

**Statement by the Federal Republic of Germany
regarding the Concluding Observations of the Committee
on the Elimination of Racial Discrimination
of 13 August 2008 in regard to Germany**

(CERD/C/DEU/CO/18 Concluding Observations/Comments)

The Committee considered the sixteenth to eighteenth periodic reports of Germany, submitted as one document (CERD/C/DEU/18), at its 1886th and 1887th meetings (CERD/C/SR.1886 and CERD/C/SR.1887) held on 5 and 6 August 2008, and on 13 August 2008 adopted its concluding observations and recommendations. In paragraph 33 of those concluding observations and recommendations, the Committee requests that Germany provide, within one year, information on the way it has followed up on the Committee's recommendations contained in paragraphs 16, 17, 22 and 26. The Federal Republic of Germany submits the following in that regard:

1. Preliminary remarks

A copy of the Committee's concluding observations and recommendations plus a German translation thereof were sent to the competent federal ministries, the Bundestag Committee on Human Rights and Humanitarian Aid and to the federal *Länder*. The concluding observations and recommendations and the sixteenth to eighteenth periodic reports of Germany are available in English and German on the Federal Ministry of Justice's website (www.bmj.bund.de).

Follow-up events

On 18 June 2009 the German Institute for Human Rights held a non-public meeting of experts to discuss the Committee's concluding observations and recommendations. This well-attended event served the exchange of information and opinions between representatives of the competent federal ministries, federal *Länder*, German Bundestag, academics, non-governmental organisations such as amnesty international, the Human Rights Forum, and representatives of the Central Council of German Sinti and Roma and the Rhineland-Palatinate Association of German Sinti und Roma. The meeting of experts addressed the following issues: racist propaganda on the internet, racially motivated crimes

as an aggravating circumstance for the purpose of sentencing, discrimination on the housing market, the situation of Sinti and Roma in Germany, as well as school access for children seeking asylum, children with tolerated status and children without residence status.

In addition, a conference entitled "Conference Against the Dissemination of Hatred on the Internet" was held at the Federal Ministry of Justice on 9 July 2009 as a follow-up to the international conference "Dissemination of Hatred on the Internet" held in 2000. The conference on the one hand took stock in regard to the combating of hatred and xenophobia on the internet, the range of legal and technical instruments that had proved their worth in practice, and what difficulties still needed to be overcome. Participants also looked to the future and discussed what approaches to adopt in the years to come.

2. Recommendation C.16.

While noting that the definition of the crimes in Sections 86a and 130 of the Criminal [Code] provides a basis for prosecuting crimes committed via racist propaganda on the internet, the Committee remains concerned about reported incidents of hate speech, including racist propaganda on the internet (art.4 (a)).

The Committee recommends that the State party increase its efforts to prevent racially motivated offences including hate speech and racist propaganda on the internet, and ensure that relevant criminal law provisions are effectively implemented. The Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities, in particular the obligation not to disseminate racist ideas. In this respect, the Committee encourages the State party to ratify the Additional Protocol to the Convention on Cybercrime.

a) Racist offences on the internet

The competent criminal prosecution authorities of the federal *Länder* collated and passed on to the Federal Criminal Police Office the following statistics regarding the number of cases of racially motivated offences committed on the internet:

	2006	2007	2008
Racist offences committed on the internet (total); of which:	29	35	28
Right-wing politically motivated crime	28	34	28
Left-wing politically	0	0	0

motivated crime			
Politically motivated crime against foreigners	1	1	0

b) Measures to combat racially motivated crime on the internet

Because of the difficulties encountered in ascertaining and prosecuting racially motivated offences committed on the internet, there are numerous ways of combating this phenomenon.

The extent of the internet and the great fluctuation in items posted on the internet make the ascertainment and prosecution of racially motivated crimes committed on the internet a very complex issue. The **comprehensive monitoring of the entire internet** with regard to racially motivated and other criminal content is not possible.

Punishable content is therefore primarily researched on a case-by-case basis once information has been received. Against that background, it must be assumed that a large number of racially motivated offences committed on the internet go unreported and undetected.

One measure is to **raise internet providers' awareness** for what content constitutes a punishable offence and to call for them to **undertake self-surveillance**. This approach has been quite successful with German internet providers, who have been very willing to cooperate.

Cooperation with foreign providers, through which the overwhelming majority of content of a punishable nature is posted on the internet, is, however, very difficult. That applies in particular to countries such as, for instance, the United States and Australia, which do not have definitions of crimes equivalent to incitement to hatred and propaganda crimes.

Where content does fulfil the definition of a relevant criminal offence, the **offices for the protection of the constitution** submit an enquiry to the respective internet provider to ascertain the name of the operator of the homepage.

Further procedure is then agreed in close cooperation between the offices for the protection of the constitution and the police. Direct information regarding a newly discovered homepage with possibly punishable, racially motivated content is immediately made available to the security authorities of the federal *Länder*.

The **police** engages in the following **activities**, among others, to combat racially motivated crime on the internet:

- Case-by-case internet searches,
- Promotion of a self-regulatory procedure adopted by German internet providers and umbrella organisations in the internet and multimedia sector through a general exchange of information,
- Cooperation with the Federal Department for Media Harmful to Young Persons and NGOs such as *Jugendschutz.net* to develop strategies to combat racially motivated crime on the internet,
- Organisation of conferences involving the competent experts in the security authorities of the Federation and the federal *Länder* on the issue of "the internet" during which, for instance, Google's data protection officer explains the formal and material preconditions for submitting requests for information to internet service providers,
- Introduction of a system for covert information-gathering on the internet which enables anonymised access without being able to trace the user.

One recent example of measures adopted by the police are the nationwide executive measures against users of the **online platform *UnserAuktionshaus.de***.

The measure involved searching a total of 224 properties simultaneously. Sound carriers (89,784), PCs/laptops (210), weapons (82), publications (552) and devotional objects (162) were confiscated. These executive measures will no doubt permanently unsettle the right-wing extremist scene in regard to internet trading.

c) Additional Protocol to the Convention on Cybercrime

On p. 77 of the aforementioned report, the German Government stated the following in respect of the ratification of the First Additional Protocol to the Convention on Cybercrime:

"Germany signed the First Additional Protocol to the Council of Europe's Convention on cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems in January 2003. Ratification is currently in preparation."

This statement is still valid. The Additional Protocol is to be ratified when the Council Framework Decision on combating certain forms of and expressions of racism and

xenophobia by means of criminal law formally adopted by the Council on 28 November 2008 is implemented, since it provides for similar definitions of crimes as the Council Framework Decision.

3. Recommendation C.17.

The Committee is concerned about the possible negative effects in terms of indirect discrimination on the grounds of ethnic origin due to the exception to the principle of equal treatment as regards access to rental housing contained in paragraph 19, section III of the General Equality Act. According to this provision, landlords can refuse to rent apartments to persons applying for accommodation with a view to creating and maintaining socially stable residential structures and balanced housing estates and also balanced economic, social and cultural conditions (art.3 and art. 5(e)(iii)).

The Committee recommends that the State party guarantee the equal enjoyment of the right to adequate housing by ensuring that housing agencies and other providers of accommodation refrain from engaging in discriminatory practices. Furthermore, the Committee encourages the State party to consider modifying paragraph 19 section III of the General Equality Act in order to conform with article 5 (e)(iii) of the Convention.

The German Government is aware that the provision of accommodation is an especially sensitive area, also in view of possible discrimination on the grounds of ethnic origin. Nevertheless, it believes that section 19 (3) of the General Equality Act, about which the Committee has voiced concern, is justified so as to be able to take account of the principles of the urban and housing policy that has proved its worth in Germany. Socially stable occupant structures in urban districts are the prerequisite enabling different cultures to live together without mutually excluding each other. Controlling occupancy structure merely serves to create balanced economic, social and cultural conditions and thus the basis for integrating people from diverse backgrounds. The purpose of section 19 (3) of the General Equality Act is not to permit discrimination, but rather to facilitate integration by avoiding, as far as possible, various population groups shutting themselves off in residential districts. The better people from diverse backgrounds can be integrated, the less discrimination occurs. Occupancy management creates the basis for achieving that objective.

At the above-mentioned meeting of experts held at the German Institute for Human Rights on 18 June 2009, representatives from the German Government suggested that NGOs should inform the Federal Anti-Discrimination Agency of any cases of discrimination in order to thus be able to better assess the situation and possibly initiate suitable measures.

4. Recommendation C.22.

While noting current proposals for legislative change, the Committee is concerned by reports that the principle of compulsory primary education is not fully applied to children of asylum seekers in Hesse, Baden-Württemberg and Saarland, with the effect that children concerned encounter obstacles in connection with school enrolment (art. 5 (e) (v)).

In light of its General recommendation N°30 (2004), the Committee recommends that the State party ensure that children of asylum seekers residing in the territory of the State party do not face any obstacles in connection with school enrolment.

Saarland has since amended the legislation in question. The following amendment to the Compulsory School Attendance Act of 21 November 2007 was published in the Saarland Official Gazette on 31 July 2008:

“Compulsory school attendance (...) also applies to foreign children, youth and adolescents with permission to reside or tolerance status. In the case of foreign children, youth and adolescents who are required to leave the country, the obligation to attend school applies up until the enforcement of their requirement to leave the country.”

In Baden-Württemberg, compulsory school attendance, including compulsory primary school attendance, is linked to place of residence or habitual place of residence, i.e. it applies regardless of nationality. Children of those who have been granted asylum are obligated to begin attending school six months after arriving in Germany. They do, however, have the right to attend school prior to that and their attendance must not be linked to any form of discrimination.

In regard to Hesse, it must be noted that according to section 3 (1) of the Ordinance on School Attendance by Pupils Whose Mother-tongue is Not German of 5 August 2008 (Official Gazette, p. 430), those applying for asylum are obligated to attend school if they are assigned to a local authority. In accordance with section 3 (3) of the aforementioned Ordinance, asylum-seekers whose residence is tolerated under foreigners' law have the right to attend school. In Hesse, compulsory school attendance and this legal right are not limited to compulsory primary school attendance. This legal right poses no obstacles to school enrolment.

5. Recommendation C.26.

While noting that the Penal Code includes a general provision stipulating that the motives and aims of the offender must be taken into account in determining the sentences for crimes, the Committee is concerned that German criminal law does not explicitly include a provision which stipulates that racist motivation should be taken into account as a specific aggravating circumstance for the purpose of sentencing in relevant crimes. The Committee understands that such a law will be considered by the Parliament (art.6).

The Committee recommends that the State party continue its efforts to include in its domestic criminal legislation a specific provision to ensure that the motive of ethnic, racial or religious hatred is taken into account as an aggravating circumstance in proceedings under the criminal law.

Germany takes note of the concerns expressed by the Committee in paragraph 26. The German Government is aware that, particularly in the case of racially motivated offences, great importance is attached to the signal sent by legal judgements. The German Government therefore completely shares the Committee's concern.

The German Government is nevertheless of the opinion that this concern has already been appropriately addressed by means of the general provision set out in section 46 of the Criminal Code, according to which the motives and aims of the perpetrator, and the state of mind reflected in the act are to be taken into consideration in determining the sentence for crimes. It is recognised legal practice in Germany that section 46 of the Criminal Code regularly acts as an aggravating circumstance for the purpose of sentencing where the act is racially motivated. Furthermore, the German Government will be forwarding this letter to the *Land* departments of justice in order to take this opportunity to again draw the relevant offices' attention to the Committee's concern.

In addition, reference is again made to the fact that the Federal Court of Justice in 1962 already ruled that racial hatred was to be considered as a base motive within the meaning of the definition of murder in accordance with section 211 of the Criminal Code.

It was not possible to conclude consultations on the draft law put forward by the Bundesrat, to which the Committee makes reference in its concluding observations, within the sixteenth electoral term of the German Bundestag, which ends in autumn 2009. It remains to be seen whether the draft will be tabled again in the next electoral term.