

**Parallel Report by the German Institute for Human Rights to the UN Committee on  
the Elimination of All Forms of Racial Discrimination (CERD)**

in the context of the examination of the 19<sup>th</sup>- 22<sup>nd</sup> State Report of Germany

Berlin, April 2015

## Preliminary remarks

The German Institute for Human Rights is Germany's independent national human rights institution. It is accredited under the United Nations Paris Principles (A status). The institute's tasks include policy advice, human rights education, information and documentation, applied research into human rights issues and cooperation with international organisations. This Parallel Report to the Committee (CERD) is not intended as a comprehensive assessment of Germany's implementation of its obligations under the UN convention against racial discrimination. Rather, its aim is to provide the Committee with information on certain aspects of protection against racism in Germany from a human rights perspective considered by the Institute to be of particular relevance, and on recent developments following the submission of the State Report of Germany (reporting period: January 2006 to November 2012), to assist the state report procedure.

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## 1. Racist views in the public sphere

cf. State Report paragraph 30 ff.

### Background

In Germany, racist views are expressed in the public sphere - i.e. in speeches, interviews, at demonstrations, in publications, on election posters, on the internet - both by far-right parties and organisations, and by persons and organisations who do not obviously belong to the far-right spectrum, extending as far as the political mainstream. Attitude research reveals that stereotypes and attitudes directed against Jews, Sinti, Roma, Muslims, refugees and migrants are by no means limited to far-right environments.<sup>1</sup>

A new development dating from late 2014 are the weekly “PEGIDA” demonstrations which began in Dresden and spread to other cities, attracting thousands of participants, held in protest against a supposed Islamisation of Germany and against refugees. A novel aspect of these demonstrations is that the participants come from both the far right and the political mainstream. At these demonstrations, racist stereotypes and attitudes are openly aired in public. Since 2014 the party AfD (Alternative for Germany) has gained a presence in four Länder parliaments. Some of the leading members of the party openly sympathise with the PEGIDA movement.

Conversely, there has also been a noticeable counter-movement, with many people across the country demonstrating against racism and in favour of a diverse German society in which refugees are welcome. The Federal Chancellor, the Minister of Justice and the Minister for Foreign Affairs have appealed to people in Germany to disregard racist slogans and movements such as PEGIDA. In the wake of the attacks by Islamic extremists in Paris in January, the Federal President, the Federal Government and the parliamentary groups of the Bundestag accepted an invitation by Muslim associations in cooperation with Christian churches and the Central Council of Jews to take part in a public vigil for a “open-minded and tolerant Germany and for freedom of opinion and religion”.

In the preceding years, an increase in anti-Muslim and anti-Gypsy views could already be observed in public debates on integration, asylum and immigration. This is exemplified on the one hand by the controversy sparked in 2009 and 2010 by Thilo Sarrazin, a German politician and at the time a member of the Deutsche Bundesbank executive board who expressed racist views directed primarily against “Turks”, “Arabs” and Muslims in books printed by renowned publishers and in magazines.<sup>2</sup> On the other hand, since 2012 Sinti and Roma have increasingly come under attack in debates about asylum and freedom of movement within the European Union, in some cases from politicians belonging to

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<sup>1</sup>Cf. e.g. Zick, Andreas, Klein, Anna (2014): *Fragile Mitte. Feindselige Zustände [Fragile centre. Hostile conditions]*, Friedrich Ebert Stiftung/Institut für interdisziplinäre Konflikt- und Gewaltforschung, Bielefeld University (publisher), Bonn.

<sup>2</sup> Amicus curiae Brief Submitted by the German Institute for Human Rights to the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD), Turkish Union in Berlin-Brandenburg (Petitioner) v Federal Republic of Germany (Respondent), (Communication No. 48/2010), December 2011 [http://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/PDF-Dateien/Pakte\\_Konventionen/ICERD/icerd\\_GIHR - amicus curiae brief on communication 48-2010\\_final.pdf](http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICERD/icerd_GIHR_-_amicus_curiae_brief_on_communication_48-2010_final.pdf); European Commission against Racism and Intolerance (ECRI), Report on Germany (fifth monitoring cycle), published on 25 February 2014, paragraph 35 ff., <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Germany/DEU-CbC-V-2014-002-ENG.pdf>.

established parties.<sup>3</sup> Moreover, in several electoral campaigns the far-right National Democratic Party of Germany (NPD) used posters bearing the slogan “Geld für die Oma statt für Sinti und Roma” (Money for grandma instead of for Sinti and Roma). In 2013, a number of mayors gave orders for the posters to be taken down in their cities, but were forced to withdraw the instructions after the NPD obtained an expedited injunction. The administrative court in Kassel, for example, ruled that the content of the posters was not of a racist nature, and the public prosecutor’s office suspended its preliminary investigations of the NPD officials responsible for them.<sup>4</sup> By contrast, the then Minister of Justice declared that she fully understood that besides feeling offended by the posters, Sinti and Roma also felt scared.<sup>5</sup>

## Assessment by the German Institute for Human Rights

The expression of racist views in the public sphere is on the rise in Germany. Reaction to these views ranges from condemnation to approval. Notably, when they invoke characteristics such as ‘culture’ or ‘religion’ rather than biologicistic theories, they are often not recognised as racist due to a narrowed understanding of racism. Racism is frequently equated with organised and violent right-wing extremism. The definition of racial discrimination given in article 1, paragraph 1 of ICERD and the obligations arising from ICERD are barely known in Germany. The effect of racism on its victims is also frequently underestimated.

ICERD sets out obligations for state parties and their institutions aimed at combating racism in the political sphere and in public life. One-time pledges to human rights are not enough; rather, these pledges must be put into practice and defended. The state and its institutions have a key role to play in this process.

## Proposed recommendations

- Speak out and take decisive action against any racist statement in the political sphere and in public life.
- Cultivate an understanding of racism in line with the provisions of ICERD in the judiciary and administrative bodies.

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<sup>3</sup>Cremer, Hendrik (2013): Die Asyldebatte in Deutschland 20 Jahre nach dem Asylkompromiss [*The Asylum Debate in Germany 20 years on from the Asylum Compromise*], German Institute for Human Rights, [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/essay\\_Die\\_Asyldebatte\\_in\\_Deutschland\\_20\\_Jahre\\_nach\\_dem\\_Asylkompromiss.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/essay_Die_Asyldebatte_in_Deutschland_20_Jahre_nach_dem_Asylkompromiss.pdf).

<sup>4</sup>Cf. Central Council of German Sinti and Roma (publisher) (2013): Verbot rassistisch diskriminierender Wahlkämpfe: eine Bestandsaufnahme zur Auseinandersetzung über die NPD-Wahlplakate gegen Sinti und Roma [*Prohibition of racial discrimination in election campaigns: a review of the dispute surrounding the NPD election posters targeting Sinti and Roma*]; Documentation for submission to the Federal Ministry of Justice, Heidelberg.

<sup>5</sup> *Hessische Niedersächsische Allgemeine*, 11 September 2013, NPD-Plakate: Justizministerin steht hinter Hersfelds Bürgermeister [*NPD posters: Justice Minister stands behind Mayor of Hersfeld*], <http://www.hna.de/lokales/rotenburg-bebra/justizministerin-steht-hinter-fehling-3105500.html>.

### 3. Proper handling of racist offences by the police and the judiciary - failing of the investigation into the series of murders committed by the NSU (National Socialist Underground)

cf. State Report paragraph 58 f., para. 66 ff., para 74 ff. and para 103 ff.

#### Background

In 2011 it became known that the far-right terror cell “National Socialist Underground” (NSU) was behind a series of racially motivated murders and attacks perpetrated from 1998 to 2007. Its members are charged with carrying out ten murders and two bombings in locations across the country (Nuremberg, Munich, Hamburg, Rostock, Dortmund, Kassel, Heilbronn and Cologne). The failure of the police and security authorities to solve this crime spree and determine its causes for so many years has been examined in parliamentary committees of inquiry at both federal and Länder level.<sup>6</sup>

This examination revealed serious administrative omissions and mistakes and fundamental organisational shortcomings by federal and Länder bodies, e.g. with regard to exchange of information, employee selection and prioritisation. Furthermore, the investigations’ lack of success over the years was found to have been caused in part by attitudes and patterns of behaviour which led to one-sided investigations, with the result that the motive for the crimes was sought primarily in the victims’ environment and in the field of organised crime; a possible racist background as a motive was never pursued with the necessary vigour. What is more, the manner in which the victims and the bereaved were treated in the course of the investigations was in many cases inadequate and inappropriate.<sup>7</sup>

On the basis of these findings, the Bundestag committee of inquiry issued a set of cross-party recommendations in August 2013. These recommendations include a process of critical self-examination within the police, and changes to police investigation procedures. The recommendations state that future investigations must ensure that racist motives are given due consideration where appropriate in light of the victim(s) and circumstances of the crime; that social diversity must be reflected in the makeup of police personnel; and that “intercultural competence” should be a fixed component of initial and ongoing training so as to enable a professional approach to social diversity within the police. The recommendations also call for improvements in communication with victims and the bereaved.<sup>8</sup> In the wake of the German federal election in autumn 2013, the new Bundestag<sup>9</sup> and the Federal Government<sup>10</sup> endorsed the recommendations of the committee of inquiry and committed themselves to implementing them.

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<sup>6</sup>At the Länder level, committees in Bavaria, Saxony and Thüringen have already written up their final reports. At present, other committees are active in Hessen, Baden-Württemberg and North Rhine-Westphalia.

<sup>7</sup>German Bundestag (2013): Recommendation for a Resolution and Report of the second Committee of Inquiry under article 44 of the Basic Law, Bundestag printed paper 17/146000, 22 August 2013, in particular pp. 843, 830, 576, 862.

<sup>8</sup>German Bundestag (2013): Recommendation for a Resolution and Report of the second Committee of Inquiry under article 44 of the Basic Law, Bundestag printed paper 17/146000, 22 August 2013, p. 843 f.; 861 f.

<sup>9</sup> Motion by the parliamentary groups CDU/CSU, SPD, The Left Party and Alliance 90/The Greens, endorsement of the recommendations made in the final report of the second committee of inquiry of the 17th electoral term, “National Socialist Underground terror group”, Bundestag printed paper 18/558 of 19 February 2014.

<sup>10</sup> CDU, CSU and SPD (2013): Deutschlands Zukunft gestalten [*Shaping Germany's future*], coalition agreement between CDU, CSU and SPD, p. 101.

Following the recommendations of the committee of inquiry, an amendment is to be made to the German Penal Code (Strafgesetzbuch, StGB),<sup>11</sup> so that the general rules on sentencing in paragraph 46 of the StGB include the requirement that “in particular, racist, xenophobic or other discriminatory” motives and goals be taken into consideration.<sup>12</sup> The aim of the amendment is to ensure racist motives are investigated in the first place, and taken into consideration at sentencing. An accompanying amendment to the Guidelines for Criminal and Summary Proceedings (RiStBV) has also been announced.

Whether or not the many other recommendations of the Bundestag committee of inquiry are having any effect is impossible to say at present, particularly as many of them are directed not just at the Federal Government, but at each of the sixteen Länder as well.

Even after the examination of the failings in the investigation into the NSU murders, cases continue to emerge in which police, the public prosecutor’s office and the courts have failed to consider racist motives in the detection, investigation and prosecution of crimes.<sup>13</sup>

At present, statistical recording of racially motivated crimes is carried out only in the course of the criminal statistical analysis by the police (under the heading “politically motivated criminal offences”). The actual recording of offences under this heading has been criticised as insufficient.<sup>14</sup> Judicial statistics maintained by the courts do not distinguish racially motivated crimes. Flow statistics on the handling of crimes presumed to be racially motivated over the entire course of the criminal justice cycle, from the initial charge to prosecution and, where applicable, sentencing, do not exist in Germany.<sup>15</sup> The NSU committee of inquiry recommended a thorough overhaul of the statistical recording of racially motivated crimes, with the involvement of experts from the scientific community and civil society.<sup>16</sup>

### Assessment by the German Institute for Human Rights

The German Institute for Human Rights regards the causes of the failure to solve the crimes committed by the NSU documented by the committees of inquiry as indicators of systemic shortcomings in the handling of racially motivated crimes in Germany. The failure of the investigations to produce results over so many years can be attributed in part to attitudes and

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<sup>11</sup>Draft law of the Federal Government, draft of a law governing the implementation of recommendations of the NSU committee of inquiry of the German Bundestag (2014): Printed paper 18/3007 of 30 October 2014.

<sup>12</sup>The law was passed by the Bundestag on 19 March 2015, and has yet to be approved by the Bundesrat (status as of 08 April 2015).

<sup>13</sup>Lang, Kati (2014): Vorurteilskriminalität [*Bias crime*], Baden-Baden.

<sup>14</sup> Antidiskriminierungsstelle des Bundes (Editor) (2015): Möglichkeiten effektiver Strafverfolgung bei Hasskriminalität. Rechtsgutachten [*Possibilities for effective prosecution of hate crimes. Legal opinion*].

[http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/aktuelles/20150407\\_Rechtsgutachten\\_Hasskriminalitaet.html?nn=4193516](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/aktuelles/20150407_Rechtsgutachten_Hasskriminalitaet.html?nn=4193516); European Commission against Racism and Intolerance (ECRI), Report on Germany (fifth monitoring cycle), published on 25 February 2014, paragraph 26 f. and 56, <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Germany/DEU-CbC-V-2014-002-ENG.pdf>.

<sup>15</sup>Cf. in this regard Lang, Kati (2014): Vorurteilskriminalität [*Bias crime*], Baden-Baden, especially p. 473; Glet, Alke (2011): Sozialkonstruktion und strafrechtliche Verfolgung von Hasskriminalität in Deutschland [*Social construction and criminal prosecution of hate crime in Germany*], Berlin, especially p. 284.

<sup>16</sup>German Bundestag (2013): Recommendation for a Resolution and Report of the second Committee of Inquiry under article 44 of the Basic Law, Bundestag printed paper 17/146000, 22 August 2013, p. 861 (Recommendation no. 4).

patterns of behaviour which have their roots in racist stereotypes. International and European human rights bodies devoted to combating racism and NGOs have in the past already warned of insufficient recognition of racially motivated violence on the part of the police and the judiciary in Germany.<sup>17</sup>

The thorough examination of these institutional failings by committees of inquiry at federal and Länder level, and the resulting extensive recommendations for reform in the police and the judiciary constitute positive progress in this regard. The Institute considers it crucial that the Government and the Länder take decisive action to implement such a reform in order to ensure proper handling of racist offences by the police and the judiciary, and prevent discriminatory behaviour on the part of administrative bodies.

The change to the German Penal Code explicitly requiring racist motives to be taken into account at sentencing will implement current recommendations made to Germany by international and European human rights bodies devoted to combating racism, as well as Germany's obligations under Article 4 of ICERD. In order for this change to be effective, however, the Institute holds the view that it must be accompanied by a reform of the staff regulations and guidelines of the police and the public prosecutor's office, and targeted training measures for the police and the judiciary.

Whether or not a crime is recognised as being racially motivated and investigated accordingly is primarily the responsibility of the police. It is the police who are called to the scene when a crime is committed. The public prosecutor's office also plays an important role, as it is responsible for leading the investigation. In order to ensure that potential racist motives receive greater attention at an early stage of criminal investigations, the Bundestag committee of inquiry issued the following recommendation, which has yet to be implemented (Recommendation no. 1):

"In all cases of violent crime which could, in light of the victim's identity, have a racist or other political motive, this motive must be examined in detail, and the process transparently documented in an appropriate form unless witness statements, crime scene evidence and initial investigations suggest a different hypothesis with a sufficient degree of certainty. The police or public prosecutor's office must record and give due consideration to any motive suggested by the victim or by witnesses."<sup>18</sup>

Ensuring the investigation of potential racist motives is not only an obligation arising from ICERD. Also the European Court of Human Rights considers that in the event of violent

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<sup>17</sup>Cf. e.g. UN Committee on the Elimination of All Forms of Racial Discrimination (2008): Concluding observations of the Committee on the Elimination of Racial Discrimination, Germany, UN Doc. CERD/C/DEU/CO/18, 22 September 2008, paragraphs 18 and 26; Muigai, Githu (2010): Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Germany, UN Doc. AHRC/14/43/Add.2, 22 February 2010, Summary, p. 2, paragraphs 14, 32-36 and 78; European Commission against Racism and Intolerance (2009): Report on Germany, published on 26 May 2009, paragraph 79 ff.; Human Rights Watch (2011): Die Reaktion des Staates auf „Hasskriminalität“ in Deutschland [*The reaction of the State to "hate crime" in Germany*], 9 December 2011; *Welt am Sonntag* (2011): 182 Todesopfer rechter Gewalt [*182 killed by right-wing violence*], 20 November 2011, p. 1 and p. 8 f.

<sup>18</sup>German Bundestag (2013): Recommendation for a Resolution and Report of the second Committee of Inquiry under article 44 of the Basic Law, Bundestag printed paper 17/146000, 22 August 2013, p. 861.

crimes, Articles 2 and 3 of the ECHR in conjunction with Article 14 of the ECHR impose a procedural duty to investigate on states parties, including with regard to racist motives.<sup>19</sup>

Action must also be taken in the field of initial and ongoing training. Legislative amendments alone cannot be expected to address shortcomings in the police, public prosecutor's office and courts concerning the proper identification and handling of racially motivated crimes. The (frequently isolated) qualification opportunities available to date are not enough to achieve this. The ability of the police, the public prosecutor's office and the judiciary to recognise, effectively investigate and prosecute crimes with potentially racist motives must be fostered in a targeted manner so as to bring about a change in legal practice. This includes raising awareness of Germany's human rights obligations. To this end, it is necessary to design, develop and implement methods and content for qualification and awareness-raising purposes.

### Proposed recommendations

- Draft a report at the end of the current electoral term (2017) stating whether and how the Federal Government and the Länder have implemented the individual recommendations of the final report of the NSU committee of inquiry of the German Bundestag. For the drawing up of the report, an independent expert committee should be formed, involving the scientific community and NGOs.
- Include provisions in the Police Staff Regulations (PDV) and the Guidelines for Criminal and Summary Proceedings (RiStBV) imposing an explicit duty of investigation and documentation where racist or other discriminatory motives are concerned, in parallel to the legislative change to paragraph 46 of the German Penal Code (StGB).
- Develop specific modules to raise awareness of racism and provide human rights education for the police, the public prosecutor's office and judicial system and use them in regular, obligatory initial and ongoing training at a national level. Recognition and investigation of racist motives should become a core part of initial and ongoing training.
- Before submission of the next State Report to the committee, verify whether the amendment to paragraph 46 of the German Penal Code (StGB) and accompanying measures have led to changes in the actions of the police in individual Länder and at national level, in public prosecutor's offices and courts.
- Reform the system for recording of statistics in the police and the judiciary so that all crimes with racist motives are recorded and meaningful statistics on criminal proceedings can be produced.

## 4. Racial Profiling

cf. State Report paragraph 100 ff.

### Background

Under section 22 (1) (a) of the Federal Police Act (Bundespolizeigesetz, BPolG), for the purpose of controlling immigration the Federal Police can stop, question and demand identity documents from, and inspect objects in the possession of, any person in railway stations,

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<sup>19</sup>ECtHR (2005): Judgment of 6 July 2005, *Nachova v. Bulgaria*, application no. 43577/98 and 43579/98; ECtHR (2014): Ruling of 11 March 2014, *Abdu v. Bulgaria*, application no. 26827/08.

trains and airports.<sup>20</sup> According to the latest information from the Federal Government, in 2014 the Federal Police carried out 443,838 identity checks (questionings) on the basis of section 22 (1) (a) BPolG; between 2005 and 2013 the number of checks ranged between 328,169 and 581,101.<sup>21</sup>

According to information from the Federal Government, out of 443,838 identity checks carried out under section 22 (1) (a) BPolG in 2014, unauthorised entry or unauthorised residence was suspected in 10,109 cases. This corresponds to a proportion of 2.27%. In 2013 a total of 486,295 checks were carried out under section 22 (1) (a) BPolG. In 6,529 cases unauthorised entry or unauthorised residence was suspected, which corresponds to a proportion of 1.34%. In previous years the proportions were even lower. The fact that the proportion has increased in recent years can be explained by an increase in the number of asylum seekers fleeing to Germany. It is true that these statistics do not reveal whether the people concerned had just arrived in Germany in order to seek asylum. The statistics provide no information on this. However, the people in relation to whom the suspicion of unauthorised entry arose in 2014 came predominantly from the countries that were also the main countries of origin of asylum seekers:<sup>22</sup> in first place were Syrian nationals, followed by Eritreans and Afghans.<sup>23</sup>

Criticisms have grown that the Federal Police use racist practices when carrying out identity checks<sup>24</sup> since the Higher Administrative Court (Oberverwaltungsgericht, OVG) in the Rhineland-Palatinate found discrimination, prohibited under Article 3 (3) of the Basic Law (Grundgesetz, GG), in a case in October 2012. Cases where people go to court and accuse the Federal Police of having discriminated against them are increasingly reported.<sup>25</sup>

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<sup>20</sup> Section 22 (1) (a) BPolG states: "In order to prevent or stop unauthorised entry into Federal territory the Federal Police may briefly stop, question and demand the handover for examination of identity papers or travel documents and inspect objects in the possession of any person in trains and in the area of railway facilities belonging to the Federal Railways (section 3) and also in any air transport complex or facility of a commercial airport (section 4) handling international flights, if, on the basis of situational knowledge or border control experience, it is probable that these are being used for unauthorised entry."

<sup>21</sup> Federal Government's response to a minor interpellation of 27 February 2015, Bundestag Printed Paper (Bundestag-Drucksache) 18/4149, p. 5; Federal Government's response to a minor interpellation of 15 August 2013, Bundestag Printed Paper, 17/14569, p. 7; Federal Government's response to a minor interpellation of 20 December 2012, Bundestag Printed Paper 17/11971, p. 6 and p. 8; Federal Government's response to a minor interpellation of 9 August 2011, Bundestag Printed Paper 17/6778, p. 2.

<sup>22</sup> Syria was in first place here, with Eritrea in third place and Afghanistan in fourth place; see [http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Flyer/flyer-schluesselfzahlen-asyl-jahr-2014.pdf;jsessionid=5BBC99FD9CA2618BB9928D82351E85E9.1\\_cid368?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Flyer/flyer-schluesselfzahlen-asyl-jahr-2014.pdf;jsessionid=5BBC99FD9CA2618BB9928D82351E85E9.1_cid368?__blob=publicationFile).

<sup>23</sup> Federal Government's response to a minor interpellation of 27 February 2015, Bundestag Printed Paper 18/4149, p. 10 f.

<sup>24</sup> See also European Commission against Racism and Intolerance (ECRI), Report on Germany (fifth monitoring cycle), published on 25 February 2014, paragraph 15 f., <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Germany/DEU-CbC-V-2014-002-ENG.pdf>.

<sup>25</sup> Marvin Oppong, Marvin, Racial Profiling, Die Fälle vor Gericht häufen sich [*Racial profiling. The number of cases before the courts is increasing*], 15 April 2014, <http://mediendienst-integration.de/artikel/ethnic-racial-profiling-deutschland.html>.

## Assessment by the German Institute for Human Rights

In the view of the German Institute for Human Rights, section 22 (1) (a) BPolG is incompatible with Article 3 (3) GG and the prohibition of discrimination in international human rights law.<sup>26</sup> These not only provide protection against legal provisions that stipulate unequal treatment in their very wording, they also apply if legal provisions result in de facto discrimination. According to the case law of the Court of Justice of the European Union, the Federal Constitutional Court<sup>27</sup> and also the European Court of Human Rights (ECtHR)<sup>28</sup>, legislators have a duty to provide protection against de facto discrimination. Under the ICERD too, it is expressly relevant whether laws “have the effect of creating” discrimination (Article 2 (1) (c) ICERD).

Against this background, section 22 (1) (a) of the Federal Police Act is irreconcilable with the prohibition on racial discrimination. The wording of section 22 (1) (a) BPolG does not indicate a violation of the prohibition on racial discrimination. It does not, for instance, refer to people of a particular appearance or to people with “dark skin” but states that “any person” can be checked. However, whether section 22 (1) (a) BPolG has the effect of creating racial discrimination depends on the consequences of the provision in practice.

According to the explanatory memorandum to the Act, identity checks by the Federal Police pursuant to section 22 (1) (a) BPolG are to occur “on a spot-check basis”.<sup>29</sup> This term is misleading because it could be thought to mean that the checks would follow a certain, specified system, capable in principle of covering any person. This is not, however, the case. The authority to stop and check any person in fact empowers the Federal police officers carrying out the checks to choose themselves which people they check in a train, railway station or airport.

Section 22 (1) (a) BPolG therefore authorises Federal police officers to act selectively without a person’s conduct having to provide grounds for their being checked. The legislative objective of the checks is that a look-out should be kept for people who are residing in the country illegally. With this requirement of the legislation it stands to reason that the Federal Police select people first and foremost on the basis of phenotypic characteristics. Indeed in reality (such) external characteristics are essentially all that the police can go on when the selection can and is to be done solely through visual observation. The law thus suggests that people’s residence status can be determined on the basis of phenotypic characteristics. Against this background it is clear from the provision itself that it has the effect of creating discrimination.<sup>30</sup> It therefore sends the police who carry out the checks a message that

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<sup>26</sup> Cremer, Hendrik (2013): “Racial Profiling” - Menschenrechtswidrige Personenkontrollen nach § 22 Abs. 1 a Bundespolizeigesetz [*Racial Profiling - Identity checks under section 22 (1) (a) BPolG that violate human rights*], German Institute for Human Rights (publisher), Berlin, [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Studie\\_Racial\\_Profiling\\_Menschenrechtswidrige\\_Personenkontrollen\\_nach\\_Bundespolizeigesetz.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_Racial_Profiling_Menschenrechtswidrige_Personenkontrollen_nach_Bundespolizeigesetz.pdf).

<sup>27</sup> Federal Constitutional Court (BVerfG) (2008): Decision of 18 June 2008, Case reference: 2 BvL 6/07, No. 48 f.

<sup>28</sup> EHCR, Grand Chamber (2007): Judgment of 13 November 2007, application number 57325/00 (D.H. and others v The Czech Republic), in particular paragraphs 175, 185 and 193.

<sup>29</sup> German Bundestag (1998): Bundestag Printed Paper 13/10790, 26 May 1998, p. 4.

<sup>30</sup> See Seebode, Manfred (1998): German Bundestag, meeting of the Committee on Internal Affairs on 15 June 1998, public hearing of experts on the draft of the First Act to Amend the Federal Border Guard Act [*Erstes Gesetz zur Änderung des Bundesgrenzschutzgesetz*], Printed Paper 13/10790; Möller, Winfried (2013): Der Fremde im Zug, Kritische Anmerkungen zum verwaltungsgerichtlichen Umgang mit Racial Profiling [*The foreigner in the train, critical comments on administrative court dealings with racial profiling*], relates to: Die Justiz, No 114, June 2013, p. 89; Amnesty International

contradicts the prohibition on racial discrimination.

The extent to which the practice of discriminatory identity checks on the basis of section 22 (1) (a) BPolG occurs cannot be determined statistically. However, for the officers of the Federal Police, unchangeable external characteristics routinely serve as a criterion that triggers suspicion, and thus as a selection criterion for carrying out checks.<sup>31</sup> This was also confirmed by the Chair of the German Police Federation, Rainer Wendt, in an interview which appeared in the newspaper “die tageszeitung” in October 2013.<sup>32</sup>

### Proposed recommendations

- Repeal section 22 (1) (a) BpolG and legally prohibit discriminatory profiling.
- Review and if appropriate repeal other statutory provisions that are comparable to section 22 (1) (a) BpolG.
- Entrench the prohibition on racial discrimination in both education and training and in policing so that police officers carry out their public authority tasks without discriminatory profiling.

## 5. Legal protection against discrimination

cf. State Report paragraph 129 ff. and paragraph 137

### Background

The General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, AGG) introduced in 2006 provides a legal framework for protection against discrimination by private individuals in employment law and civil law. There are also provisions in other laws providing protection against discrimination.<sup>33</sup> Studies show, however, that in Germany people seldom seek judicial assistance despite widespread discrimination in all areas of life.<sup>34</sup> An evaluation of the AGG has not yet taken place.

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(2014): Racial/Ethnic Profiling: Positionspapier zu menschenrechtswidrigen Personenkontrollen [*Position paper on identity checks that violate human rights*], Berlin, p. 11; Herrnkind, Martin (2014): “Filzen Sie die üblichen Verdächtigen!” oder: Racial Profiling in Deutschland [*“Frisk the usual suspects!” or: Racial profiling in Germany*], *Polizei & Wissenschaft* 3/2014, p. 52; European Commission against Racism and Intolerance (ECRI), Report on Germany (fifth monitoring cycle), published on 25 February 2014, paragraph 15 f., <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Germany/DEU-CbC-V-2014-002-ENG.pdf>.

<sup>31</sup> See Cremer, Hendrik (2013): Menschenrechtliche Verpflichtungen bei der Unterbringung von Flüchtlingen [*Human rights obligations in relation to accommodating refugees*], German Institute for Human Rights, Empfehlungen an die Länder, Kommunen und den Bund [*Recommendations to the Länder, municipalities and Federal Government*], Berlin, p. 27 ff., with numerous references.

<sup>32</sup> *die tageszeitung* (2013): Racial Profiling bei der Polizei. “Igittigitt, das ist Rassismus” [*Racial profiling by the police. “Ugh, that’s racism”*], 27 October 2013, <http://www.taz.de/!126295/>.

<sup>33</sup> Federal Anti-Discrimination Agency [Antidiskriminierungsstelle des Bundes] (2014): Handbuch rechtlicher Diskriminierungsschutz [*Handbook on legal protection against discrimination*], Baden-Baden.

<sup>34</sup> Rottleuthner, Hubert/ Mahlmann, Matthias (2011): Diskriminierung in Deutschland. Vermutungen und Fakten [*Discrimination in Germany. Assumptions and facts*], Baden-Baden.

The prohibition on racial discrimination contained in Article 3 (3) GG is directly binding on all public authorities. In court proceedings before the administrative courts against discriminatory action by government bodies, the principle of ex officio examination of the facts applies. Provisions comparable to the rules contained in the AGG on the relaxation of the burden of proof for persons affected by discrimination and on support from anti-discrimination organisations do not apply here.

Within the scope of its limited resources the Federal Anti-Discrimination Agency has supported and promoted projects for the regional integration of anti-discrimination activities and the training of advisors since 2012. Only in a few Länder are there state-run anti-discrimination bodies. Regional anti-discrimination advice centres established as civil society initiatives have established a Federal umbrella association (Antidiskriminierungsverband Deutschland) and developed standards for their advisory work.<sup>35</sup>

### **Assessment by the German Institute for Human Rights**

In the view of the Institute, 10 years on from the entry into force of the General Act on Equal Treatment, an appraisal of the law and other anti-discrimination legislation is due.

Efforts to promote qualification of the legal profession and the judiciary with regard to human rights protection against discrimination must continue. A model project by the German Institute for Human Rights, funded by the Ministry for Labour and Social Affairs, has developed training modules to this end aimed at the legal profession.<sup>36</sup> The Institute believes that it is also necessary to strengthen the ability of the courts to properly handle social diversity (diversity competence) and diversity in the courts themselves so as to safeguard access to justice without discrimination.

Despite the efforts of various state and non-state bodies, a Germany-wide accessible infrastructure of qualified anti-discrimination advice centres has yet to be established.

### **Proposed recommendations**

- Conduct an evaluation of the General Act on Equal Treatment and other anti-discrimination legislation in order to determine whether comprehensive and effective legal protection against discrimination is in place in Germany, in line with its human rights obligations, and which barriers stand in the way of effective enforcement.
- Include basic and human rights as a cross-cutting topic and diversity competence as a key qualification in standard initial and ongoing training for the legal professions and public service.
- Establish accessible non-governmental anti-discrimination advice centres throughout Germany and secure their long-term existence, set up public anti-discrimination agencies in all the Länder, increase the funding and independence of the Federal Anti-Discrimination Agency and expand its powers to include investigative powers and the power to initiate legal proceedings.

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<sup>35</sup> Website of Antidiskriminierungsverband Deutschland: <http://www.antidiskriminierung.org/>.

<sup>36</sup> <http://www.institut-fuer-menschenrechte.de/themen/projekt-anwaltschaft-fuer-menschenrechte-und-vielfalt/>.

## 6. Accommodation of refugees

No details in the State Report

### Background

The quality of refugee accommodation in Germany varies widely. There are no systematic obligatory minimum standards regulating its design or fixtures. All that is systematically regulated at national level is that in accordance with section 47 of the Asylum Procedure Act (AsylVfG), people who flee to Germany and request asylum must initially live in a reception centre.

Accommodation of refugees after the time spent in a reception centre is subject to widely varying regulations across Germany: they are generally housed in shared accommodation facilities, although there are also a number of municipalities where refugees are primarily housed in individual homes.<sup>37</sup> In these cases, the Länder leave the decision on the type of accommodation to the municipalities.<sup>38</sup> Other Länder require asylum-seekers or those who have been granted a “temporary suspension of deportation” (*Duldungsstatus*) to remain in shared accommodation for periods of up to several years.<sup>39</sup>

NGOs, charity organisations and refugee councils have been highlighting the inhumane conditions in some refugee accommodation facilities for years. Aspects criticised include inadequate hygiene, mould infestations, insufficient numbers of toilets, leaking roofs, malfunctioning heating systems in winter, a lack of spaces for children to move around and play in, and inadequate protection against violence for women. A further point of criticism concerns the size of certain refugee accommodation facilities in which hundreds of people are housed.<sup>40</sup> The number of protests and attacks against refugee accommodation facilities has increased.<sup>41</sup> Furthermore, in 2014 cases of security staff abusing refugees came to light.

In order to combat deficits in refugee accommodation facilities, charity organisations and refugee councils have for many years been calling for obligatory minimum standards for reception centres and shared accommodation facilities. Moreover, Germany has until 20 July 2014 to transpose into national law the EU directive on reception conditions of 26 June 2013 (2013/33/EU), which lists requirements for the accommodation of refugees.

### Assessment by the German Institute for Human Rights

In the view of the German Institute for Human Rights, the practice of forcing people to live in shared accommodation facilities for periods lasting several years, thereby denying them

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<sup>37</sup>Wendel, Kay (2014): Unterbringung von Flüchtlingen in Deutschland, Regelungen und Praxis der Bundesländer im Vergleich [*Accommodation of Refugees in Germany. A Comparison of Regulations and Practice across Federal States*], Pro Asyl: Frankfurt am Main, p. 64.

<sup>38</sup>These include e.g. Rhineland-Palatinate, Lower Saxony, North Rhine-Westphalia and Hessen.

<sup>39</sup>These include e.g. Bavaria and Hamburg (cf. in this regard explicitly: Article 4, paragraph 4, item 2 of the Bavarian Reception Act (AufnG) and implicitly: Fachanweisungen zum Asylbewerberleistungsgesetz [*Technical notes on the Asylum Seekers' Benefits Act*], <0 Behörde für Arbeit, Soziales, Familie und Integration, Hamburg: II. 1.3.1 Types of housing).

<sup>40</sup>Cf. e.g. Diakonie Deutschland (2014): Position paper, positions on the reception, housing and accommodation of refugees; German Red Cross (DRK) press release (2012): German Red Cross calls for improvements in accommodation for asylum-seekers. <http://www.kvneuburg-schrobenhausen.brk.de/>.

<sup>41</sup>Federal Government's response to a minor interpellation, Bundestag Printed Paper (Bundestag-Drucksache) 18/3964 vom 06.02.2015.

access to the housing market, is not compatible with the right to housing, which is recognised as a human right.<sup>42</sup>The corresponding regulations, whether in force at the Länder level or at the level of the municipalities, should therefore be revoked. The state's duty to respect the right to housing encompasses that the state may not impose legal barriers which restrict or indeed deny access to the housing market by individuals in an unjustified manner.<sup>43</sup>Economic, social and cultural rights such as the right to housing must be available to all, in particular the weakest segments of society, both legally and in practice, without discrimination. The principle of non-discrimination applies regardless of nationality or residence status.<sup>44</sup>

While the right to freely choose a place of residence can be restricted for asylum-seekers and people who have been granted a "temporary suspension of deportation" (*Duldungsstatus*), and therefore do not hold a residence permit, it is unclear what justification there could be for forcing people to remain in refugee accommodation for rigidly prescribed periods without, for instance, taking into consideration whether measures for termination of their residence status are imminent. Impositions of this nature are not just unduly severe, but in fact constitute a violation of the human right to freedom from discrimination, at least when they extend over several years. To categorically deny people access to the housing market over a period of years is neither commensurate nor in line with the human right to freedom from discrimination.

Furthermore, in order to ensure reception conditions for asylum-seekers which are in line with human rights, nationwide obligatory minimum standards for the operation of refugee accommodation facilities must be created.

In addition, the establishment of mass accommodation facilities must be categorically avoided, as such facilities involve significant potential for conflict. Acceptance for the reception of refugees on the part of the local population can be negatively affected if refugee accommodation facilities for large numbers of asylum-seekers are created. The strain on the surrounding community caused by these facilities can be blamed on those living there, putting them at increased risk of hostility and racist attacks against refugees.

### Proposed recommendations

- Revoke legislation at Länder and municipal level forcing asylum-seekers and people who have been granted a "temporary suspension of deportation" (*Duldungsstatus*) to live in shared accommodation facilities.

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<sup>42</sup>Cremer, Hendrik (2013): Menschenrechtliche Verpflichtungen bei der Unterbringung von Flüchtlingen [*Human Rights Obligations in the Accommodation of Refugees*], German Institute for Human Rights, Berlin, [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Policy\\_Paper\\_26\\_Menschenrechtliche\\_Verpflichtungen\\_bei\\_der\\_Unterbringung\\_von\\_Fluechtlingen\\_01.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Policy_Paper_26_Menschenrechtliche_Verpflichtungen_bei_der_Unterbringung_von_Fluechtlingen_01.pdf).

<sup>43</sup>UN, Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN-Doc. CESCR E/C.12/GC/20, 2 July 2009, with additional remarks.

<sup>44</sup>UN, Committee on the Elimination of All Forms of Racial Discrimination (CERD), General recommendation No. 30 on discrimination against non-citizens (2004); UN, Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN-Doc. CESCR E/C.12/GC/20, 2 July 2009, with additional remarks.

- Create nationwide obligatory minimum standards for the operation of refugee accommodation facilities to ensure reception conditions for asylum-seekers which are in line with human rights.
- Avoid the creation of mass accommodation facilities.