in the areas of health and education that this last entails.<sup>103</sup> The National Coalition also criticised the discretionary regulation<sup>104</sup> that entered into force in August of 2018 concerning family reunification for beneficiaries of subsidiary protection.<sup>105</sup>

### Assessment of the Monitoring Mechanism

Although Germany has implemented individual Committee recommendations, most of the more than 25 pieces of legislation affecting minor refugees that the Bundestag has

<sup>98</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), pp. 50–51.

<sup>99</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 50.

<sup>100</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), p. 52.

<sup>101</sup> It should be noted here that before 2106, this possibility existed, subject to certain conditions, for members of the nuclear family (parents/minor children) of beneficiaries of subsidiary protection, but was suspended from March of 2016 and July of 2018, and was reintroduced in August of 2018 in the form of a discretionary regulation allowing visas to be granted to a maximum of 1,000 persons per month. Siblings of unaccompanied minors are not covered in general by the regulations on family reunification.

<sup>102</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 122–144.

<sup>103</sup> Joint statement by 20 civil society associations on the planned legislation and the welfare of the children involved (2017): Geplantes Gesetz zur besseren Durchsetzung der Ausreisepflicht muss das Wohl der betroffenen Kinder berücksichtigen, [https://b-umf.de/src/wp-content/uploads/2018/08/2017\\_02\\_21\\_stn\\_gesetz-zur-besseren-durchsetzung-derausreisepflicht.pdf](https://b-umf.de/src/wp-content/uploads/2018/08/2017_02_21_stn_gesetz-zur-besseren-durchsetzung-derausreisepflicht.pdf) (retrieved: 07 Aug. 2019).

<sup>104</sup> BGBl. I 2018, p. 1147.

<sup>105</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 77–78. [https://familie.asyl.net/fileadmin/user\\_upload/pdf/Gutachten\\_Familiennachzug\\_Deutsches\\_Kinderhilfswerk.pdf](https://familie.asyl.net/fileadmin/user_upload/pdf/Gutachten_Familiennachzug_Deutsches_Kinderhilfswerk.pdf) (retrieved: 07 Aug. 2019).

enacted since 2015 impose tougher rules for them (whether unaccompanied or accompanied). A shared understanding of Germany's obligation to respect the primacy of the best interests of the child and the general principles of the Convention has not taken root sufficiently across all government ministries. In 2016, the German Institute for Human Rights expressed great concern about the issue of family reunification, pointing out the inadmissibility of a blanket suspension<sup>106</sup> of family reunification for beneficiaries of subsidiary protection and calling for practices that respect children's rights and human rights.<sup>107</sup> The German Institute for Human Rights condemned the legislative changes that followed, which established a monthly maximum number of visas that could be issued on the grounds of family reunification of beneficiaries of subsidiary protection, describing them as irreconcilable with human rights.<sup>108</sup>

The extension of the period of mandatory residence in reception centres makes gaining access to schools and childcare facilities more difficult and sometimes impossible until children have been assigned to a specific municipality (see also the versions of the map charting children's rights in Germany on refugee children's access to schools and childcare facilities).<sup>109</sup> This period can be between 6 and 24 months; it was even possible during the period under report for children from safe countries of origin to be required to live in a reception centre until they left Germany (sect. 47 Asylum Act (AsylG), before amendment). A recently adopted package of seven pieces of legislation toughens the rules for refugees, including children, relating to detention, living expenses allowance and prospects.<sup>110</sup>

#### SUGGESTIONS FROM THE MONITORING MECHANISM

44. The Committee should strongly urge Germany to revise its immigration policy to ensure non-discrimination and respect for children's rights in accordance with the Convention.
45. The federal and Länder governments should ensure that refugee children are treated as children, both in law and in practice.<sup>111</sup>
46. The primary consideration of the best interests of the child must be explicitly anchored in immigration and asylum law.

<sup>106</sup> BGBl. I 2016, p. 390.

<sup>107</sup> Deutsches Institut für Menschenrechte (2016): Das Recht auf Familie Familieneinheit von Kindern und Eltern ermöglichen – auch für subsidiär Geschützte.

<sup>108</sup> Deutsches Institut für Menschenrechte (2018): Zur öffentlichen Anhörung am Montag, dem 29. Januar 2018, 9 Uhr im Hauptausschuss des Deutschen Bundestags zum Familiennachzug Zum Gesetzentwurf der Fraktion der AfD, 06.12.2017, BT-Drucksache 19/182; Gesetzentwurf der Fraktion DIE LINKE, 12.12.2017, BT-Drucksache 19/241; Gesetzentwurf der Fraktion der FDP, 15.01.2018, BT-Drucksache 19/425; Gesetzentwurf der Fraktion der CDU/CSU, 16.01.2018, BT-Drucksache 19/439 und dem Antrag der Fraktion BÜNDNIS 90/DIE GRÜNEN, 17.01.2018, BT-Drucksache 19/454.

<sup>109</sup> <http://landkarte-kinderrechte.de>

<sup>110</sup> Deutsches Institut für Menschenrechte (06 Jun. 2019): Press release: Vertiefte Diskussion des Geordnete-Rückkehr-Gesetzes erforderlich. <https://www.institut-fuer-menschenrechte.de/aktuell/news/meldung/article/pressemitteilung-vertiefte-diskussion-des-geordnete-rueckkehr-gesetzes-erforderlich/> (retrieved: 07 Aug. 2019).

<sup>111</sup> UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (2017), Joint General Comment No. 3 of the CMW and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3-CRC/C/GC/22, para. 11.

47. The primary responsibility of child and youth services for the identification, accommodation and care of unaccompanied minors must be explicitly and unambiguously established in Book VIII of the Social Code and in immigration and asylum law.
48. The legislature should ensure that family-court decisions are always taken into account in asylum- or immigration proceedings involving unaccompanied or accompanied minor refugees.
49. The federal legislature should ensure that the exemption from the obligations to transfer data to the authorities responsible for enforcing immigration and asylum law explicitly applies to all bodies that promote the participation and support of refugee children – i.e. not only educational facilities as is currently the case.
50. It should be possible for refugee children to assert their right to protection on child-specific grounds effectively in asylum proceedings. To this end, the federal legislature should establish procedures ensuring that proceedings are child-sensitive right from the start, introduce requirements to provide information delivered in a child-sensitive manner and to make available independent advisors and representatives trained in family law (*Kindschaftsrecht*) and immigration law.
51. The federal legislature should create a statutory basis for the consideration of child-specific grounds for protection in asylum proceedings<sup>112</sup> – fleeing persecution as a child soldier, for instance – in line with the guidelines developed<sup>113</sup> by the Office of the United Nations High Commissioner for Refugees. It should also ensure that asylum proceeding hearings involving testimony by all minors are carried out by specially trained personnel.
52. The federal and Länder governments should ensure that all persons influencing the asylum or immigration prospects of children – such as the personnel of the Federal Police or immigration authorities (Ausländerbehörden) – are qualified specifically to work with children.
53. Germany should ensure that children, without exception, are never the subject of procedures that make it more difficult to establish a well-founded fear of persecution in their country of origin (the “safe country of origin” concept).
54. Germany should make it clear that children must not, without exception, be subjected to any form of detention for purposes of deportation.
55. The federal legislature should considerably shorten the period for which children and families are required to stay in reception centres. Children’s right to access to the general education system, to a high standard of healthcare, to development and to an adequate standard of living should be ensured right from the start.

<sup>112</sup> UNHCR (2009): Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. HCR/GIP/09/08.

<sup>113</sup> UNHCR (2009): Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. HCR/GIP/09/08.

56. The federal legislature should take prompt action to ensure that children's right to family life is upheld, by formulating an unqualified entitlement to family reunification for recognised refugees and beneficiaries of subsidiary protection that applies for members of the nuclear family – including siblings. Effective procedures allowing accelerated and sympathetic processing of family reunification applications should be established.

## 4.5 Participation in political and social life

### Recommendations of the United Nations

The Committee discussed and emphasised children's important role as human rights defenders in 2018 at the Day of General Discussion 2018.<sup>114</sup>

### Depiction in the reports submitted by Germany

In a section on article 12 and respect for the views of the child, the State-party reports point to the special role of youth associations and their federations, as self-organisations of children and young people in Germany, in participation in social and political life.<sup>115</sup> The reports emphasise that the coalition agreement of the parties currently forming the Federal Government provides for the development of a joint youth strategy and, at the Länder level, the partially completed incorporation of participation rights of children into the municipal codes<sup>116</sup> and the lowering of the voting age to 16 for Länder parliament and local elections in some Länder.<sup>117</sup>

### Responses from civil society

The National Coalition defines true participation in political life as beginning when young people have the right to be heard, to take initiatives and influence policy through the election of delegates from youth civil society. Accordingly, they call for a further reduction of the minimum age for signing public petitions and for voting in referendums and in elections at the local, Länder, federal and European levels. In addition, the National Coalition advocates a systematic incorporation of structures and processes for child and youth participation in child and youth policymaking and calls for the promotion of youth civil society organisations as a democratic form of self-administration by young people and of the representation of their interests.<sup>118</sup>

### Assessment of the Monitoring Mechanism

Article 12 of the Convention contains children's right to be heard and to have their views considered. This right should be understood broadly and is by no means restricted to specific procedural situations or individual cases. Rather, it is the foundation for a universal right of children to participate in the political and social life of their communities and of the society at large. The engagement of children who actively defend their own human rights is a special form of social participation. For this

<sup>114</sup> UN, Committee on the Rights of the Child (2018): Day of General Discussion – "Protecting and Empowering Children as Human Rights Defenders".

<sup>115</sup> Fifth and Sixth State Party Reports of the Federal Republic of Germany on the United Nations Convention on the Rights of the Child (2019), pp. 16–18.

<sup>116</sup> Fünfter und Sechster Staatenbericht der Bundesrepublik Deutschland zu dem Übereinkommen der Vereinten Nationen über die Rechte des Kindes (2019), Anhang 1, Table, pp. 19–23.

<sup>117</sup> Cf. see also [www.landkarte-kinderrechte.de](http://www.landkarte-kinderrechte.de)

<sup>118</sup> National Coalition (pub.) (2019): Die Umsetzung der UN-Kinderrechtskonvention in Deutschland, 5./6. ergänzender Bericht an die Vereinten Nationen, Empfehlungen 39–41.

kind of engagement, children need an enabling environment. This entails, inter alia, a supportive legal framework, opportunities to participate in policymaking, planning and decision-making processes, long-term support and (financial) resources for self-organisation.

Germany is one of the many countries in which pupils and students have mobilised to demand action to protect the climate and the environment, and thus their future, within the international Fridays for Future movement. A great many politicians in the current Governments, as well as some school authorities and schools, have reacted to the activists' absence from instruction by threatening of serious sanctions for violating the obligation to attend school. In doing so, they have failed to recognise that the rights of children to freedom of opinion and freedom of assembly guaranteed in the Convention – two individual rights that are key enablers of social participation – rank as constitutional rights in Germany, meaning that threats of blanket sanctions under the laws relating to schools may be out of proportion. Under certain circumstance, skipping classes in order to participate in a demonstration calling for a new climate policy constitutes a violation of the obligation to attend school on the part of students, however, in individual cases this violation may be justified on constitutional and human rights grounds. It is imperative that this be considered in decisions on the possible imposition of sanctions.

Children's participation in society also entails an environment conducive to all forms of self-organisation. Self-organisations of children and young people can contribute substantially towards ensuring a greater recognition of the concerns of children as those of rights holders.

#### SUGGESTIONS FROM THE MONITORING MECHANISM

57. The Committee should remind Germany that children who defend their human rights, like others who do so, should be respected and protected by the State rather than sanctioned.
58. The federal and Länder governments should ensure that public education institutions and institutions providing child and youth services actively inform children and their legal guardians about the possibilities and conditions for civic engagement and political and social participation.
59. The Committee should strongly urge the federal and Länder governments to promote all forms of self-organisation by children actively and directly, particularly in public education institutions and institutions providing child and youth services.

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Report I October 2019

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