6 October 2017

**Submission from Germany on the draft General Comment on**

**Article 6 of the International Convenant on Civil and Political Rights – Right to life**

1. The Federal Government would like to thank the Human Rights Committee for its draft general comment No. 36 on the right to life. The Federal Government welcomes the opportunity to provide comments on the draft and looks forward to a fruitful discussion on this important issue.
2. The Federal Government would first of all like to take the statements under marginal no. 10 of the Draft general comment No. 36 as an occasion to present to the Human Rights Committee aspects of the legal situation on assisted suicide in Germany. In addition, the Federal Government offers some comments on other parts of the draft.

**No. 10 of the Draft General Comment**

1. In Germany – as in other states – the appropriate limits and conditions of assisted suicide have been thoroughly discussed for years. States parties to human rights treaties enjoy a wide margin of appreciation in drawing up regulatory concepts in this matter. The European Court of Human Rights, for example, decided that even a general prohibition of assisted suicide in Great Britain remains within such a margin of appreciation.
2. The German legal situation is the result of an intensive, long and detailed social and political discussion, conducted without any preconceived ideas as to its outcome. Human rights treaties did not prescribe one specific outcome of this debate, but there were many conceivable solutions that would have respected human rights.
3. The Federal Government submits that it would therefore not be appropriate for the Human Rights Committee or other international bodies to direct States parties as to whether and under which conditions States parties should allow or not prohibit assisted suicide (for example, physician-assisted suicide), based on the right to life.
4. The discussion about the permissible extent of assisted suicide concerns issues relating to criminal, administrative and civil law. In civil and administrative law, for example, the issues concern guardianship law, medical treatment law, medical professional law and medicinal products law.
5. Under German law, a person committing voluntary suicide does not commit a crime. Difficult questions arise, however, insofar as other people assist a suicide (see below para. 12 et seqq.), or discontinue life-sustaining treatment.
6. Under German law, if a person in the dying process refuses life-sustaining or life-prolonging measures, human dignity requires respect for this person’s decision, i.e., his or her right to self-determination. A patient (who is capable of giving consent) may not be treated without his or her consent, even if, from a medical or objective point of view, such treatment is necessary or appropriate. The patient may discontinue treatment, even if this leads to death. Accordingly, termination of treatment by a physician in accordance with the patient’s will is not a crime.
7. If the patient is no longer capable of giving consent, the question arises as to whether a decision declared in the past or a will presumed to be probable can or must also be accepted and, in addition, how this will and its applicability in the current situation can be determined.
8. In practice, it has been seen as problematic to judge what form such a declaration should have (oral, in writing, notarial), how to determine whether the declaration included the treatment situation arising in the particular case and whether it (still) corresponded to the person’s current will, e.g. whether the declaration had to be regularly renewed.
9. These questions were extensively discussed in parliament over several years. There were many debates and hearings of various researchers and experts, culminating in a vote being taken in the Bundestag to decide between three bills or a request to the Federal Government to propose a bill. There were different opinions, for example, as to whether a living will should only be valid if the patient had received comprehensive medical and legal information, the living will was certified by a notary public, and, in the case of an old living will, it had been confirmed after a new medical consultation at the latest five years after it was made. There were also different opinions as to whether a legal guardian should be allowed to decide to terminate treatment even in the case of a curable, non-fatal illness, if there was no living will or an existing living will was no longer up to date or relevant, but termination of the treatment corresponded to the patient’s presumed will. There were also different opinions as to who should be involved in the decision to terminate treatment.
10. The law that was adopted in 2009 provides for a legal guardian to give expression to and ensure the practical application of the will of a patient who is no longer able to express consent, provided that patient had previously (as a competent adult) stated in writing that in the case of his incapacity to give consent, he consents to or prohibits certain examinations of his state of health, treatments or medical interventions not yet imminent at the time of the statement (living will). This also applies if the patient wishes to prohibit medical treatment in certain situations, even if this leads to death. The legal guardian examines beforehand whether these statements apply to the patient’s current life and treatment situation. In addition, the law provides that a living will may be revoked informally at any time. It also provides that nobody can be obliged to make a living will. Finally, the law provides that non-consent to medically appropriate treatment must be approved by a judge if the legal guardian and the attending physician do not agree that such non-consent corresponds to the presumed will of the patient stated in a living will or determined in some other way.
11. In addition to the question as to whether life-prolonging medical treatment can be refused or not performed, the question arose as to the extent to which physicians, relatives or third parties should be allowed to provide assisted suicide to a person wishing to die. In principle, assistance to a voluntary suicide is not punishable under German law. Killing on request, however, is punishable. The distinction between assisted suicide, which is not punishable, and killing someone else on request, which is punishable, is determined according to who effectively controlled the event leading to death, in particular who undertakes the act directly leading to death. However, some professional codes of conduct governing physicians explicitly prohibit physician-assisted suicide.
12. In any case, treatment of extreme pain is not punishable even if it leads to premature death as an inevitable and unintended side-effect (so-called indirect assisted suicide).
13. In 2014, there was another intensive parliamentary discussion on further regulations in the field of assisted suicide. Some of the members of the Bundestag proposed to criminalise certain forms of assisted suicide, specifically if the assistance was offered as a “business” (which only means offered on a regular basis). One of the reasons given for this was that the increasing number of deaths in neighbouring countries resulting from assisted suicide gave cause for concern. Another proposal envisaged allowing doctors to end the lives of patients who are experiencing extreme suffering if they have been given comprehensive advice on all the palliative options. Yet another legislative proposal aimed not to prohibit assisted suicide that was offered as a business, but only “commercial assistance”, i.e. profit-oriented assistance. Yet another proposal concerned the general prohibition of assisted suicide. Another subject of the various discussions was whether and what obligations to provide advice and documentation should be imposed.
14. The law that was passed in November 2015 makes assisted suicide a crime if it is offered as a “business”. As already mentioned, the term “as a business” does not presuppose a profit motive; it is sufficient that the offender “makes repetition of such acts the subject of his activity”. In principle, a physician can also fall under this penal provision and would, in such a case, be prohibited from assisting suicides. As was the case before, the prohibition does not cover “assistance to die “, i.e. medical and care measures which alleviate pain without aiming to shorten life. Such assistance is of no relevance under criminal law and does not constitute assisted suicide.

**Further comments**

1. In addition to the aforementioned delicate question of when and under which conditions a State may allow medical professionals to facilitate the termination of life, Germany further wishes to comment on the following issues that are being touched upon in Draft General Comment No.  36:
2. Draft para. 12 concerns the study, development, acquisition or adoption of a new weapon, means or method of warfare and their impact on the right to life. Germany is fully committed to the implementation of Article 36 of the Protocol Additional to the Geneva Conventions (Protocol I), which provides the relevant legal standard in this regard. Therefore Germany determines strictly, in a procedure pursuant to Art. 36 of Protocol I, that any new weapon, means or method of warfare, introduced in its armed forces, is in accordance with international law. It is furthermore the German view that humans have to maintain the decision in matters of life and death. Hence, Germany does not intend to develop or to acquire weapon systems that completely exclude the human factor from decisions about the employment of weapon systems against individuals.
3. In draft para. 13 it is being considered whether the threat with the use of weapons of mass destruction, in particular nuclear weapons, is incompatible with respect for the right to life. The International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons observed that “in view of the current state of international law and of the elements of fact at its disposal, [it] cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”. It can therefore in the view of the government of the Federal Republic of Germany not be concluded that to threaten with the use of weapons of mass destruction, including nuclear weapons, can in itself already be considered to be a violation of the right to life incompatible with Art. 6 of the Covenant.
4. In draft para. 22 the duty to protect the right to life by law is being considered and in para. 26 this duty is specified in relation to acts of other states. Germany fully approves the assumption of such a positive duty of all states and is committed to fulfill its respective obligations which are also laid down in German national constitutional law. At the same time Germany would like to draw attention to two issues in this regard. Firstly, States have a wide margin of appreciation with regard to the concrete measures to take in order to protect life, taking into account the specific circumstances of each case. Secondly, in cases of acts of third parties, especially of other states, the scope of the obligation has to be defined in accordance with the recognized principles of state responsibility.
5. In draft para. 66 it is assumed that the obligation of States parties to respect and to ensure the rights under article 6 of the Covenant extends even outside any territory effectively controlled by the State to persons who are nonetheless impacted by its military or other activities in a direct, significant and foreseeable manner. Pursuant to Article 2, paragraph 1 of the Covenant, Germany ensures the rights recognized in the Covenant to all individuals within its territory and subject to its jurisdiction. Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction. The mere fact that a military or other activity abroad has an impact on persons abroad, however, is in the view of Germany not a link that would automatically suffice to establish jurisdiction of Germany over the persons concerned.
6. In a similar vein, it is assumed in para. 66 that the obligation to respect and to ensure respect for the right to life extends to individuals who due to a situation of distress at sea found themselves in an area of the high seas over which particular states have assumed de facto responsibility, including pursuant to the relevant international norms governing rescue at sea. Germany wishes to clarify that it does not perceive action in the context of maritime rescue coordination as an establishment and exercise of jurisdiction over persons in distress on the high seas. Germany further wishes to clarify that it does not view the establishment of a search and rescue region for the purposes of the 1979 International Convention on Maritime Search and Rescue (SAR Convention) as assuming de facto responsibility over a maritime area. The United Nations Convention on the Law of the Sea defines the maritime zones over which a coastal state has sovereignty (territorial sea) or exercises sovereign rights or jurisdiction (exclusive economic zone). Furthermore, the SAR Convention defines a search and rescue region merely as “an area of defined dimensions associated with a rescue coordination center within which search and rescue services are provided”. Once persons in distress are taken on board a government ship, jurisdiction of the flag state over the persons concerned is established.
7. With regard to the relationship between the right to life and the norms of international humanitarian law, laid out in draft para. 67, Germany is of the view that while Article 6 of the Covenant remains applicable in situations of armed conflict, the conduct of hostilities is governed by the special regime of international humanitarian law. The rules of international humanitarian law are indeed relevant to the interpretation and application of the right to life in situations of armed conflict. This principle has inter alia already been established by the European Court of Human Rights.
8. In draft para. 71 a direct relation between acts of aggression and the right to life is assumed. Germany wishes to point out that maintaining international peace and security is primarily a matter regulated by the part of international law governing the *ius ad bellum,* rather than a subject matter treated by human rights law. Notwithstanding the fact that an act of aggression may entail or lead to violations of human rights, a clear distinction between the different legal regimes should be maintained in order to allow for an adequate attribution of responsibilities in international law.