

Permanent Peoples' Tribunal - Berlin Hearing
Indictment on Migration and the Right to Health
October 23-25,2020

part of the

45th SESSION ON THE VIOLATIONS WITH IMPUNITY OF THE HUMAN RIGHTS OF
MIGRANT AND REFUGEE PEOPLES(2017-2020)

Preamble

In this trial, we call upon the Permanent Peoples' Tribunal (PPT) to carefully examine whether the current migration and asylum policies of the Federal Republic of Germany and the EU violate the right to health and physical and psychological integrity of migrants and refugees, in particular the Arts of the Universal Declaration of the Rights of Peoples signed in Algiers in 1976; whether it seriously violates the rights of the individual as set forth in the Universal Declaration of Human Rights of 1948; and whether and to what extent these violations of rights, taken as a whole, constitute a crime against humanity as defined in Art 7 of the Rome Statute of 1998.

The present indictment is part of a series of indictments against the governments of the EU member states and institutions of the EU. They are based on a general framework document that was developed in the PPT's opening hearing on "Human Rights of Migrant and Refugee Peoples" in Barcelona in July 2017.

These indictments together show how the governments of the 'Global North' and the institutions of the EU have created conditions under which millions of people in the 'Global South' are deprived of their livelihoods and forced to migrate; which treat those who have migrated to the 'Global North' as 'non-persons' by denying them rights that are due to all human beings on the basis of their common humanity, including the rights to life, human dignity and freedom; and which in practice have created legal vacuum in the 'Global North' with regard to the rule of law and human rights.

In general, illegalized migrants* and refugees represent particularly vulnerable groups of people who experience systematic violations of their right to health and physical and psychological integrity. Even before and during migration they are confronted with war or armed conflicts, human rights violations, traumatic losses, as well as climate change, expropriation or displacement caused by a system of global exploitation. This system is supported by a labour and migration policy that favours the freedom of movement of capital and citizens of the 'global north' while people from the 'global south' are denied this freedom. Migrants and refugees become a class of illegalized, exploited and deportable people and workers who are exposed to (state) violence and repressive and racist policies and practices.

Based on their common experiences of oppression and repression, it can be said that migrants and refugees form a "people" in the sense of the Universal Declaration of the Rights of Peoples (Declaration of Algiers). This declaration states that every people has a right to exist and that no one, on account of his or her national or cultural identity, may be subjected to persecution, deportation, expulsion or living conditions that may affect the identity or integrity of the people to whom he or she belongs.

The Human Right to Health

The Human Right to the enjoyment of the highest attainable standard of physical and mental health (Right to Health) is recognized in numerous sources of the law. Because human life is the vital basis of human dignity it is indispensable for the exercise of all other human rights. The following provisions are relevant to the considerations of the Tribunal:

The right to health and medical care are recognized in Art 25 of the Universal Declaration of Human Rights (UDHR) as attributes of the human right to an adequate standard of living.

They are inseparably linked to the right to social security in the event of sickness and to the rights to food, clothing and housing. Art 25 UDHR reads:

- (1) *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*
- (2) *Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.*

The WHO's interpretation of the right to health, which was already enshrined in its constitution in 1946¹ and upheld at the Alma-Ata Conference in 1978², continues to be regularly invoked.

As a binding document the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR), which has been ratified by Germany, is of particular importance. Art 12 ICESCR reads:

- (1) *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
- (2) *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*
 - (a) *The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*
 - (b) *The improvement of all aspects of environmental and industrial hygiene;*
 - (c) *The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
 - (d) *The creation of conditions which would assure all medical service and medical attention in the event of sickness.*

The monitoring UN-Committee on Economic, Social and Cultural Rights (CESCR) has emphasized multiple times that the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers and other migrants, stateless persons, migrant workers and victims of international trafficking, *regardless of legal status and documentation*¹ In its General Comment No. 14 of 2000² The CESCR has further differentiated the minimum requirements of the right to health and identified the obligations of all state parties to *respect, to protect and to fulfil*. They have to be met not only on a national level but also on an international level through joint cooperation. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. This includes *“refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal [undocumented] immigrants, to preventive, curative and palliative health services”* and *“from enforcing*

1 CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2, para. 2), 25. September 2009, U.N. Doc. E/C.12/GC/20, para. 30; CESCR, Statement: Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights, 13. March 2017, U.N. Doc. E/C.12/2017/1, para. 3.

2 CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art 12), 11 August 2000, UN Doc. E/C.12/2000/4.

discriminatory practices as a State policy". The obligation to protect requires States to take measures that prevent third parties from interfering with Art 12 ICESCR. The obligation to fulfil requires States to adopt appropriate measures towards the full realization of the right to health. States must ensure the provision of health care, which must be accessible for all and without discrimination, as well as equal access to food and drinking water, basic sanitation and adequate living conditions.

Germany has recognized the right to health in numerous other international binding agreements, e. g. in Arts 2 and 5e (4) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Art 11 .and 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art 24 of the Convention on the Rights of the Child (CRC) and Arts 25, 26 of the Convention on the Rights of Persons with Disabilities (CRPD).

On a European level, Germany has recognized the European Social Charta (ESC). Although it has still not recognized the revised version of the ESC 1996 it is bound to the provisions of the original one. Art 11 ESC provides for the right to protection of health. Art 13 ESC ensures the right to social and medical assistance to any person without adequate resources. The European Committee on Social Rights has explicitly stated that the ESC contains the obligation to guarantee at least emergency medical care for undocumented migrants.³ Further provisions can be found in the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) which, according to its Art 4, has to be implemented without discrimination on any ground such as migrant or refugee status.

The EU has for the scope of the full implementation of Union law recognized the right to health in Art 35 of the Charter of Fundamental Rights (CFR). Art 35 CFR reads:

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Because in EU Member States, the scope of healthcare to which a third-country national has access depends on their residence or employment status, various directives have been installed, that shall be implemented by the member states. According to Council Directive 2003/109/EC (Long Term Residents Directive), long-term residents enjoy the same access to healthcare as nationals. Where beneficiaries of international protection are concerned the Directive 2011/95/EU (Recast Qualification Directive) grants access to adequate healthcare, including treatment of mental disorders when needed, to beneficiaries of international protection under the same eligibility conditions as nationals. Where applicants of international protection are concerned Directive 2013/33/EU (Reception Directive) establishes minimum standards for access to healthcare during the asylum procedure. It requires EU Member States to ensure that asylum seekers at least receive emergency care and essential treatment for illnesses and serious mental disorders. Art 17 (2) of the Reception Directive further requires member states to guarantee the subsistence and the physical and mental health and to ensure that that standard of living is met in the specific situation of vulnerable persons as well as in relation to the situation of persons who are in

³ International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§30f.

detention. Where undocumented migrants are concerned the Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive) has to be implemented. Arts 5 and 14 of the Return Directive oblige member states to take due account to the best interest of the child, family life and the state of health of the third-country national concerned and respect the principle of non-refoulement.

Further the European Court of Human Rights has ruled that inadequate health care and denial of access to the health care system may violate the right to life in Art 2 of the European Convention on Human Rights (ECHR)⁴, the right to respect for privacy and family life Art 8 ECHR⁵ or the prohibition against torture or inhuman treatment in Art 3 ECHR⁶.

In the German Constitution the right to health is included in the fundamental right to life and physical integrity in Art 2 (1) GG and the fundamental right to a subsistence minimum, which derives from the human dignity clause in Art 1 (1) GG in connection with the principle of the welfare state in Art 20 (1) GG. The latter guarantees the physical minimum (food, clothing and housing, health) and the cultural minimum.⁷ The German constitutional court made it clear that the right to the subsistence minimum is a human right and extends to non-nationals. Under no circumstances can migration policy considerations justify lowering the standard of benefits below the constitutionally required minimum standard of living.⁸

(1) Access to health care

Many groups of migrants have no or only limited access to health care. These include asylum seekers, illegalized persons and workers from EU and non-EU countries. In addition to discrimination by health professionals and language barriers, the removal of which is essential for treatment, there are also legal provisions that hinder access (see below).

These restrictions on access are already from a medical and humanitarian perspective highly problematic. Due to the lack of or limited access to the health care system and, in the case of illegal immigrants, the potential danger of deportation, many people do not seek medical help until the illness has already progressed. The inadequate medical care leads to:

- incomplete vaccination protection
- Doctors* or hospitals refuse further treatment if the assumption of costs is not ensured.
- Longer and more severe courses of illness, chronicities and emergencies are more frequent
- psychosocial effects on the dependent social environment of the person
- This is accompanied by loss of employment, poverty and homelessness.

In addition, it can be assumed that the more frequent use of emergency care in hospitals will lead to higher costs in the healthcare system overall. For asylum seekers, it has been shown

4 EGMR (GK) 17.7.2014, Centre for Legal Resources im Namen von Valentin Câmpeanu gg Rumänien, Nr 47848/08.

5 EGMR 27.2.2018 Mockutė v. Lithuania, Nr. 66490/09, Rn. 93-94 mwN

6 EGMR 2.5.1997, D. gg das Vereinigte Königreich, Nr 30240/96; EGMR (GK) 27.5.2008, N. gg das Vereinigte Königreich, Nr 26565/05.

7 BVerfG, 5.11.2019 - 1 BvL 7/16 -, juris; BVerfGE 132, 134 (160); BVerfGE 125, 175 (223).

8 BVerfGE 132, 134 (173).

that the reduction of benefits they are subjected to leads to increased costs, for example, because preventive measures are not perceived.

a) Asylum seekers, holders of a “Duldung” (a title that does not constitute a residence permit but only suspends the obligation to leave the country) as well as other persons, that are – often wrongly - considered to stay in Germany for only a short period of time do not receive social assistance and medical care under the general system of social security and statutory health insurance (GKV). Instead they are subjected under the special regime of the Asylbewerberleistungsgesetz (AsylbLG - Act on Benefits for Asylum Applicants) in the first 18 months of their stay. In accordance with §§ 4, 6 AsylbLG they are only entitled to limited medical services in the event of acute or painful conditions, pregnancy and birth. Additional benefits, e.g. for the treatment of some chronic illnesses or mental illnesses (e.g. as a result of trauma), must be applied on an individual basis and in often lengthy procedures. They are at the discretion of the authorities. In some municipalities, their approval is also made dependent on the applicant's prospects of remaining in the country. In many cases, personnel from other fields of expertise decide whether treatment is medically necessary. Even if an application for psychological treatment has been approved, the treatment often fails due to the lack of coverage for the required language mediation. Restrictions on access to health care are extended beyond the 18 months if the persons concerned are accused of having influenced the duration of their stay in an improper manner. To make matters worse, the AsylbLG sanctions alleged violations of the obligation to cooperate with further restrictions on benefits. Refugees who have already been granted protection status in another EU country are even completely excluded from health care; only in exceptional cases do they receive access to health care.

At the end of 2017 there were 468,000 recipients* of benefits according to AsylbLG

The provisions of the AsylbLG violate the fundamental right to health and to the minimum physical subsistence level laid down in Art 2 (1), Art 1 (1) and Art 20 (1) of the German Constitution. The minimum subsistence level for essential health services has been defined by the scope of the statutory health insurance system (GKV) and is guaranteed accordingly through basic security provisions for persons not subjected under the AsylbLG⁹. In case of a reduction the legislator must offer a justification in a comprehensible and factually differentiated manner. Politically justified reductions in benefits, for example to discourage people seeking protection, are not permitted. The benefits in the AsylbLG do not meet these requirements. The legislature has not given comprehensible reasons why persons subjected under the AsylbLG have a lower need than other people in need. Regardless of this, legal claims to health care in the AsylbLG are significantly below the level of the GKV, which means that the persons concerned do not receive benefits to the extent of what is medically necessary. The difference in treatment between persons subjected under the GKV and persons subjected under the AsylbLG further violates the principle of equality in Art 3 (1) of the German Constitution.

| The denial of health care to those in need, constitutes a violation_ the right to the enjoyment of the highest attainable standard of physical and mental health and the right to access to health services without discrimination as laid down in Art 25 UDHR, the 1946 Constitution of the WHO, Art 12 ICESCR and Arts 2 and 5e (4) ICERD,. The CESCR came to the same

⁹ See: § 5 Abs. 1 Nr. 2a SGB V, § 264 SGB V, § 48 SGB XII; BVerfG, 13.2.2008 - 2 BvL 1/06 , BVerfGE 120, 125.

conclusion, when it expressed concern about the restricted and unequal health care for asylum-seekers in Germany.¹⁰ Additionally Arts 11 and 13 ESC, Art 4 of the Istanbul Convention as well as Arts 2 and 8 ECHR may be violated. The exclusion from access to preventive health care and to medical treatment under the conditions established by the general system of social security and the GKV further violates Art. 35 CFR in connection with the provisions on health care laid out in the EU Reception Directive, especially the guarantee to subsistence and to the physical and mental health.

Where especially vulnerable persons, like pregnant persons and children, are seeking medical assistance the provisions and policies may violate Art 25 (2) UDHR, Art 12 (2 Nr. 1) ICESCR, Art11 (2) CEDAW, Arts 25, 26 CRPD and Art 24 CRC.

Measures deliberately depriving anyone of the means of life may further breach Arts 9 ICESCR (right to social security) and Art 11 ICESCR (right to an adequate standard of living), and may constitute inhuman and degrading treatment contrary to Art 5 UDHR, Art 3 ECHR and Art 4 CFR.

b) People without a regulated residence status are legally entitled to limited benefits under §§ 4, 6 AsylbLG. In practice however they have no access to medical care. Other than persons subjected to the GKV they have to apply with the social welfare office for a treatment certificate. According to § 87 (2) of the Residence Act the all public authorities, including the social welfare offices, are obliged to report any undocumented person to the aliens' registration office. This threatens deportation. Only in cases of emergency care, in which an application with the social security office could not be made in due time, the patient is not reported because of medical confidentiality. Therefore, many people do not seek medical assistance until the illness is already well advanced and has become an emergency. The obligation to notify the authorities applies even to pregnant women, who thus have de facto no access to antenatal care. Only the delivery can be carried out in hospital as emergency care.

According to the latest estimates, 180,000-520,000 people will be living in Germany in 2014 without a regular salary status. It can be assumed that the number has increased since then.

The CESCR pointed out rightfully that § 87 (2) of the Residence Act can deter irregular migrant workers from seeking services, such as health care, that are essential for the enjoyment of their rights and from reporting crimes, including domestic violence and sexual and gender-based violence and may therefore negatively affect the exercise of the rights laid out Art 2 (2) ICESCR and Art 12 ICESCR). The provision deprives migrants and refugees from any health care, including emergency medical care.

§ 87 (2) of the Residence Act therefore is a provision that restricts access to health care and social security in a discriminatory way. This constitutes the violation of Art 2 (1), Art 3 (1), Art 1 (1) and Art 20 (1) of the German Constitution, Art 22, (social security), 25 (1) UDHR, the 1946 Constitution of the WHO, Arts 2 (2), 9, 11 and 12 ICESCR, Arts 2 and 5e (4) ICERD, Art 11, 13 ESC and Arts 4 and 35 CFR in connection with the provisions on health care laid out in the EU Return Directive.

¹⁰ CESCR: Concluding observations on the sixth periodic report of Germany, 27. November 2018, U. N. Doc. E/C.12/DEU/CO/6, para. 58.

Where pregnant persons, children or persons with disabilities are seeking medical assistance the provision may violate Art 25 (2) UDHR, Art 12 (2 Nr. 1) ICESCR, Art 11 (2) CEDAW, Art 24 CRC and Arts 25, 26 CRPD.

Measures that lead to the submission of data attained during the exercise of social rights also disproportionately interfere with the right to privacy as laid out in Art 12 UDHR, Art 16 CRC, Art 22 CRPD and 8 ECHR as well as with the right to the protection of personal data as laid out in Art 8 CFR. Because data protection legislation has been fully harmonized through the General Data Protection Regulation (GDPR) Arts 8 and Art 35 CFR are applicable.

c) Non-employed migrants from EU member states who have been registered in Germany for less than five years are no longer entitled to health care benefits according to SGB XII since the so-called exclusion of benefits law of the end of 2016. Instead, they can receive so-called bridging benefits once within two years for a maximum of one month. These also include limited health services for acute illnesses and pain. After the end of the month, there is no entitlement - even in emergencies - to reimbursement of costs for doctor's visits, hospital stays or medication.

There are no figures available on how many people in total are affected by the exclusion of benefits law. In most civil society services for medical care, EU citizens make up the majority of clients.

The restrictions on access to health care for non-employed migrants from EU member states violate the human right the fundamental right to health and to the minimum physical subsistence level, the right to the enjoyment of the highest attainable standard of physical and mental health and the right to access to health services without discrimination as well as the right to social security and the right to an adequate standard of living and may constitute inhuman and degrading treatment contrary to Art 5 UDHR, Art 3 ECHR and Art 4 CFR, as described in the previous sections.

(2) Effects of living conditions in mass housing on mental and physical health

Asylum seekers are generally obliged to live in reception centres until a decision is made on their asylum application and, in the case of rejection, until they leave the country or until deportation is completed (§ 47 (1) AsylG). However, this obligation is limited in time. The maximum period of stay to which asylum seekers can be obliged is usually up to 18 months. However, it is possible for the states to extend the obligation to reside to up to 24 months through a state regulation (§ 47 (1b) AsylG). For families, i.e. children and their parents as well as unmarried siblings of full age, a maximum residence period of up to six months applies.

Until 2015, asylum seekers were only allowed to stay in a reception facility for up to six weeks, but for a maximum of three months. This was followed by an extension of the obligation to stay in a camp for up to 6 months. With the coming into force of the "Ordered Return Act" in August 2019, the possible periods of stay have now been tripled once more.

At the same time, it was established that persons accused of violating certain obligations to cooperate are subject to the obligation to stay in a camp for an indefinite period of time. The same has already applied since October 2015 to persons from so-called safe countries of origin. Formally, fugitives must be redistributed to shared or decentralized accommodation at the latest at the end of the aforementioned periods. Practical experience shows, however, that some facilities only "rededicate" individual sections of the accommodation to shared accommodation for this purpose.

Fugitives are not distributed to the communities in these cases, but are simply moved, for example, from one section of the building that formally belongs to the anchorage centre to another section that formally counts as shared accommodation. De facto, therefore, they merely change their room without any change in their living conditions, their integration prospects or their care situation. This means that mass accommodation is often the central point of life for children and young people who have fled to Germany with their families, often for a long time, often for several years.

In addition, the benefits supposed to ensure the subsistence minimum for persons subjected under the AsylbLG are even further reduced for persons living in collective or shared accommodation. The legislator falsely claims that these persons have lower needs, since they could share their benefits with other inhabitants like "married couples".

Such living conditions are extremely stressful due to social isolation, lack of privacy, structural defects and lack of protection against violence and (sexual) assaults, among other things, and have a negative effect on the physical and mental health of the residents, especially in connection with the long period of time. Women, children and persons with disabilities are particularly affected.

Since COVID-19, people living in large collective accommodation are also in particular danger of becoming infected. The virus can spread quickly as soon as the first infection has occurred through shared kitchens and sanitary facilities or living together in very confined spaces. It is simply not possible for the residents of these facilities to protect themselves by keeping their distance.

The danger of a chain of infections has been also intensely discussed in the text of the overcrowded refugee camps on the Greek Islands since the beginning of the pandemic. In the case of the camp Moria, which was originally build for less than 3000 people but accommodated more than 13.000. The outbreak of COVID-19 in the camp has spread panic among the dwellers and became a crucial turning point in an already tense situation. Eventually, the Prime Minister of Greece has accused the refugees of setting fire to the Moria camp themselves in order to be able to leave Lesbos. A Greek government spokesman declared, "They thought if they just set fire to Moria, they would be able to leave the island. We tell them bluntly: they can forget it." Even prior to the fire in Moria, life in the camp was "hell on earth." Jean Ziegler, the Swiss former UN special rapporteur for the right to food, described the conditions in February 2020 as follows: "Everything I have seen in the slums around the world pales in comparison to what I experienced in Moria. Human rights are being violated in the camp at every turn, total despair is all-pervasive. The malefactors in Brussels are allowing conditions of survival to develop in the hot spots that recall the deplorable

concentration camps and hope in this way to drain the flood of refugees.” The refugees are now literally left with nothing. They are forced to camp in the dirt without tents or blankets. The police fires tear gas at them. They are refusing to allow aid organisations to access the homeless refugees, who are desperately searching for food, and force volunteers to dispose of meals that have already been prepared for them.

The concept for the Moria camp was developed in Germany, and it was established and operated with the help of the EU. It is the direct product of the deal negotiated by German Chancellor Angela Merkel with Turkey in 2016. At the time, the EU obligated the Greek Syriza government to establish camps on Aegean Sea islands that were euphemistically referred to as “hot spots.” Their role was to capture, register and deport as soon as possible refugees who successfully made the sea crossing from Turkey to Greece. At the same time, the coastguard was significantly strengthened and NATO warships were sent to the eastern Mediterranean to deter refugees.

The agreement with Turkey intentionally violated the right of each person to have an individual review of their reasons for seeking asylum so as to facilitate the mass deportation of refugees. The German government and EU sent several liaison officials and employees of the EU border agency Frontex to Greece in order to swiftly process the asylum applications. Many of the rejections were so obviously unlawful that Greek judges subsequently overturned them. The German government and EU have responded to the self-made catastrophe in Moria by adopting an even harder line on refugee policy. At a joint press conference, Interior Minister Horst Seehofer and EU Commission Vice President Margaritis Schinas presented the key points of the EU’s new refugee policy. According to them, refugee camps on Europe’s external borders should be funded and operated by the EU itself. “Moria no longer exists,” said Schinas. “That’s why it is clear that the Greek authorities must quickly establish a new institution that is modern, that is a centre with all of the necessary facilities to identify and process asylum cases.” This reflects the accelerated implementation of plans presented by Seehofer to the EU last summer. They include extra-territorial internment camps on the external borders where legal proceedings and the Geneva Conventions for Refugees will be effectively suspended.

Instead of evacuating the people from Moria, Seehofer is threatening with a Moria 2.0. The spiral of deterrence set into motion by the EU in its struggle against refugees is being pushed to a new stage. It can already be expected that in a relatively short period, the conditions in the newly established EU camps will be even worse than those in Moria. The “common European solution” being sought by Berlin, Paris, Brussels and Rome is focused on intensifying “the war on refugees” and driving them out of Europe. There is no room for the millions of people fleeing war, hunger and poverty out of pure desperation.

Meanwhile, several of Germany’s federal states have said throughout the campaign “Wir Haben Platz” they are ready to accept the refugees, including the North Rhine-Westphalia state which has pledged to accept 1,000.

The policies and circumstances described interfere with the principle of human dignity as recognized among others in Art 1 of the German Constitution, Art 1 UDHR, Art 1 CFR and Art 1 ECHR. The failure to protect persons living in collective accommodations from physical or mental harm inflicted by either government or third parties and/or through illnesses like Covid-19 may violates the right to physical and mental integrity as laid out among others in

Art 2 (2) of the German Constitution, Arts 3 and 5 UDHR, Art. 5 (b) CERD, Art. 19 CRC, Art 3 ECHR and Art. 3 CFR.

The failure to provide adequate housing may breach the right to an adequate standard of living, which is recognised among others in the Art 25 UDHR, and in Art 11 ICESCR, further amplified by General Comment No 4 on Adequate Housing by the CESCR (1991), Art 27 CRC, - as well as Art. 2, 5 (e i) CERD. Moreover the obligation to reside in a camp or collective accommodation may interfere with the right to freedom of movement as recognized among others in Art.11 of the German Constitution, Art 13 UDHR, Art 11 of the International Covenant on Civil and Political Rights (ICCPR), Arts 2 and 5 (d i) CERD. Because of the lack of privacy there are further interferences with the rights laid out in Art 12 UDHR, Art. 17 ICCPR, Art 16 CRC, Art 22 CRPD and 8 ECHR.

It has been shown, exemplified by the devastating situation in Moria, that the EU-Turkey-Deal as well as the Hot-Spot-approach have led to gross violations of human rights. By developing, signing, enforcing and maintaining the EU-Turkey-Deal without giving due attention to the right to health and all other human rights mentioned above and by not providing adequate assistance to the countries involved the EU as well as Germany violate their international obligations to achieve the full realization of human rights. In Art 56 and 55 of the Charter of the United Nations the Member States have pledged themselves to take joint action to achieve higher standards of living, solutions for health problems and universal respect for human rights. The CESCR thus reminded states in its General Comment No. 14 of the obligation to take steps through international assistance towards the full realization of the right to health. To comply with their international obligations in relation to Art 12 ICESCR, States parties should among others respect facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required. States parties should ensure that the right to health is given due attention in international agreements and consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Although the ICESCR takes into account that some member states may not have the resources or political means to impact the realization of human rights in other countries, this certainly is not the case for Germany. Germany as a highly developed country and powerful actor within the EU and in relation to third countries is economically and politically able to fulfil its international obligations and must not refrain from it based on migration policy considerations.

(3) Deportation and health

Deportations can have serious consequences for health. Deportation to a country of origin or transit is basically an act of (state-ordered, executed and legitimized) violence. Deportations usually take place at night or in the evening without prior notice.

In addition to the fundamental problems of deportations, there have been further tightening of asylum and residence legislation (Asylum Package II 2016, GRG 2019) in recent years. The amendments to the law focus on questions of security and regulatory policy. They lead to a blatant disregard for the needs and rights of persons in need of special protection in asylum procedures and are aimed, among other things, at facilitating the deportation of seriously ill

and traumatized persons. The Asylum Package II (Law on the Introduction of Accelerated Asylum Procedures) resulted in changes to the Asylum, Residence and Asylum Seekers Benefits Act.

The accelerated procedures (§ 30a AsylG) particularly affect groups of persons, such as asylum seekers from "safe countries of origin", subsequent applicants or in cases of "deception of identity", etc. In these cases, the Federal Office decides within one week of the asylum application being filed. Underage, sick and particularly vulnerable persons can also be excluded from the regular asylum procedure and experience an acceleration of the procedure. Furthermore, members of a family have no right to an automatic temporary suspension of their deportation for the purpose of a joint deportation of the whole family.

Access to healthcare in the country of return can be a factor in the process of decision-making on applications for international protection. Subsidiary protection may apply if the asylum-seeker contends that a return to the country of origin is impossible for health reasons. According to the Residence Act, deportation is further to be refrained from if there is a specific danger to the person concerned (§ 60 (7) AufenthG). However, a "specific danger" is only present in the case of a life-threatening or serious illness. If a so-called "domestic health alternative" exists in at least one part of the country of destination, deportation to that country is permitted. It is not taken into account whether the person to be deported has actual access to health care in the country of destination.

In addition, new presumption rules for deportations have been introduced (§ 60a para. 2c and 2d AufenthG). There are no health reasons for deportation. Thus, the principle of official investigation by the authorities is undermined and the persons concerned are themselves obliged to prove that there are reasons for deportation that are contrary to the principle. Finally, the second law introduces a so-called "co-operative detention" to improve the enforcement of the obligation to leave the country. This allows foreigners to be detained for 14 days if they have failed to comply with a medical examination of their ability to travel.

Against the background of the described healthcare provisions, it is even more contradictory, that the Residence Act constitutes a state interest for deportation (§ 54 (2) No. 4 AufenthG), if a person with an addiction disease refuses therapeutically treatment. Although the mere consumption of psychotropic substances does not constitute a criminal offence in Germany, the reason for deportation punishes permitted behaviour that the persons can't change due to their addiction. As a result, the success of the therapy is considerably weakened by the fear of deportation.

These changes tighten the conditions for being able to present an asylum application in full and without contradiction. Contrary to the general legislation, the time limits for appeals are shortened. There is often no time for counselling, as well as the provision of expert opinions and evidence for a conclusive presentation of often complex situations. Thus, it is often not possible for asylum seekers to assert their claim to asylum, and deportations from hospital treatment are threatened or carried out. Very pregnant women are often deported shortly before the legal maternity protection period is reached. In this context, family separations and damages for mother and child up to miscarriages are accepted.

If someone in a deportation situation rebels against these coercive measures, physical violence (beatings, shackling, blindfolding, insults) is usually used, which has led to the death of people in the past.

By actively abolishing and restricting the content as well as the scope and range of review mechanisms by the state and limiting the means of legal protection as described above, the legislator deliberately does not comply with his obligation to respect, to protect and to fulfil the human rights of the persons endangered by deportation. As a result he is responsible for the human right violations that occur through and because of deportations.

To be taken into account are violations of the right to dignity (Art 1 of the German Constitution; Art 1 UDHR; Art 1 of the ECHR), the right to live in security and free from violence and terror and to be protected from deportation (Art 33 of the Geneva Refugee Convention), the right to health (Arts 2 (1), 1 (1) and Art 20 (1) of the German Constitution, Art 25 (1) UDHR, the 1946 Constitution of the WHO, Art 12 ICESCR, Art 5e (4) ICERD, Art 11, 13 ESC and Art 35 CFR in connection with the EU Return Directive.), the right to family protection (Art 6 of German Constitution, Art 8 ECHR), various Art of the UN Convention on the Rights of the Child, in many cases the EU Reception Directive and the EU Return Directive.

Deportations to war and crisis zones directly violate the right to life and the right to physical and mental integrity. The right to life is protected, among others, by Art 3 of UDHR, Art 6 ICCPR, Art 2 ECHR and Art 2 CFR in connection with the Return Directive. The right to physical and mental integrity is protected in Art 2 (2) of the German Constitution, Arts 3 and 5 UDHR, Art. 5 (b) CERD, Art. 19 CRC, Art 3 ECHR and Art. 3 CFR.

In case a deportation occurs although the person concerned has appealed the decision on grounds of health Arts 2 and 3 ECHR and Art. 35 CHR in connection with the corresponding provision of the Return Directive might be violated. The CJEU¹¹, in this regard established a link between an applicant's state of health and the principle of non-refoulement. It deduced that Art 14 of the Return Directive requires, to the extent possible, meeting basic needs (emergency health care and essential treatment of illnesses) in the case of a deferral of removal associated with the application of a suspensive effect of the appeal.

(4) EU Border Policy and Germany's Responsibility

Prior to the Covid-19 outbreak, the issue of undocumented migration had been at the top of the EU's political agenda for over a decade. At the same time, the governance of migration proved to be the most complex and problematic area of governance in the EU due to the multiplicity of interests within the Union which are in constant flux.

One such case is the Malta Declaration¹² agreed upon by Italy and Malta together with France and Germany in September 2019 under the Finnish Presidency of the Council of the EU, whereby the five states declared their intent to develop a new scheme for disembarkation and relocation of migrants rescued at sea to ease pressure on Italy and

11 <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-562/13>

12 <https://www.statewatch.org/media/documents/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf>

Malta. The proposal, however, was rejected the following month by EU interior ministers in the Justice and Home Affairs Council.¹³

The Covid-19 crisis is giving rise to a similar response from EU member states and the pursuit of national interests rather than common ones. More concretely, the pandemic has revealed the lack of solidarity and unity in the EU response to undocumented migration even in an unprecedented situation.

Current European responses to undocumented migration thus illustrate that the governance of migration is giving rise to suboptimal policy outcomes. In other words, the tightening of national migration policies has resulted in a 'race to the bottom' in asylum standards and rights across Europe. Moreover, the pandemic has exposed the unwillingness of EU leaders to act cohesively in the face of a major crisis. All of this increases the violations of rights against migrants and asylum seekers.

The European Commission encourages member states to strengthen the Operational cooperation between EU States which is coordinated by the European Agency for the Management of Operational Cooperation at the External Borders ("FRONTEX")¹⁴. The major task of the Frontex Agency is to coordinate joint operations to assist EU States in managing migratory flows at their external borders. The joint operations coordinated by the Frontex Agency at sea are governed by Regulation 656/2014¹⁵, which establishes rules on interception, rescue and disembarkation to be applied in the context of such joint operations. The Agency also manages a pool of border guards called European Border Guard Teams for deployment as guest officers during Frontex joint operations and pilot projects, and during Rapid interventions in States facing urgent and exceptional pressures at their external borders. The EU established a new information sharing and cooperation mechanism called EUROSUR (European Border Surveillance System)¹⁶. This mechanism provides Schengen countries with a common operational and technical framework, which assists them in countering cross-border crime, preventing unauthorized border crossings and diminishing the tragic death tolls of migrants at sea.

In the REGULATION (EU) 2016/399 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) states clearly that "Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations and border checks should be carried out in such a way as to fully respect human dignity. Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued."¹⁷

13 <https://www.consilium.europa.eu/en/meetings/jha/2019/10/07-08/>

14 <https://ec.europa.eu/home-affairs/what-we-do/agencies#1>

15 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0656&from=EN>

16 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/pdf/eurosur_final.pdf

17 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0399&from=EN>

In 2017, in the February infringements package the European Commission is pursuing legal action against Member States for failing to comply with their obligations under EU law. The key decisions taken by the Commission (including 5 letters of formal notice, 50 reasoned opinions, 7 referrals to the Court of Justice of the European Union, and 3 closures) because of Non-compliance of German Bundespolizei Gesetz with Art 20 and 21(a) of Regulation (EC) No 562/2006 (Schengen Borders Code)¹⁸ and since then Germany is taking a big part with Frontex, EU external border police and its navy patrolling in the Mediterranean.

To understand to what extent German police and Bundeswehr (German military) are involved in practices that violate international laws, the Geneva Convention and applicable EU law we can give an example from the Aegean region, Pushbacks off the coast of Lesbos are currently taking place almost on a daily basis, such as the one on August 15th 2020. A case like many in recent months and thus representative of the European isolationist policy:

A dinghy with an estimated 32 migrants on board was pushed back and forth for eight hours at sea by various ships, a practice cynically termed as "Greek Water Polo". In the afternoon the boat was brought back to Turkey by the Turkish Coast Guard. There were three helicopters and nine Hellenic and Turkish Coast Guard, Frontex and NATO vessels present at the scene.¹⁹ An illegal pushback with the participation of at least three, possibly four nations among them was the German naval vessel A1411 Berlin under NATO-command. It is unclear whether the crew was actively involved or was simply watching for hours while people were in acute distress at sea and all authorities present refused or at least delayed any rescue attempt. The German supply vessel has been stationed in the Aegean Sea since April 2020 and is a flagship of the standing NATO Maritime Group 2. And as such protocol requires that liaison officers from both the Hellenic and Turkish Coast Guards and Frontex are always on board.

This is not the first time that the German ship was present as an eyewitness during brutal and illegal pushbacks. On June 8th 2020 Frontex blocked a boat with migrants until the Hellenic Coast Guard arrived. They then destroyed the engine and pushed the boat back into Turkish waters. In the background of a video taken by the Turkish Coast Guard²⁰ which was also at the scene: the A1411 Berlin.²¹ Also on June 17th 2020, the German Bundeswehr ship, the A1411 Berlin, was present at a pushback of 67 people, including 20 women and 27 children, off the coast of Lesbos.²²

The crew members of the A1411 Berlin witnessed over several hours as the disabled dinghy floated in the water. An overcrowded, unstable dinghy at sea is by definition in distress, as it is very fragile and not suitable for such a purpose. Especially if - as can be seen in the video of the Alarm Phone - not all of the people on board are wearing life jackets. This is a clear violation of Article 98 of the United Nations Convention on the Law of the Sea, which defines the duty to rescue "any person found at sea in danger of his or her life"²³ This is by definition

18 [https://ec.europa.eu/home-affairs/what-is-new/eu-law-and-monitoring/infringements_en?](https://ec.europa.eu/home-affairs/what-is-new/eu-law-and-monitoring/infringements_en?country=All&field_infringement_policy_tid=1625&field_infringement_number_title=)

19 https://www.facebook.com/story.php?story_fbid=897343147455457&id=285298881993223

20 <https://www.aa.com.tr/en/europe/eu-border-force-helps-greece-violate-asylum-seekers-/1924458>

21 <https://twitter.com/SARwatchMED/status/1287770446809751554?s=20>

22 https://twitter.com/alarm_phone/status/1273206437959938048?s=20

23 https://www.vilp.de/treaty_full?lid=en&cid=162

a pushback and violates the prohibition of refoulement under the Geneva Refugee Convention and current EU law.

Roughly one month after this incident, the crew of the A1411 Berlin was awarded the medal for "early detection of crisis-like developments" in the Mediterranean region.²⁴

There was another case on June 4th, 2020: The A1411 Berlin was present as three boats were drifting for up to 28 hours with the knowledge of all authorities, in Greek waters north of Lesbos.^{25 26} And these are just the cases we know about. In addition to the A1411 Berlin, every so often other German Coast Guard ships under Frontex command are present in the Aegean Sea.²⁷

A request to the Bundestag by Luise Amtsberg, MP for the Green party, on whether the German government has any knowledge of pushbacks in the Aegean Sea revealed that this cannot be disclosed as it could have "adverse effects on NATO activities [and] bilateral relations between Germany and Greece".²⁸ Andrej Hunko, MP for the Left party, had also recently asked whether German navy ships under NATO or Frontex command had observed pushbacks.²⁹ The Federal Ministry of Defence admitted that they had observed one case on 19.06.2020. Nothing was known of this case until then.

Since the beginning of 2020, about 150 push-backs have been learned about, which have deprived 5000 people of their right to apply for asylum. During the same period, around 71 migrants have died in the Aegean Sea,³⁰ at least five of them in pushbacks. Through its behaviour, the German government is also to blame for these deaths.

Another Example from the Balkan route, more than 700 reports published the experiences of a total of more than 7,000 asylum seekers who have been illegally expelled from Croatia in recent years.³¹ In many of these so-called pushbacks, the persons concerned were deported from the EU to Serbia or Bosnia-Herzegovina even across several national borders.³² In 80% of the cases there are indications of disproportionate use of force up to cases of torture³³ by Croatian officials and 38% of those affected are minors. For thousands of people seeking protection, who want to continue their refuge to Western and Central Europe via Greece, the Balkan region represents a politically intended impasse.

The systematic nature of these pushbacks did not stop at the infection control measures required by Covid-19: Despite the border closures and contact restrictions, pushbacks across

24 https://twitter.com/Bw_Einsatz/status/1286214756978827264?s=20

25 https://twitter.com/alarm_phone/status/1268579446199660545?s=20

26 <https://www.bellingcat.com/news/uk-and-europe/2020/06/23/masked-men-on-a-hellenic-coast-guard-boat-involved-in-pushback-incident/>

27 <https://www.youtube.com/watch?reload=9&v=pfEoSPFWHQI>

28 <https://polit-x.de/de/documents/3874084/bund/bundestag/drucksachen/schriftliche-fragen-2020-06-30-schriftliche-fragen-mit-den-in-der-woche-vom-22-juni-2020-eingegangenen-antworten-der-bundesregierung>

29 <https://www.andrej-hunko.de/start/download/dokumente/1516-von-deutschen-einheiten-beobachtete-push-backs-in-der-aegaeis/file>

30 https://missingmigrants.iom.int/region/mediterranean?migrant_route%5B%5D=1377

31 <http://www.borderviolence.eu/>

32 <https://medium.com/are-you-syrious/ays-special-italian-court-stops-deportation-to-slovenia-while-pushbacks-continue-a0370c30cd02>

33 <https://www.borderviolence.eu/new-report-on-cases-of-torture-of-asylum-seekers-by-croatian-authorities-at-eu-external-borders/>

several national borders continued to be part of the daily routine of the Croatian authorities. The fact that those seeking protection were taken to overcrowded, quarantined camps in Bosnia-Herzegovina and Serbia played just as little a role as the potential risk of infection from Croatian police officers. Covid-19 infections in a hotel near the border region in Topusko, inhabited by about 200 officers, were not followed up, although the officers were in daily contact with asylum seekers in pushback operations. The infection of vulnerable persons seeking protection and the spread of the virus without the possibility of tracing of the European Commission. In 2018, Chancellor Angela Merkel even praised the actions of the Croatian security forces as “outstanding work”³⁴ and in January 2020, Interior Minister Seehofer donated surveillance equipment for border protection to Croatia.³⁵ Other German politicians, too, have in the past repeatedly commented positively on the security policy developments in Croatia and advocated accession to the Schengen Agreement.³⁶ Additionally, Germany is participating in Frontex training missions for Croatian border guards, most recently in December 2019 in Sankt Augustin³⁷ and in February 2020 in Valbandon in Croatia.³⁸ All this legitimises the Croatian approach and even led to the Croatian Minister of the Interior Davor Božinović describing Germany as an appreciative partner in border management.³⁹

The brutal approach at Croatia's borders is not a national phenomenon but the implementation of an EU refugee and migration policy based on violence and deterrence. Five years after the “March of Hope” from Budapest, the undersigned human rights organisations and activist groups call on the Federal Government to work during Germany's EU Council Presidency for an end to violence against people seeking protection and the respect of the law at the EU's external borders, and to no longer support and tolerate the massive and well-documented human rights violations.

Last example from Africa and the central Mediterranean region, for several years, Germany and the EU have been seeking to seal Libya's border with Niger. Already on July 16, 2012, the EU had decided to establish the EUCAP Sahel Niger, a non-military EU mission, training and counselling Nigerien repressive forces - in the meantime, under pressure from Berlin, also to fight migration. The mission, which also involves German officials, has been expanded with the addition of a field office in Agadez, in central Niger, the town serving as a hub for the transit route to Libya. In 2013, the German Association for International Cooperation (GIZ) development aid agency had initiated a "Police Program" in Niger, which also includes the training of border police. The program is set to run until at least 2018.⁴⁰ The International Organization for Migration (IOM), financed by the German foreign ministry and the EU, is also operating a centre in Agadez, whose staff is to deter refugees from continuing

34 <https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/pressekonferenz-von-bundeskanzlerin-merkel-und-dem-kroatischen-ministerpraesidenten-plenkovi%C4%87-1526696>

35 <https://zastita.info/hr/novosti/sr-njemacka-hrvatskoj-policiji-donirala-je-10-termovizijskih-kamera,26685.html>

36 <https://glashrvatske.hrt.hr/de/nachrichten/politik/joachim-herrmann-bewertet-kroatiens-sicherheitspolitik-positiv/>

37 <https://policijska-akademija.gov.hr/vijesti/hrvatska-i-njemacka-lideri-u-obuci-granicne-policije/3511>

38 <https://policija.gov.hr/vijesti/zastita-temeljnih-ljudskih-prava-prioritet-hrvatske-policije/4449>

39 <https://zastita.info/hr/novosti/sr-njemacka-hrvatskoj-policiji-donirala-je-10-termovizijskih-kamera,26685.html>

40 <https://www.german-foreign-policy.com/en/fulltext/58891>
<https://www.german-foreign-policy.com/de/fulltext/59456>

their journey and motivate them to return to their home countries. It is nearly impossible to deport ECOWAS citizens, because within the ECOWAS zone people have the right of free circulation. During her visit to Niger's capital Niamey in October 2016, Chancellor Merkel promised ten million euros for vehicles and communication technology for controlling illegal trade and migration.⁴¹ The European Agency for the management of Operational Cooperation at the External Borders (Frontex) will also open a liaison office in Niamey this year.

The reality is that the German government and its European partners bear chief responsibility for the misery and mass deaths on Europe's external borders. German Interior Minister Horst Seehofer is supporting his party colleague, Greek Prime Minister Kyriakos Mitsotakis, who is doing all he can to make life a living hell for the refugees.

By developing, signing, enforcing and maintaining the above agreements and policies without giving due attention to the right to life, the right to health and all other human rights of migrants and refugees and by not providing adequate assistance to the countries involved the EU as well as Germany violate their international obligations to achieve the full realization of human rights. In Arts 56 and 55 of the Charter of the United Nations the Member States have pledged themselves to take joint action to achieve higher standards of living, solutions for health problems and universal respect for human rights. To comply with their international obligations in relation to Art 12 ICESCR, States parties should take steps to ensure that international agreements do not adversely impact upon the right to health. In addition the CESCR has made it clear, that violations of the obligation to respect the provision of Art 12 ICESCR are those state actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. This includes the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities.

(5) Criminalization of solidarity

Criminalization of Solidarity refers to the increased policing of people who help migrants, including through search and rescue operations, reception activities and the provision of food, housing and services. In particular, people helping migrants, including lifeguards, journalists, priests, volunteers and NGOs, have been portrayed and investigated as criminals. EU and national laws define the crime of migrant smuggling so vaguely that any assistance to migrants can in principle be criminalised. At the EU level, the Facilitation Directive defines the 'intentional assistance' to asylum-seekers or migrants without regular documentation as a crime of facilitation of irregular migration. People helping migrants can be accused of facilitating irregular migration even if they do so for humanitarian purposes or seek unjust profit. Such a broad criminal definition captures many legitimate and moral actions, some of them even constituting states' human rights obligations. Existing exemptions are extremely narrow and have proved to be ineffective in preventing the risk of criminalisation across the EU.

Crime of Facilitation of Entry & Transit, Article 1.1(a) of the Facilitation Directive: "any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the

⁴¹ <https://www.german-foreign-policy.com/de/fulltext/59458>

entry or transit of aliens;” Crime of Facilitation of Residence, Article 1.1.(b) of the Facilitation Directive: “any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.”

All the following groups could be accused of facilitating irregular migration:

- 1) NGO or merchant ships conducting search and rescue operations.
- 2) NGOs and volunteers in the border zones providing food, shelter, showers, medical assistance, access to justice, etc.
- 3) Individuals giving a lift or providing shelter, Smuggled migrants (including family members and friends) helping each other
- 4) Lawyers, Doctors.
- 5) Journalists and filmmakers, making a story about the situation in border/transit zones.
- 6) Taxi, Uber, other shared car services, bus drivers.
- 7) Landlords, people renting their houses through Airbnb, etc.
- 8) Shelters and other service providers that take small fees/donations for their services.
- 9) Mayors who receive EU funding to promote integration of migrants.

For instance, in the case of the German ship “Mare Liberum” German authorities ordered on 19th of August 2020 the detention of the ships “Mare Liberum” and “Sebastian K” of the non-profit association Mare Liberum e.V. Mare Liberum monitors the human rights situation for refugees at the sea border between Turkey and Greece. Despite the recent change of law in the regulation on ship safety, the activists had announced earlier that their ships would leave port to the Mediterranean Sea in the end August 2020. The detention by the authorities now prevents this departure. The story begins as early as March 2019, the Federal Ministry of Transport instructed the BG Verkehr to require ship safety certificates for “vessels used in the context of sea rescue in the Mediterranean Sea”. Until then, these certificates were only necessary for commercial vessels. In April 2019, Mare Liberum received a detention order for their ship “Mare Liberum” as it didn’t have the required ship safety certificate. Mare Liberum then successfully sued in two instances. In consequence, the Federal Ministry of Transport changed the regulation on ship safety in order to still block Mare Liberum’s work for the rights of refugees. Mare Liberum as well as other associations affected by this policy were informed about the change of law in April this year. The association Mare Liberum e.V. is active in the Eastern Mediterranean Sea since 2018. There, the human rights activists are monitoring the situation for refugees who are attempting to cross the Aegean Sea from Turkey to Greece. In the process, the non-profit association has repeatedly exposed violence and violations of law by the Greek and Turkish Coast Guards. Frontex, the European border agency, and ships under NATO command are regularly involved in these rights violations as well. Since March this year, the association has been increasingly observing illegal pushbacks by the Greek Coast Guard.

In another case, the Greek police issued a press release about the criminal investigation into 33 people from four different NGOs and two ‘third country nationals’. Accordingly, a criminal case was filed for the offenses of forming and joining a criminal organization, espionage, violation of state secrets, as well as facilitation of entry⁴². Even though the press statement does not name the NGOs or the individuals, there were several media reports stating that the

42 http://www.astynomia.gr/index.php?option=ozo_content&lang=%27..%27&perform=view&id=97610&Itemid=2509&lang=

Watch The Med Alarm-Phone is among Mare Liberum, Sea Watch and FFM e.V. (Which all are German NGOs), that are targeted.⁴³ For the time being, mentioned NGOs refrain from publicly commenting on the ongoing investigation. Alarm Phone published a press release that argued and pointed out the Pushbacks which are the real crimes ongoing by Greek government and EU member states involved in FRONTEX.⁴⁴

To respect, protect and fulfil human rights and especially the rights to life and to health is a genuine task of the states both individually and through international assistance and cooperation. The failure to do so is in itself a violation of human rights.

In addition, by criminalizing the organization above Germany as well as the other countries responsible further carry their international duty to protect the human rights to life and health ad absurdum. In relation to Art 12 ICESCR the CESCR in its General Comment No. 14 has explicitly expressed that members of society - individuals, including health professionals and non-governmental organizations, - have responsibilities regarding the realization of the right to health. States parties should therefore provide an environment which facilitates the discharge of these responsibilities. The introduction of and the pursuit of laws that criminalize members of society fulfilling the obligations of the states causes the contrary situation.

(5) Police whale/policing and racial profiling

Since 2015, political currents that interpret the presence of migrants* and refugees as a threat to national identity and welfare state services in the Federal Republic of Germany have again increased sharply. The political construction of migrants and refugees as a threat to internal security and order is closely linked to social practices of policing, a social process of control and criminalization of migrants and refugees, which particularly affects them due to their precarious residence status. Against the background of the history of the emergence of the modern police force, policing pursues a colonial continuity, whereby the exercise of state power is directed primarily against (post)colonial subjects.⁴⁵ The practice of policing extends beyond the institution of the police deep into social structures. Forms of control and criminalization can also be found in private security services, the criminal and judicial system, public authorities, welfare institutions and welfare state institutions. They are thus closely intertwined with policies of participation.⁴⁶ Polishing is intersectional, along several forms of discrimination at the same time, and draws a dividing line between the legal subjects considered worthy of protection and the criminalized "others" who are constructed as perpetrators not worthy of protection. Their exclusion from the liberal understanding of security also occurs, among other things, through checks independent of suspicion and events (Racial Profiling), the lack of specifications of racial discrimination elements in anti-discrimination laws and independent complaint bodies.⁴⁷ As a consequence, Black People and People of Colour have to expect counter-indictments and sanctions if they report

43 <https://vimapress.gr/telos-sti-drasi-evropaikon-mko-pou-diefkolytan-tin-diakinisi-metanaston-apo-tin-tourkia-sti-lesvo/>

44 https://alarmphone.org/en/2020/10/01/the-real-crimes-are-push-backs-and-human-rights-violations-by-the-greek-government/?post_type_release_type=post

45 Thompson, Vanessa E. 2020: Die Verunmöglichung von Atmen. Online: <https://heimatkunde.boell.de/de/2020/09/02/die-verunmoeglichung-von-atmen>

46 Hess/Lebuhn (2014): Politiken der Bürgerschaft. Zur Forschungsdebatte um Migration, Stadt und citizenship. In: sub\urban Zeitschrift für Kritische Stadtforschung 2.3, S. 11-34

47 Siehe 36

experienced physical assaults, e.g. by the police or security services. For persons with a precarious residence status, the consequences to be feared, such as a deterioration of the residence permit up to deportation, are even more far-reaching and thus associated with additional psychological stress.

The change of the police laws in all German states in May 2018 had far-reaching consequences, especially for refugees and migrants. Even though in the federal system of the FRG the police are considered a matter for the states, there was a uniform tendency to expand the concept of terrorism. The concept of the "abstract threat situation" was introduced across the board. The changed legal situation extended the application of measures to broad strata of the population that had previously been introduced for acts of terrorism. In addition, the new laws focus on police prevention, whereby contingencies in investigations are in the foreground and grounds for "suspicion of a crime" have been extended. For example, according to civil rights activists, Bavaria's new police law is the most stringent since 1945 in Germany and, among other things, legalizes the admission of persons to months of preventive detention.⁴⁸ —

Initiatives against racial profiling, NGOs and documentation centres report that controls that are independent of suspicion and open-ended leave behind fear of persecution and depression in the criminalized persons. According to the German civil education campaign "Death in Custody", there have been at least 179 deaths of Black People, People of Color and people affected by racism in German custody since 1990.⁴⁹

Activities by the state that lead to death and physical and mental harm violate the right to physical and mental integrity as laid out among others in Art 2 (2) of the German Constitution, Arts 3 and 5 UDHR, Art. 5 (b) CERD, Art. 19 CRC, Art 3 ECHR and Art. 3 CFR. Depending on the kind of activity the principle of equality of Art 3 (1) of German Constitution as well as various provisions of the International Convention on the Elimination of All Forms of Racial Discrimination may be affected.

(7) Specific charges against the German government (in its own right and as representative of the EU and member states and the global North)

Within the framework of the so called European Asylum System granted to people fleeing persecution or serious harm in their own country and therefore in need of international protection. Asylum is a fundamental right; granting it is an international obligation, first recognised in the 1951 Geneva Convention on the protection of refugees.⁵⁰ In the EU, an area of open borders and freedom of movement, countries share the same fundamental values and States need to have a joint approach to guarantee high standards of protection for refugees. Procedures must at the same time be fair and effective throughout the EU and impervious to abuse. With this in mind, the EU States have committed to establishing a Common European Asylum System. Asylum flows are not constant, nor are they evenly

48 Andrea Kretschmann, Das Wuchern der Gefahr. Einige gesellschaftstheoretische Anmerkungen zur Novelle des Sicherheitspolizeigesetzes 2012, in: Juridikum 3/2012, S. 320-333.

49 It is important to note that the "Death in Custody" campaign "is based on a broader understanding of custody that goes well beyond the legal concept (custody in the sense of a custodial measure by the police). In order to fall within the definition of "death in custody", the state apparatus of violence must have played a causal role for the death of a person. Two perspectives must be distinguished here; spatial and actor-related.

50 <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

distributed across the EU. Asylum must not be a lottery. EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar.

Since 1999, the EU has been working to create a Common European Asylum System (CEAS) and improve the current legislative framework.

Between 1999 and 2005, several legislative measures harmonising common minimum standards for asylum were adopted. Also important was the strengthening of financial solidarity with the creation of the European Refugee Fund.⁵¹ And in 2001, the Temporary Protection Directive⁵² allowed for a common EU response to a mass influx of displaced persons unable to return to their country of origin. The Family Reunification Directive⁵³ also applies to refugees.

1. Within, the system that is based on the idea of the “defense” of the fortress of Europe, Germany continues to misuse its power and geographical privilege, to ensure that migrants and refugees are deprived of their human social rights, especially their rights to health, to social security and to adequate housing:

- i. Failure to create an European Asylum System that is sensitive to the national and international obligation to respect, protect and fulfil the rights and interests of migrants
- ii. Maintenance of the “Hot-Spot”-approach and the Dublin-System, that are systematically designed to deprive migrants and refugees of their human social rights, especially their rights to health, to social security and to adequate housing:
- iii. Failure to enforce its international responsibility in close cooperation with other EU member states to ensure health care, social security, food and adequate housing within the European Asylum System

2. Within a framework of policies that solely focus on the reduction of incentives and the scientifically wrong idea of abolishing so called “pull-factors” for migration, it has ensured that migrants and refugees remain marginalized and deprived of their human social rights, especially their rights to health, to social security and to adequate housing:

- i. Failure to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- ii. Failure to ratify the revised European Social Charta of 1999 which includes among others the rights to protection against poverty and social exclusion, to housing as well as the goals to improve social protection for mothers, children and young people and persons with disabilities
- iii. Failure to explicitly include the Human Rights to Health, to Social Security and to Adequate Housing in the constitution
- iv. Failure to explicitly include the prohibition of discrimination based on the status of residence and on the status of nationality in the constitution

51 <https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund>

52 <https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection>

53 <https://ec.europa.eu/home-affairs/what-we-do/policies/immigration/family-reunification>

- v. Maintenance of a legal framework which excludes migrants such as asylum seekers and undocumented migrants from the general social security system and from health insurance
 - vi. Maintenance and aggravation of a legal framework and politically motivated policies that provide health services for migrants below the subsistence minimum
 - vii. Failure to justify the limitation of the benefits applied in the AsylbLG in a comprehensible and factually differentiated manner.
 - viii. Creation and maintenance of a discriminatory legal framework that creates fear and existential threat around the exercise of social rights, thereby forcing undocumented migrants to decide against the exercise of their Human Social Rights and especially their right to health
 - ix. Creation and maintenance of a legal framework that forces migrants to live in inadequate collective accommodations and to share their social benefits with strangers
 - x. Restricting the legal means of protection against human rights violations that occur during and because of deportations
 - xi. Failure to provide measures for adequate interpretation when accessing medical services
 - xii. Creation of racialized laws and policies in the law of security and order and failure to analyse racist structures in law enforcement
3. Meanwhile, the government's policies with regard to immigration and asylum have fostered racism, Islamophobia and nativism, and have deliberately created a 'hostile environment' for non-citizens which involves enforced destitution, denial of rights to housing and essential medical treatment, indefinite detention and deportation. These policies violate international human rights obligations to protect rights to life, to health, to adequate housing, to dignity, to physical and psychological integrity, to respect for private and family life, to liberty, and to protection from forced labour and from inhuman and degrading treatment. This has been achieved through:
- i. Increasingly restrictive visa policies which limit legal rights to enter and stay in the Germany for work (for non-EEA or third-country nationals) to a small and diminishing number of highly qualified or corporate employees, with extortionate fees for issue and renewal;
 - ii. The provision of no-choice, often squalid asylum accommodation to asylum seekers, who are required to live on small monthly benefits, that are often replaced by benefits in kind;
 - iii. The entrenchment of racialised viewpoints about migrants in the control system to the point that people of colour resident for decades are exposed to the suspicion of having no lawful right to reside, denied essential services, and threatened with enforced removal
4. The government, by policies – especially by not providing adequate health care - which make it impossible to live without working and simultaneously making work illegal, forces vulnerable people to accept conditions of super-exploitation and total insecurity as the price of remaining in the country, and enables private companies to profit from such super-exploitation.

5. Additionally, while EU free movement law recognises the importance of family unity for EEA nationals who move in order to work, the government's family reunion rules for non-EEA nationals (whether they are admitted as workers or as refugees) are extremely restrictive and result in long-term separation of families.
6. These policies also work to the detriment of the rights of children, who are exposed to risks of exploitation and abuse when they attempt to migrate in their own right, or to hardship and destitution as a consequence of policies which deny public funds support to family migrants.
7. At the same time, the government, in its own right and as an EU member state, facilitates the making of vast profits by security corporations through contracts for the border security regime, the housing of asylum seekers and for the detention and deportation of migrants, while overlooking or condoning brutality, racism and other human rights violations, criminal offences, fraud and negligence, committed by their agents against migrants and refugees, in fact rewarding them through the continuing award of such contracts

Questions for the Tribunal

The Tribunal is asked to consider the cumulative effect of all these measures, policies and operations taken together, in creating and maintaining a people without rights within Europe and at its borders.

1. To the extent that the Tribunal finds the above violations proved, how do they fit with the general pattern of violations found by the Tribunal in its hearings at Rome, Barcelona, Palermo, London and Paris?
2. How does the creation and maintenance of a rightless people sit with the pretensions of Europe to be a cradle of universal human rights and values and with the human rights instruments written, signed and ratified by European states?
3. How does the continued tolerance of the suffering of those condemned as rightless affect the rule of law?
4. Since the protection of fundamental human rights is designed to embrace both the executive and juridical arms of state, to what extent does the treatment of migrants destroy this bridge between the political and the juridical?
5. To what extent can migrants' experimental subjects for a broader destruction of the rights of populations under globalisation?
6. How do government policies and ministerial statements treating poor migrants and refugees as 'benefit tourists', 'health tourists', 'a swarm', help to exacerbate popular racism and encourage hatred of migrants and racial violence?
7. Has the Tribunal found examples of resistance against these measures which can act as models or markers for future action?