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45° Session on the Violations of the Human Rights of Migrant and Refugee Peoples

The Human Right to Health of Migrant and Refugee Peoples

Berlin Hearing, 23-25 October 2020

JUDGMENT

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1. Introduction

The Session of the Permanent Peoples' Tribunal (PPT) convened in [Berlin on 23-25 October 2020](#), in response to a request submitted by a broad spectrum of groups and movements from Germany and various other European countries, coordinated and represented by the German branch of the International Physicians for the Prevention of Nuclear Wars (IPPNW), coincided with the concluding event of a process opened in Barcelona in July 2017 and developed through a series of public hearings and judgments held by the PPT: in Palermo (18-20 December 2017), Paris (4-5 January 2018), Barcelona (29 June-1 July 2018), London (3-4 November 2018), with preliminary conclusions presented to the European Parliament in Brussels (9 April 2019).

The detailed documentation of the proceedings is available on the [PPT's website](#) and should be considered an essential component of the overall body of evidence that was taken into due consideration in the formulation of the decisions of the Jury of the present Session.

Over the last few years, the dramatic evolution of the situation of the migrant and refugee people has confirmed the permanence of what in the [opening Indictment](#) presented to the PPT was qualified as the *necropolitics* of the states involved, further aggravated by the absence of any substantive remedial measures in the face of massive violations of human and peoples' rights, as well as the adoption of stricter security measures, both at the borders and within national legislations.

Confronted with this worsening scenario, the Session convened in Berlin adopted the following objectives as its terms of reference:

- to provide a general update on the already available evidence of the gravity of systemic violations and corresponding responsibilities;
- to integrate the broad spectrum of documentation with a specific focus on the situation of the migrant and refugee people in Germany: the fundamental human right to health (as a comprehensive indicator of the individual and collective right to a life with dignity, which is also a constitutional obligation and guarantee) was adopted as a specifically informative point of view, together with due consideration of Germany's role and responsibilities in European policies;
- to assess whether and how very recent tragic events, which occurred after the PPT report was presented in Brussels, were addressed by the new European Parliament and Commissions comprising measures that would demand modifications to past PPT Judgments.

The present report is therefore structured as follows:

- a) a synthetic overview of the current factual and juridical migration context within the European framework;
- b) the presentation of evidence submitted during this Session through testimonies, delivered in different formats (in presence and remote, oral, visual and written materials), due to the logistic impositions of the current pandemic;
- c) an overall qualification of the consistency, strength, anthropological, social, political and juridical significance of the evidence related, on the one hand, to the various forms of violations and, on the other, to national and European behaviours and responsibilities;
- d) the forward-looking decision of the Jury, which considers the obligation of national and European authorities to abide by their role of guarantors of a democratic order, complying with human and peoples' rights, as the only inclusive remedy to a situation where the defence of the exclusive and excluding national and European interests is the illegitimate priority.

The detailed program of the public hearings of the Session which took place in Refugio Berlin (Lenastraße 3-4, Berlin) is available in the Attachment 1 of this text.

Due to the constraints imposed by the Covid-19 pandemic, a mixed strategy was adopted to ensure an effective participation of the witnesses, the rapporteurs, and the members of the Jury: the physical presence was restricted to those living in Berlin, while all the others were present throughout

the full program on a dedicated platform. The Jury (Attachment 2) was composed by the following members:

Luciana Castellina, Italy (Chairperson), Philippe Texier, France (President of the PPT), Teresa Almeida Cravo (Portugal), Leah Bassel (UK), Marina Forti (Italy), Domenico Gallo (Italy), Kira Kosnick (Germany) and Sarah Lincoln (Germany).

The Secretariat of the PPT is composed by Simona Fraudatario, coordinator, and Gianni Tognoni, Secretary General.

The Indictment (Attachment 3) accepted by the PPT as the basis of the proceedings was notified, according to the PPT Statute, to the German Government through its Embassy in Rome and by certified mail, and to the competent authorities of the European Union by certified mail. The notification included the explicit invitation to nominate a defence.

The elaboration of this Judgment has also included access to the written and visual materials supporting the testimonies which could not be fully presented during the public hearings.

2. The general context

We are witnessing an acceleration of institutionalized crimes against humanity perpetrated against migrant people along externalized and internal European borders, as already highlighted by the Palermo Judgment of the PPT (December 2017). Precisely because of the lethal combination of deliberate policies not to save the lives of migrants and to deter their entry, European authorities have used the Covid-19 pandemic to further justify the already existing border policies: i.e., the practice of non-assistance at sea, mass detention, mass push-backs and forced return of survivors back to unsafe third countries, such as Turkey, Libya (a place of war, torture, and rape), and other North African countries. These systematic violations have been documented over the years by several and highly consistent United Nations expert reports and Human Rights groups. Despite such unfolding and unequivocal evidence, the crimes are on-going and have been escalating, with a surge in the loss of life occurring within European Search and Rescue (SAR) zones and within European borders.

While impunity is expanding, amidst an information black hole, the bodies washed up on the shores of Libya and Tunisia, lost in the deserts, and stranded in the Balkan and Alpine routes, as well as the voices of the victims or their parents gathered by civil monitoring networks, nonetheless apprise us of the facts and the extent of the structural, systematic and repeated crimes that confront us.

Mass murder in the Mediterranean is a blatant example of the silence of international justice: so far, an estimated 20.000 people have drowned in the Mediterranean Sea since 2013, and 55.000 civilians have been pushed back to Libya by virtue of its 2017 Memorandum of Understanding with the EU (IOM). Further loss of life must be attributed to the deliberate rescue gap by specific migratory policies adopted by EU Member States, such as the withdrawal of European States' rescue assets; a blockade imposed on almost all humanitarian vessels; distress calls left unanswered; and closed ports policies. European States continue concerted efforts to prevent those in distress from reaching Europe, at all costs. Faced with this evidence, one may speak of the Mediterranean as a place of planned physical elimination, through attempts to turn it into a place where legality and jurisdiction do not apply.

In reality, the entire purpose of the practice of border externalization is to try and avoid jurisdiction, by means of a deliberate policy to prevent people from enjoying their rights to protection, health and dignity. The shift from "push-backs" – involving Italy's own navy and which were declared illegal by the European Court of Human Rights in the Hirsi Jamaa judgment – to "pull-backs" – delegated to Libyan militias – constitutes a naked attempt to avoid accountability under human rights law. This applies when assigning the externalization of "border management" to Turkey and African third countries.

According to the level of proxy given over to third countries' police, military forces and border guards, the crimes committed can indeed be qualified as falling under individual and State responsibility. In the case of the Mediterranean, EU institutions and member states undeniably provide technical, logistical, political, and often even direct operational support to third parties. Through aerial surveillance and [facilitation of interception activities of migrants at sea, coordinating, for instance, with Libyan authorities, they have frequently violated their SAR obligations](#). The EU and Member States individually should thus be held directly responsible for the systematic violation of the [human rights of thousands of migrants – notwithstanding their](#) wish to hide their responsibilities at all costs, attempting to remove all uncomfortable witnesses, such as SAR NGOs and activists.

Along the Aegean and other routes, civil society monitoring has been denouncing similar use of physical and psychological violence as a deterrence tool, to contain and reject migrants that Europe wants to keep at bay. The overall consequences of such policies on migrants' lives and health are particularly devastating and often lethal: distress, trauma, mental health disorders, abuse, rape, illegal detention, illegal push-backs and forced disappearances, to name but a few. On all borders there is also clear evidence of horrific and needless suffering perpetrated on vulnerable people on the move, through indiscriminate detention or collective push-backs, where potential asylum seekers experience systematic forms of torture ([as demonstrated along the Balkan route](#)). Such documentation reveals

therefore cruel, inhuman and degrading treatment as a means of controlling migration flows. To put it plainly: the use of torture as a deterrence tool against migrants who wish to reach Europe. Indeed, in May 2020, the Centre Suisse pour la Défense des Droits des Migrants submitted [a formal request](#) to the UN Committee against Torture to launch an inquiry procedure under Article 20 CAT concerning Italy's conduct in the Central Mediterranean which is leading to the mass torture, rape and forced labour of thousands of refugees and migrants pulled back to Libya.

Despite a few national sentences and international efforts, such as the [Dossier](#) sent to the International Criminal Court by an international team of lawyers (2019), which highlighted the crimes against humanity perpetrated against migrants and refugees, international justice has not been responsive so far, resulting in States' lack of sensitivity, apathy, disregard for migrants' lives, and the resort to bureaucracy and Covid-19 as an excuse not to be held accountable. International justice and the relative legal impasse of national jurisdictions have led to a failure to protect people on the move, thus fostering a widespread and unacceptable sense of impunity, denounced in all its forms by civil society in close association with migrants and refugees' movements. There is indeed an urgent need to qualify these crimes as expressions of a structural, systemic, intentionally planned design, which also aims to facilitate their denial and acceptance by a passive European public opinion, and to legitimize violations otherwise associated with individual criminal liability.

According to the Statutes of the International Criminal Court, the “widespread or systematic attack (i) directed against every civilian population (iii) is a crime against humanity, consciously carried out (v) in execution of the political design of a state or organization (iv)”. Agreements with third countries to repel migrants at sea can therefore integrate the particular form of responsibility of the material facilitation ex art. 25(3)(c) of the Rome Statute. Indeed, cooperation with Libya can be understood as the international responsibility of the Italian State.

Moreover, it is to be considered that Italy and all other European Member States are and have been fully aware of the widespread human rights violations and abuses suffered by refugees and migrants in Libya and on externalized borders. Knowledge of hundreds of reports by international organizations, governmental bodies, UN expert bodies and individuals, NGOs and numerous media outlets, which have thoroughly exposed the widespread human rights violations committed by Libyan state actors and the abuses perpetrated by armed groups, criminal gangs and militias against refugees and migrants in Libya, can hence be imputed to European actors. And today this knowledge of mass violations also includes the Balkan, Aegean, Western Mediterranean and North African routes.

The bureaucratic structure of crimes, bilateral agreements, EU measures financed by taxpayer money, diluted State responsibilities, and hidden chains of command have aided the overall climate of impunity that characterizes EU institutions and Member States' policies and actions. The Permanent Peoples' Tribunal has therefore the unique responsibility of highlighting the political, economic and cultural systematic nature of the ongoing genocide at EU borders, as [stated in March 2020](#). If left unpunished, this widespread impunity may lead to the complete psychological and physical annihilation of the migrant and refugee peoples that deserve our committed protection.

3. The facts

During the hearing on “The Human Right to Health of Migrant and Refugee Peoples”, this Jury heard appalling testimonies on how migrants and refugees are routinely being denied their fundamental rights to respect and to a dignified life.

Witnesses from Germany, Greece, the Netherlands, Spain, and the United Kingdom highlighted the many challenges that migrant and refugee people are facing. We heard how the precariousness of one person’s legal status can lead to even basic health care being denied. We also heard testimonies of how the European policy of “hot spots” enabled the creation of a massive refugee camp on a Greek island, where thousands of refugees face unhealthy and often inhumane conditions. From overcrowded transit camps in Lesbos to “temporary” shelters for refugees in Germany or in Dover, to sweatshops or homes where migrants toil in Britain or Spain, this Jury heard how migrant and refugee people are living in constant uncertainty, confronted sometimes with blatant racism, sometimes with more subtle mechanisms of discrimination; with the brutality of police and law enforcement agents, or with the banalized, routinely indifference and disregard of the institutional machinery.

“These policies are designed to push people to leave the country by making the social environment increasingly hostile to them”, as one witness said. And this is true in most European countries, as one testimony after another made clear.

Testimonies given to this Jury explained that thousands of people in Germany are in fact denied access to basic health care because they lack resident status or private insurance. A person undergoing asylum procedures is only entitled to basic health services, but even that can be difficult to access: “Unless they have a private insurance, often non-resident persons are either turned away, or dismissed too early from hospital”, stated a representative of the German NGO Medibüro. According to this testimony, “migrants are clearly discriminated upon in the public health services, which constitutes a violation of the German constitution”.

Witnesses gave a grim picture of life for refugees in a country “so proud of championing human rights”, but where “reality is quite different”, as one social worker observed. One example is the case of migrant and refugee people with disabilities: “All too often services are not available or non-affordable to them”, said a representative of the NGO Handicap International. Testimonies also pointed to a lack of help for those who suffer mental health problems, often stemming from the traumas of war or from violence and torture experienced during the flight to Europe.

Life can be especially tough for those living in often overcrowded refugee camps (*lagers*, in German), usually far from any city or town, waiting for their asylum application to go through procedures that may take many months, if not over a year, to be completed. “The camp is an old barrack at the former east-west border, an isolated place. There was a doctor, but now there is only a nurse. One could see a doctor in town but it is difficult to get the permission”, said the father of an autistic child. Others reported cases of aggressions within the camp: “My 5-year-old daughter was harassed in our own room”, said another witness. “Then our windows were broken. My family and I fled my country because I was in danger; here we are treated as if we were criminals”.

Harassments within the refugee camps are common, according to many testimonies; yet “the camp guards do not protect us”, a witness told the Jury. Guards and staff do not respect refugees, another witness explained further: “We are constantly mistreated: in the canteen, in the daily life. They enter our rooms without permission. They display total disregard for us. They have an ideology of white supremacists”.

Other testimonies spoke of the anxiety of a life spent waiting. “We live in constant fear of deportation”, said one witness. “It is now two years I am here, doing nothing. I am not allowed to go to school nor to get a job”, said a young man from Sierra Leone. “How should I spend my life? But when I raised my voice I was beaten by the police and transferred to another camp”.

Alongside the camps, “integration” is not an easy word. Some described “the daily racism” experienced by many black migrants in many German cities. “We do not feel ‘integrated’, our voices are ignored”, said one young man from Cameroon. “I have been in Germany for six years and attended professional training, but I’m still prevented from looking for a job. Why should I spend my time idle?”

Women’s voices are often missing. “Sometimes migrant women are too scared to talk about problems related to personal health, or family planning, or mental health”, remarked a social worker with the Self-organized Migrants’ Organization: “I know that sense of fear. Some have suffered traumatic experiences like that of Female Genital Mutilation; many have experienced violence and harassment. It is extremely painful to live with the physical consequences of that, let alone the psychological impact”. Yet many struggle to find help. The language is not the only obstacle, said the witness: “A few of the doctors and nurses are kind, but many just do not care to understand what is behind a migrant woman’s pain. Many hide their indifference and disregard behind the system’s rules and procedures”, she said. “These women arrived in Europe looking for protection. In their experience, a woman’s suffering is just normal: but here in Germany it shouldn’t be like that. We must find better ways to listen to their needs”.

Problems are aggravated when it comes to LGBTIQ+ migrants and refugees: “Many of them suffer post-traumatic stress disorders and anxiety; often they are discriminated upon in the refugee camps”, said a witness. Gender orientation might be one of the reasons a person is fleeing; in any case it is something that cannot be easily revealed to one’s own community members for fear of retribution. “But most aid workers are not trained to deal with these issues, nor with the special psychological problems they imply. Mental health of the LGBTIQ+ people should be taken more seriously”.

A number of testimonies from Germany highlighted how police brutality is a common occurrence. The Jury was also told of people deported in spite of mental or physical problems or even after a suicide attempt, provided a doctor declare the person “fit to fly”. This raises serious deontological questions that must be considered.

Witnesses from the United Kingdom and from Spain described how domestic workers, often undocumented migrants, risk losing their basic rights during the Covid-19 pandemic. “When the workplace is a home, confinement means that the working days become longer”, said a witness from Spain, adding: “And that is when they do not lose their jobs”. In Britain too, witnesses highlighted that many migrants lost their precarious jobs due to the pandemic, also losing their welfare benefits.

The pandemic is having “a disproportionate health impact on all minority groups, including migrants and refugees”, a representative of the Institute of Race Relations from the United Kingdom told the Jury. “But it was the government that created the conditions for this to happen, with migrants concentrated in overcrowded mass accommodation”. Migrants waiting for deportation, and those waiting to file for asylum or protection, are kept in overcrowded hostels or former military barracks, often without proper sanitation: “No wonder there have been outbreaks of Covid-19”, the witness remarked. The plight of those recently arrived through the English Channel is dismaying: “In the reception area in Dover people are forced to wait for hours in the open air, often in wet clothes. Social distance is just impossible”.

The Jury then heard dramatic accounts from the “hot spot” Greek island of Lesbos, where thousands of migrants and refugees are held in overcrowded camps while their applications for protection are considered. The procedures can last many months, often years. Meanwhile, most witnesses described a nightmarish life. Poor sanitation, poor shelters – often just tents – and insufficient water and hygiene facilities, widespread malnutrition. “No wonder measles and skin parasites are common”, said one doctor. Health care is provided by a few doctors or nurses, the witness continued: “A medical consultation can last a few minutes and there is no sufficient privacy to guarantee confidentiality. In case of emergency, there is a clinic in town: but usually it is the police, not the medical staff, who decide whether to call the ambulance”.

Mental health is also a challenge. “We found widespread anxiety. Tension is high, conflicts can easily erupt. People live under constant stress. Two thirds of the inhabitants of the camp stated they never feel secure”. The few counseling services are offered by volunteers, the Jury was told, including interpreters: “I wonder how much information is lost in translation, because of misunderstandings”, said the witness. Unaccompanied children are especially vulnerable.

One witness described spending the entire winter in a tent, “my clothes constantly wet with rain and damp”. He described the long search for a pair of crutches, having a leg impaired because of a wound reported in Afghanistan before fleeing; the hospital turning him away four times before finally giving him an X-ray to find an infected broken leg; the scramble to get a surgery in Athens: “It was my physiotherapist that helped me through all this”.

“Serving in Moria was a shocking experience”, said a German doctor in a dramatic testimony. He served as a volunteer in Lesbos after the fire that ravaged the refugee camp last year, he said: “I saw children with severe burns. Pregnant women asked for echography fearing their children might have been hurt. Even now that camp is not adequate, exposed to winds and flooding. I saw a paraplegic man living in a tent with rat bites on his legs. Doctors can only prescribe medicines that few refugees can afford to buy”. No human being should live in those conditions, said the witness: “I have worked in war ravaged countries. But I could never imagine that people should live without basic care here on European soil. I wonder how Europe can tolerate this happening”.

The Jury was also told of initiatives designed to relieve the pressure on the overcrowded Moria camp. One is the Pikpa initiative, a small bungalow camp that sheltered women and children fleeing violence. Here they could find some respite, counseling and care, said one of the doctors serving there. “But we are under threat of being evicted”, the witness remarked. In fact, a few days following the PPT hearing, this Jury was informed that the Pikpa camp was indeed closed by the Greek authorities.

“Lesbos is living through a dangerous situation”, the witness from Pikpa said. “It is of utmost importance to provide public health infrastructures to all, the Greek citizen as well as the refugees”. But this is a European problem. Indeed, the Moria camp in Lesbos is one of the outcomes of the European policy of keeping newcomers in a few “hot spots” until their applications are sorted out.

Witnesses remarked that those providing assistance to migrants and refugees are often themselves criminalized, as in the case of the boats providing rescue in the Mediterranean Sea. “To prevent those boats from doing their humanitarian duty is a deliberate policy of not saving lives”, one witness said, “and also to avoid any scrutiny. We no longer know what is happening in the high sea”.

“It is a global responsibility of all states to ensure that the fundamental human rights of the migrant and refugee people be respected”, as one witness remarked. Yet, what we are seeing is an “undeclared war on migrants”.

4. The German context

Among the EU Member States, the Federal Republic of Germany has taken in the largest overall number of asylum seekers and refugees, projecting an image of humanitarian concern. At its inception after the Second World War, the Federal Republic made the right to asylum a central part of its new constitution (Article 16a), in recognition of the devastating situation many refugees and stateless people found themselves in as a consequence of war, occupation, genocide and atrocities under German National Socialism. The Federal Republic also became an early signatory to the Geneva Convention in 1951 (the East German GDR in 1990). To this day, German governments have retained a legal commitment to the right to asylum, and the number of refugees residing in the country is relatively large in comparison with other European Member States: 1.8 million people were registered in the country as refugees and asylum seekers at the end of 2019; 1.4 million had a protection status, of which 80% was temporary.

While the UNHCR ranks Germany in second place in 2019 when it comes to comparing the size of refugee populations world-wide relative to its population size and economic power, its contribution is smaller than that of countries such as Turkey, Pakistan and Uganda. It is also important to note that asylum rights have been successively restricted in the context of several reform packages that have been initiated in response to periodic increases in the number of asylum seekers reaching the country. The first such reform was carried out in 1993, after the reunification of the country, in a climate of racist programs, such as the arson attacks and murders of migrants in Rostock-Lichtenhagen, Mölln and Solingen. Further legal restrictions followed quickly in response to the so-called “refugee crisis” of 2015-16, when larger numbers of asylum seekers were able to make their way to European member states, with Germany a favored destination for many. The so-called asylum packages I and II were passed in October 2015 and March 2016; in addition, there were further legal changes in 2019: all seeking to make Germany less “attractive” as a destination for asylum seekers, by rendering the prospects of achieving protection less likely, reducing family reunification, facilitating deportation and modifying differentiated protection statuses with differently graded rights and prospects to remain. At the same time, the German government has taken a prominent role in advancing European border “protection” and securitization, and in externalizing migration control by seeking contractual agreements with “third country” States, transit countries and countries of origin, in order to stop unwanted migrants from reaching European territory.

Beyond refugee migration, it has to be noted that German governments have only quite recently accepted that Germany is an immigration country, with citizenship laws in the Federal Republic until the year 2000 making the “naturalization” of foreigners difficult unless based on German ancestry. Even after the reform of citizenship laws to add a *jus soli* principle to the *jus sanguinis*/German descent principle, aimed to facilitate particularly the naturalization of children born to non-citizens on German territory, the term foreigner is still widely in use to refer to racialized parts of the population who are denied symbolic belonging to the nation, regardless of citizenship, and “hostility against foreigners” stands in as a problematic term to denote racism. Regardless of their formal status vis-a-vis citizenship or formal rights as foreign residents, individuals and groups experience structural, institutional and everyday racism on the basis of their appearance, religion, language and ethnic heritage. What is more, incidents of racist violence and right-wing extremist murder have steadily increased, in line with a general political climate that has turned against immigration and refugee protection, evidenced also by the electoral successes of the extreme right-wing party AfD (*Alternative for Germany*), based on an anti-immigration agenda. Despite evidence that racism and extreme-right ideologies have taken a firm hold in the German police and secret service apparatus – the National Socialist Underground (NSU) murders and the unsatisfactory process of revealing their underpinnings are a case in point – German governmental representatives have up to now widely resisted attempts to study and counteract institutional racism.

When it comes to the composition of Germany’s immigrant population, the general census (Mikrozensus) counted 10.1 million foreign citizens residing in Germany in 2019, and 21.2 million

people in the category of having a migration background, which includes 26% of the total population. The latter category includes foreign citizens, German citizens who acquired German citizenship, were born abroad or have at least one parent who was. 39% of people who immigrated to Germany themselves came from other EU member states. Among those with migration backgrounds, the largest groups trace their migration histories to Turkey (2.8 million), Poland (2.2 million) and Russia (1.4 million). Depending on their ethnic ancestry, economic and cultural capital, migration history as well as country of origin/citizenship, migrants have vastly differing chances of obtaining German citizenship and/or permanent residence. Non-citizens residing in Germany have starkly stratified rights, ranging from the broad range of rights granted to EU citizens regarding residence and the labor market to the severely restricted rights of those whose asylum applications have been refused and have a status of 'exceptional leave to remain' (Duldung) until deportations can be enforced, and of course the almost full absence of rights for those who are considered to reside in the country illegally. This also includes many asylum seekers who have fallen victim to the Dublin convention concerning the responsibility of processing asylum applications in the EU country an individual has entered first, with negative consequences ranging from lack of access to housing, food, healthcare and education, among others.

The denial of basic rights becomes especially apparent in the area of health care. In the first 18 months in Germany, asylum seekers are denied full access to the German health system. Instead, Germany has created a parallel welfare system for asylum seekers which limits health care to acute illnesses or pain. Especially chronic illnesses or mental health issues often remain unaddressed. This inadequate health care is aggravated by the fact that asylum seekers are forced to live in refugee accommodation without medical staff and far off from health infrastructure.

Limited access to health care also plays a role when it comes to deportation of severely ill refugees. In recent years, Germany has passed new laws requiring such extensive medical certificates, that it has become near to impossible for refugees to prove that their illness is an obstacle to deportation.

Undocumented migrants do not even have access to the limited health care provided for asylum seekers. If they apply for treatment, they risk immediate deportation because the welfare office passes on their data to the immigration authorities.

5. Comments and qualification of the facts

The powerful testimonies heard by the Jury demonstrate systemic violations that cut across local and national specificities. In this section the gravity and systemic characteristics of these violations will be explored in three parts.

5.1. Rule of Law, racism and white supremacy

The PPT hearings and judgments prior to the Berlin session of October 2020 had concluded to condemn immigration and asylum police, EU and Member States for the total denial of fundamental rights and crimes against humanity. In this Tribunal, the “war on migrants” was exposed along its many fault lines, particularly the ways in which race and racism run *through* the rule of law, rather than being an unfortunate by-product. Multiple state and political actors were implicated in grave violations that cut across the status of citizen and non-citizen, and across social and political spheres.

Virulent, open racism and white supremacy are increasingly mainstreamed. As noted in Section 3 of this judgement, in Germany incidents of racist violence have increased in a hostile political climate that has generated electoral success of the extreme-right party AfD. German police and secret service have refused to recognise and counteract institutional, structural racism and to combat extreme-right ideologies in their midst.

Multiple testimonies indicate the state of terror migrants and non-white citizens are forced to endure. None expressed hope of recourse or redress, and indeed were again attacked and brutalised when making violence known to police. This was true of migrants living in camps across Germany, who were unsafe from police in supposed places of sanctuary. This included Central American parents and single, young Black African men in camps or sleeping on the streets, all of whom have been brutalised by police. All expressed anger at the dissonance of a Germany that claims “refugees welcome” but in fact is a place of persecutions that could remind the situations where they came from. Germany, understanding itself to be a country that respects and upholds the rule of law, does not hear the cry for help.

The circumstances of the 2005 death of Oury Jalloh, a Sierra Leonean man who burned in a police cell in Dessau, Germany, are deeply contested. This case remains a powerful reference and rallying point. For some Germans, trust is lost in the police, the justice system of Germany and the EU. For migrants, Afro-Germans and German people of colour, this trust was never a reality that could then be shattered. As explained in the testimony from one of the witnesses, when even in your own city you are treated as a stranger the effects are constant and profound, not least for mental health. Few therapists are Black and people of colour, and training does not include or address systemic racism and its impact on mental health in any way. This issue is compounded for LGBTIQ+ migrants, as shown in testimony at the Tribunal. Their suffering is disbelieved or ignored.

Systemic racial violence is therefore cycling through different spheres of social and political life, mutually reinforced by the political party system, the police and mental health services where extra trauma is added in places where, witnesses argued, problems should be solved. There are few spaces for respite and healing in a context where the violation of the rights of citizens and non-citizens is ongoing and happens with impunity – as in the case of Oury Jalloh and many others.

5.2. EU and Member State Policies: repressions and refusals

This section analyses testimony that exposed repressive EU policies and the refusal to modify repressive strategies.

Testimony revealed the recent European Commission Pact on Migration and Asylum – announced in the wake of the fire in the refugee camp of Moria in Lesbos, Greece – as a cynical

continuation of the existing policy that provides no legal way for asylum seekers to come to Europe and few legal paths for other migrants. The new EU Pact keeps the main mechanisms in place rather than placing protection at its centre.

“Solidarity mechanisms” will allegedly relieve countries experiencing migratory pressure – meaning the arrival of desperate people struggling to survive – through pledges for relocation of asylum seekers and/or forced return from another EU country. Witnesses underscored the danger of the political bargaining process of pledges will be instrumentalised by the far right – such as Germany’s AfD with their electoral success on an anti-immigrant platform – and those emulating the far right in election campaigns.

The EU Pact was decried as the continuation of previous policies, repackaged as humanitarian measures. Through the war against migrants, economic profits are secured for multinationals. Yet the migrants in agreements and pacts are portrayed as criminals or victims, never the subject of rights. Instead of recognising how migrant people, documented and undocumented, are essential for our economy and lives and regularising their status, a hypocritical discourse is wrapped in a humanitarian language (See section 6, Qualification of facts, for further discussion).

In the Mediterranean, deliberate policies to not save lives continue. The withdrawal of European States’ rescue is the physical elimination of those in distress. Witnesses demonstrated that the shift from pushback to pull back, delegated to militias, enables EU States to avoid accountability under EU law. Through institutional censorship witnesses are removed and it is only the bodies on the shores of Libya and Tunisia and the voices of victims documented by organisations that allow us to become aware of the extent of repeated crimes. This cruel, inhuman and degrading treatment is the policy through which migration flows are controlled. Witnesses demanded that the PPT fill its role as the only tribunal capable of highlighting the structurality of this impunity, this ongoing genocide at the EU’s borders.

The role of Germany

Testimony underscored the large role of Germany in border externalisation, in sharp contrast to the “refugees welcome” public image discussed above. This contrast is starkly outlined in the face of what was described as a “long list” of African, Middle Eastern and non-EU European nations to whom equipment and assistance in militarisation of border security and security projects were actively supplied *before* the so-called 2015 “summer of migration”, starting in fact in 2014. Witnesses asserted that Germans do not know the nature and extent of this “EU leadership” role, because the government refuses to disclose which companies are contracted and the nature of German involvement with different militias that externalise borders further and further away from the EU.

Instead, witnesses identified the framing of a policy problem of “illegal” crossings, and NGOs and other actors – e.g. ship captains – who are the criminals and the problem. Yet according to this analysis it is more than a decade of EU work – led by Germany – that has raised the walls of Fortress Europe and actively funded and trained authoritarian regimes that repress local and migrant populations. In turn, corporations’ profit from border control in undisclosed contracts.

The Tribunal connected EU austerity policies – in which Germany played a leading role – with the challenges on Greek islands. The ravages of austerity measures have destroyed public health infrastructure, compromising all communities’ access to health. Initiatives such as Pikpa – in Lesbos, Greece, mentioned in Section 3 – made its top priority the creation of human conditions for everyone in a public health system that is under strain for all residents of the island. In the view of Pikpa organisers, if you want health for refugees, you need health for the general population, and vice versa. No person should be left behind. But organisers felt that the Greek government and EU do not want such decent, humane conditions. This argument is borne out by the fact that mere days after the PPT Session, Pikpa camp was shut down by Greek police.

Other Member States

The withdrawal or lack of recognition of legal rights characterised the testimony of migrant domestic workers and agricultural workers in the UK and Spain.

Testimonies from the UK revealed how the hard-won gains of domestic workers in 1997 have been stripped away. Since 2012, migrant workers accompanying employers are given a non-renewable six-month visa. These workers are left vulnerable, with no protection and under the constant threat of imprisonment, deportation and serious labour exploitation. Life has been unbearable since Covid-19 for undocumented migrants in particular. The best protection is to restore the right to domestic workers visa.

In Spain, legal rights and recognised protections were not granted to begin with.

The Covid emergency saw women domestic workers locked into the homes they work in, without the right to look after their own families, and enduring even longer working days and higher workloads. Stress skyrocketed. Home workers suffered, closed behind four walls with violence from employers and no support. Legal frameworks fail to provide rights for domestic workers to defend themselves in court.

Witnesses denounced this lack of protection and xenophobia toward women domestic workers. The Spanish state has failed to guarantee their right to physical and mental health, not least the danger of contamination from Covid in the absence of protective equipment, workplace inspections and any accountability of employers. The “internal regime” means that domestic workers are unequal compared to other workers: they do not have unemployment benefits, their own lives, the ability to look after their families, social security covered by employers. Through regularisation and fair conditions Spanish government and society can protect domestic workers and value the work they do.

As a collective that is not unionised, in which the workplace is the home with no system of delegates to negotiate with employers, racialized women fall into the underground economy. In Basque country, until 1995 this group was not recognised with the status of workers. Despite this oppression, domestic workers have created their own organisation to fight back against the second class lives they are forced to live. The statute of workers must be applied for these workers who are easy to exploit because of the ways the law works, condemning migrant workers for three years until they can become legally resident. This creates fear about complaining about the situation and violence is generalised. Witness demand a collective response, for these migrant workers who remain unrecognised and unprotected.

In Spain trade union organisers for agricultural workers highlight the contradictions of working to feed the population in Germany and Europe under conditions of poverty and exploitation in the so-called First World which is Europe. When the pandemic arrived, the fight was against the invisibility of foreign undocumented workers. They described being left behind by the “social State” of Spain when the state of emergency began, receiving only bills, fines and police shields and not even a decent wage to survive. In what was described as a “kingdom of impunity” the pandemic takes these workers even further away from administrative centres, further away from health and unemployment benefits. The government was described as “deaf and blind” to screams of alarm, agony and death, when the pandemic added on to what they were already suffering.

At the request of these organisers, this Tribunal demands scrutiny of centres of industrial agriculture, in Spain and more widely. Governments and politicians are reluctant to speak against these companies. The rise of far-right parties in Spain, such as Vox (who at the time of the Tribunal had raised a motion of censorship against the Spanish government) use their platform and the pandemic to spread racism and xenophobia. Agricultural workers are threatened with the law, and the threat of expulsion and work under oppressive conditions is a form of racism, slavery in the 21st century.

While agricultural workers do not have the votes, they are political actors who are self-organising. They have integrated themselves through their union to demand regularisation and access to labour inspectors. They have given themselves a voice.

This leads to the final comment: resistance.

5.3. Resistance

The Berlin session was at its most powerful when testimony was shared by self-organised migrant and refugee groups and individuals. This is the path to resistance. Otherwise, as noted in one testimony: “We are used to having the PPT – but these things come back, and they are not solved”.

The PPT aims to centre victims/survivors, and to restore dignity and acknowledge agency. These principles were carefully considered by the Jury. Alternative methods were sought in collaboration with local organisers and activists to represent and discuss important cases – such as the independent forensic inquiry to establish the cause of death of Oury Jalloh – with full contextualisation, to avoid the risk of dehumanising the victim.

Migrant communities battling racism, the Coronavirus, have kept traditions of solidarity and mutual support alive, to try to publicise their situation and for all communities to enjoy access to health.

Through the Tribunal process it can become possible to learn from these strategies to build a path to justice for *all* migrants. Migrant justice can thus include disabled migrants, recognise migrant women’s domestic work as work, never demand of LGBTIQ+ migrants and refugees to justify their existence and mental health challenges, and end encampment and rough sleeping of migrants and refugees who wait and wait, risk police brutality...to then be deported.

This is the opportunity to ally migrant justice further with other struggles, for Black Indigenous and People of Colour not to be beaten and murdered by police, whether migrants and refugees or not, and whether here in Germany, Europe, the United States or elsewhere. And to heed the call to interrupt ideas of “criminalisation” rather than a politics of claiming not to be a criminal.

For the right to health in public health care systems ravaged by austerity, through which communities are pitted against each other, health for refugees means health for the general population, and vice versa, for all communities to enjoy access to health.

6. Qualification of facts

6.1. An ongoing genocide

The main and impressive characteristics of the scenarios which have been presented to the PPT through its years of activity, culminating in the Berlin Session, must be seen in light of the substantial denial by national and European institutions of the permanent and overwhelming accumulation of the most tragic evidence of violations of individual and collective human rights of the migrant and refugee peoples along all the sea and land routes leading to an European place expected to be a safe harbor.

The PPT intends to reiterate that this continuous, planned and systematic operating practice which has led to the death of tens of thousands of peoples over the years, leaving them in the hands of powers perfectly known for their criminal behaviors (Libya is the model case), or deprived of timely assistance, constitutes a real crime against humanity: the qualification of “systemic crimes”, already suggested in Palermo and confirmed in Brussels, indicates that they cannot be judged according to the strict rules of criminal law (as they derive from public policies and involve many players). Indeed, this gap of the present juridical order should not stand as a reason for the absence of accountability.

The creation of a real concentration camp on the island of Lesbos falls within the field of systemic crimes. There, thousands of migrants and asylum seekers are held in crowded and inhuman conditions, forced to spend months if not years, in makeshift accommodations, exposed to the cold and rain, without sanitation facilities or adequate healthcare, prevented from exercising any professional activity, deprived of their dignity as men and women. Their human condition is all the more distressing as it affects people who are weak and vulnerable, children, abused women, refugees traumatised by the brutality of the persecutions and the armed conflict situations they have fled.

Faced with the deterioration of the situation prevailing along the Aegean and Balkan routes, the PPT, in the declaration adopted on March 2020, called for urgent EU intervention in conformity with the provisions of the Treaty on the Functioning of the European Union (art.78.3), to implement an extraordinary and urgent resettlement plan for refugees coming out of Greece and Bulgaria, to save tens of thousands of human beings who have the right to be received and seek asylum in Europe away from violence and arbitrariness.

Regrettably, there was no intervention, no resettlement, or reallocation of refugees and the failure to intervene made the living conditions of the people in the overcrowded Moira camp even more dramatic.

The spectrum of the tragic and systematic violations to which are exposed the migrants forced to afford the so-called Balkan routes is strictly comparable, in terms of gravity and dimension of the affected populations, the situations described above, though their visibility is lower and restricted to most unbearable episodes. The consensus of the reporting independent sources working in the field (mainly NGOs and journalists) also documents and fully supports the direct involvement of Slovenia and Croatia police forces, both in the systematic use of torture and in the violent push back of migrants into Bosnia.

6.2. The responsibility of individuals and governments in the exercise of acts of sovereignty

Various levels of responsibility contribute to define this scenario: national legislative instruments, administrative practice, informal agreements between States, European directives and regulations, the operating practice of European agencies, all contribute to create this general picture.

Within this set of factors, where the “systemic crimes” are perpetrated, there are also individual behaviors which can be identified as constituting a breach of specific criminal laws, as in Italy where there is a pending court case against a former Minister of the Interior, on grounds of placing obstacles in the way of on-going rescue operations which were however completed. Indeed, a close web of abuses, which generate individual criminal responsibility, supports these “systemic crimes”.

International agreements on human rights bind all levels of government and prevail over national law. It is unacceptable that new zones free of rights be created by acts of sovereignty. The entire system of codification of war crimes and crimes against humanity, as it has evolved from the Second World War to the Statutes of the International Criminal Court, is based on the principle of non-immunity of unlawful acts perpetrated by individuals-bodies of a State or while exercising powers of supreme management of the State. Thus, it must be noted that, when implementing Government decisions relating to the management of migration flows, no political authority can shirk their responsibility for acts that breach fundamental human rights.

The judicial authorities of Member States cannot allow pockets of impunity to be formed under the shield of government prerogatives. The discovery of individual responsibility for illegal acts is the first stage towards dismantling these situations of grave and widespread violation of the fundamental human rights of migrants and asylum seekers which we have qualified as systemic crimes.

6.3. Responsibility of public policies in the spread of racism and inhumane treatment

It must be established that rescue at sea operations cannot be prevented or sanctioned. Behavior, even stricter these recent years, which aims at impeding rescue at sea by closing ports and blocking NGO ships, are all unlawful provisions, and when they are brandished as a public policy model they cause extremely serious damage to the moral and cultural conditions needed for democracy.

The damage consists in the collapse of moral sense in society caused by these policies, by racist poison spread by the propaganda that comes with them and the acceptance or at the very least the indifference produced by them about the possible carnage of migrants abandoned at sea. In fact, when inhumanity and immorality are displayed at the institutional level, they infect society and turn into the common feeling.

Indeed, it appears clear that the regime imposed on migrant and refugee people at the macro level, by both the EU and individual member states, has found at the micro level faithful enforcers. From the testimonies heard, migrants and refugees have suffered greatly – and continue to do so – at the hands of those charged with implementing Europe’s plan to further close down its borders.

Migrants and refugees’ accounts before this Jury of daily and often cruel micro-aggressions need to be understood in the context of the dehumanization of migrant communities, which, in turn, has led to a complete denial of their dignity and a total disregard for their rights. A system which treats migrants and refugees as threats, criminals, and invaders unsurprisingly produces the normalization of their suffering amongst those individuals in patrol vessels, at border controls, camps, police stations or medical facilities, save noteworthy exceptions. Deliberate policies not so save lives at the EU level – such as withdrawing rescue patrols, blocking humanitarian aid, ignoring requests

for rescue – expectedly lead to shocking mistreatment of migrants and refugees, be it at the hands of European states themselves or the third countries with which they cooperate in the Mediterranean.

Living in highly precarious and often dangerous conditions, from the center to the periphery of Europe, migrants and refugees are left unprotected and dispossessed, whilst Europe continues to claim its commitment to values such as freedom, equality and human rights. This Berlin hearing confirms the appalling portrait of Europe as a host continent that previous PPT sessions have already revealed.

Ultimately, what comes into play is the democratic identity of the legal systems of states and of the Union itself. These identities run the risk of disappearing, along with the memory of the many “never agains” proclaimed seventy years ago against the horrors of the past. Europe runs the risk of no longer being the Civil Europe of solidarity, of equality guarantees, of the human rights and human dignity described in the Constitutional Charters of its member states and the Charter of Fundamental Rights of the European Union. On the contrary, it is turning into the Europe of walls, barbed wire, inequalities by birth, and once again of conflicts and racial intolerance.

6.4. Pact on migration and asylum

“We will take a human and humane approach. Saving lives at sea is not optional. And those countries who fulfil their legal and moral duties or are more exposed than others must rely on the solidarity of our whole European Union. Everybody has to step up here and take responsibility.” These words, taken from President von der Leyen’s State of the Union address of 2020, were picked up in the Pact on Migration and Asylum published on 23rd September 2020.

The Commission Pact on Migration and Asylum could provide an opportunity to rethink the immigration policies adopted by EU Member States, to correct the environment of a Fortress Europe which rejects migrants, and to acknowledge the inability of the immigration policies of the Union and its Member States to comply with the principles of civilization enshrined in the constitutional documents of its Member States, in the Charter of Fundamental Rights of the European Union and in International Human Rights Law.

Instead, we are faced with a missed opportunity. When addressing the problem of the influx of people who cross borders illegally, the security approach still prevails. Fast border procedures are envisaged to expedite a quick examination of asylum applications that have little chance of being accepted, since stress is laid on the concepts of “safe country of origin” or “safe third country”. Such accelerated procedures are likely to be coupled with a return procedure from the Union to the border. Much is said about solidarity among Member States, but the Dublin system remains unchanged. And this places all the burden of managing the reception of migrants and asylum applications on the border States of southern Europe. Solidarity is not claimed to impose reception but rather to fund repatriation procedures. The pact recognizes that only one third of the people who have no right to remain in the EU are actually repatriated. The only response given is that it is necessary to increase the repatriation rate by preventing unauthorized flights and movement, and by entrusting Frontex with the task of supervising and managing repatriation operations.

A chapter of the pact is dedicated to “countering migrant smuggling”. It proposes to tighten sanctions against employers who recruit irregular migrants. It also reaffirms the border externalization policy by means of agreements signed with transit countries such as Turkey. It does not mention Libya where, as we have seen, migrants are kept in concentration camps in shameful conditions. Furthermore, no mention is made of the inhumane conditions under which migrants and asylum seekers are held in Libyan concentration camps, nor of the collective push-backs of migrants left to so-called Libyan coast-guards, a situation which, for quite some time now, has been the object of investigation by the International Criminal Court for crimes against humanity. Nor is there any mention of the inhumane conditions under which millions of irregular people are expelled from Europe.

This document, beyond a few good intentions expressed in very general terms, confirms the policies and practices of the EU and its Member States in the area of asylum and immigration which, put together, are a total denial of the fundamental rights of migrants and asylum seekers.

The migration issue is addressed as a problem of public order, to be countered by means of stricter controls, concentration camps on the external borders of Europe, rapid expulsions, more effective coercive structures to conduct repatriations, the strengthening of border police, no disavowal of the agreements with Turkey or Libya, no legal access routes for asylum seekers, no provisions for the evacuation of the Moira camp on the island of Lesbos, which is a disgrace for Europe, nor for the prevention of new ones being created, the refusal to rethink the unsustainable living conditions of that part of the migrant population, illegally present in Europe, which, for factual reasons, cannot be repatriated.

The policies of the EU also and inevitably express and determine the underlying attitudes and culture of European civil society as well as those of the governments of Member States. This is why we should not be overly surprised if racist incidents spread throughout Europe, poison public opinion and jeopardize the peaceful coexistence of European citizens and migrants within national borders, if the public discourse of media and policy-makers legitimizes the creation of an environment hostile to migrants, thus fueling widespread indifference for the fate of refugees, and the most vulnerable who seek hospitality in Europe as they flee from war or other political or natural disasters.

The heightened attention on the Covid-19 emergency, as well as the logic of neoliberal economic policies, contribute to rendering the “migration issue” not so much an indispensable indicator of our civilization’s ability to be humane but rather an explicit expression of a Europe that dooms to waste and oblivion all those human beings who do not fit into the logic of its development patterns.

The impunity of this annihilation gives this systemic crime the connotation of an “ongoing genocide” for which future generations will call us to account.

8. Judgment

Since the first hearing held in Barcelona, in July 2017, and all the way through the one in Berlin, in October 2020, all the PPT hearings on the rights of migrants – Palermo (December 2017), Paris (January 2018), Barcelona (June 2018), and London (November 2018) – have brought to the fore the similarities that exist in terms of the responsibility both of the individual States involved and of the EU. They center round two core issues: on the one hand, migrant and refugee people were always the victims of grave and systematic violations of fundamental human rights (right to life, to dignity, to work, to health, to education, among others) and discrimination. On the other hand, the right to migration, while recognized as a constituent element of the history of peoples, is constantly denied. The very existence of migrant peoples remains unrecognized.

The awareness of these many similarities, albeit with the peculiarities of each individual country, emphasizes the fact that what States termed “migrant crisis” was, in actual fact, a crisis of the EU, with States, on the one hand, proclaiming the universality, indivisibility and interdependence of human rights and, on the other, belying this proclamation by ignoring and violating the rights of migrants, thus violating quite a few of the international or regional conventions they prided themselves in having ratified.

From that very first Session held in Barcelona, the issue arose of the impunity of EU Member States with respect to their responsibility for grave violations of the rights of migrants. Likewise demonstrated was the criminalization of solidarity, in particular, concerning NGOs involved in the rescue of migrant vessels in distress in the Mediterranean (over 2000 dead these past few years). Rights-restricting policies adopted in European countries entail that the obligation to receive, a corollary to the right to migrate, is turned into the right to expel, in violation of the right to come and go and live in the country of one’s choice, as enshrined in article 12-2 of the International Covenant on Civil and Political Rights. Indeed, no effort is spared to remove migrants from a territory.

This willful ignorance of the rights of migrants by invoking, in particular, the sovereignty of States, was confirmed by the Palermo Hearing. Migrants are considered intruders. State policies do not provide for any sure and legal reception of migrants. It appears clearly that the goal of State policies in the Union is to stop migration. Agreements have been established between the Italian government and the Libyan armed forces that committed atrocious crimes against migrants. The Italian State has full responsibility for colluding with the crimes perpetrated by the Libyan military, who receive financial assistance from Italy. There is ample proof demonstrating grave violations of the fundamental rights of migrants. But since these violations are not always attributable to specific individuals, they may be qualified as systemic, both with respect to Italian authorities and as regards the EU, given its global policy to combat immigration, control borders and externalize such control, the purpose of which is to keep migrants as far away as possible from European borders, and consequently resulting in the death of migrants escaping war, repression and poverty.

The Paris Session confirmed the Palermo Judgement, qualifying EU policies as “necropolitics”, and denouncing several violations: violation of the right of non-refoulement (leading to immediate expulsions at airports); concentration camp-like conditions prevailing in detention centers; unjustified reference to pseudo-legal notions, such as safe third countries as an attempt to justify denied admission at borders; unjustified sanctions against transporters; detention of individuals without any legal grounds; militarization of the externalization process. The EU signs agreements to escape responsibility, as illustrated by the EU-Turkey agreement to push migration management as far away as possible.

During the Barcelona hearing (2018), the three lines of investigation had a specific focus on the southern borders, gender-based violations, the situation of minors and youth and demonstrated a systematic strategy aimed at the creation of “legal vacuum” areas. Such practices lead to the raising of walls that engender discrimination rather than inclusion. People are forced to live in those areas, with no access to protection or justice.

The London hearing (2018), through an in-depth analysis of national legislation, undertook to expand the focus of the Tribunal on the situation of migrants, highlighting migrant-hostile environments, the politics of fear that results in violence, racism, discrimination and stigmatization of migrants, who are never treated as equals with citizens in social life, labor rights, health and education, and enjoy no right to due process when they are expelled from a given territory.

The Berlin Session in particular highlighted violations by the German State of the economic, social and cultural rights of migrants living on its territory, and in particular their right to health, which is absolutely unprotected. It has also shown discriminatory policies, often resulting in hateful behavior towards migrants.

At the end of the Brussels Session, the PPT admitted that the policies and practices of the EU and of its Member States for asylum and immigration as a whole constitute a complete denial of the fundamental rights of persons and migrants and constitute real crimes against humanity, which are to be defined “systemic crimes”, even when they cannot be attributed to specific authors, according to the common rules for a fair trial in penal law.

At the end of the Berlin session, after receiving shocking evidence of the inhuman living conditions of thousands of refugees in the Moira “hot spot” on Lesbos, of the difficulty for migrants to access medical care and basic health care in Germany and in other European countries, after having noted the tendency to create a climate of hostility towards migrants, which fuels widespread phenomena of racism, including the use of violence on the part of police forces, after having noted that criminalisation of solidarity is continuing on the part of States who impede rescue at sea operations by NGO ships, the PPT observes that no progress has been made by the EU, or by the individual States to remedy this situation of breach of human rights in such a massive and systematic manner.

Indeed, over time, the situation has worsened also because of the further restrictions due to the spread of the Covid-19 pandemic.

Thus, it may be said, as a conclusion to those many hearings, that the EU and all its Member States have connived in crimes against humanity: deaths in the Mediterranean or the desert, torture, slavery. They are also guilty of violations of economic, social and cultural rights: namely, the rights to health, education, work, to a life of dignity. They have also violated the rights of human rights defenders through policies that criminalize their migrant rescue actions.

9. Recommendations

The PPT, at the conclusion of its investigations and evaluations, reaffirms the urgency of a profound change in the policies and practices with which the EU and its Member States have sought so far to regulate/curb migration and the flow of refugees and asylum seekers. The EU itself should take the lead in this necessary turnaround, since Member States tend to favor nationalistic and xenophobic tendencies rooted in the economic and social malaise brought about by an economic crisis seriously aggravated in the wake of the pandemic. Only the Union can adopt and sustain the broad set of policies required to address the root causes of migration, while rendering the rights of those who already live in European countries compatible with the human rights of migrants and asylum seekers.

A true cultural revolution is called for. The security-based approach that is still the backbone of the Pact on Migration and Asylum should be abandoned. The arrival in Europe of streams of migrants and people in flight should not be considered a scourge to be controlled by police measures, by militarizing borders and stepping up coercive *refoulement*, detention and repatriation measures. Rather, it should be considered a phenomenon that armed conflict and other political or natural disasters make so much more acute and to which a response should be given in line with the principles of civilization and humanity on which democratic order and peaceful coexistence among nations are based.

The idea of establishing fast border procedures that discriminate against asylum applicants on the presumption of non-eligibility of their application or of international protection should be put aside. Only an independent judge, who follows a transparent procedure, may determine the eligibility of an application. With the procedures in force, migrants and asylum applicants must be guaranteed full respect of their civil rights (adequate housing, health, education) and be authorized to exercise a profession according to their skills. It is intolerable that the migrant population be confined to small islands, as was the case on the island of Lesbos. The Moria camp must be vacated and its population relocated in European countries.

The Dublin system needs to be overcome. Hospitality cannot be shouldered by the countries bordering the Mediterranean. Refugees should be allowed to apply for asylum in the countries where they intend to go.

Rescue operations on the high seas need to be re-established, all forms of indirect *refoulement* must be suppressed and legal access routes into the Union opened for the refugees who crowd the concentration camps of Libya or other crisis areas.

Finally, the scandal of millions of people rendered invisible by their lack of residence papers must end. There can be no such thing as illegal people. People with no right of residence, who for whatever de facto reason, continue to remain on the territory of European countries, should be given the possibility to overcome their situation of illegality and become integrated in the society wherein they live and be restored to the full enjoyment of civil rights.

Germany must guarantee migrants and refugees basic human rights protection. This includes an adequate living standard, adequate housing and health care. Refugees should no longer be forced to live in mass refugee shelters, where the large number of people in a confined space, lack of perspective and the lack of privacy promote mental illness. Germany must provide adequate health care to refugees and should not limit health care to acute pain and illnesses. Germany must make sure undocumented migrants have access to basic health care by establishing a firewall between social services and immigration control. Migrants and refugees in Germany should not be subjected to forced return, and German authorities need to provide full access to NGOs at all its airports, to ensure scrutiny and transparency.

Conclusions

The Berlin Session of the PPT on migrant and refugee peoples was the last of a long process that took us through a number of EU cities with the purpose of hearing their testimonies, uncovering their stories, and apportioning responsibility. It was also the most important, not only because, being the last, it gave us the opportunity to draw a broad picture of their situation across Europe, but because of the role played by the country in which the session was held: the Federal Republic of Germany. The most populated and, widely considered, richest country in Europe, Germany, whether one likes it or not, has a specific and major part in the Union's approach to the issue of migration and refuge: it is a great and heavy responsibility indeed.

Where we stand today, Germany's responsibility must consist of not only putting an end to all of the systematic violations of human rights perpetrated against migrants in its own territory, but also leading the transformation of an European structure that legalizes, allows and enforces all manner of indignities against migrants, in absolute contradiction with the EU's proclaimed values and the UN's principles.

Reading the facts brought before the Jury in this hearing is shocking, as well as frightening. The worsening of the migrant and refugee people's situation, in recent years and currently under the pandemic, is unequivocal. The multiplication of xenophobic and racist behavior of European citizens against migrants and foreigners in general; the dramatic growth of opportunistic political parties running on anti-immigration platforms across Europe; shifting European public opinion against migrants; the subsequent pressure put on legislative, executive and judicial bodies to tighten laws, minimize welfare and strip protections for migrants: all are only likely to increase.

But so too is migration likely to increase. It is a historical process which, by now, can no longer be stopped: in a system in which capital travels freely, one cannot expect humans to be locked where they were born. "Normalcy" – once wrote a prominent adviser to the French president François Mitterrand, Jacques Attali – "is no longer the peasant digger but the nomad". Already having a single citizenship is obsolete and humans often change countries where they live and work during their lifetimes. Pushed by a globalized economy or disasters that we, Europeans, are often responsible for – such as wars and ecological catastrophes – human mobility will only expand. We may be sure some in Europe will continue to exacerbate the hostility towards the growing wave of humans arriving from those parts of the world most affected by suffering and violence. However, we must demand more of Europe, and of Germany in particular. Germany must begin a much-needed conversation that can change the paradigm on which our answer to migrants and refugees' arrival operates, legalizing their entry and finding ways to facilitate their settlement on European soil.

We, the Permanent Peoples' Tribunal, address not only the German authorities, but German civil society, rich in prominent cultural foundations, and the German people that, in its majority, has addressed and rejected the Nazi horror of their country's past. We urge you to recover the human dignity and decency on which any solution must be founded.

Difficult? Indeed, very. But it will be far more difficult if we continued with business as usual, with the inevitable spread of violence in our societies, of which, even if we survive, we will all be victims.

The deliberations of the PPT translate in the form of a judgment the immense number of testimonies whose sufferings and deaths are the true judges of the crimes against their humanity: they remain the inviolable subjects and testimonies of rights, beyond and above their qualification as victims.

The PPT further acknowledge the research and solidarity work of all the movements and experts who have contributed to give visibility and solid credibility to the material which have been submitted to the PPT, throughout the series of Sessions which have led to the event in Berlin: because of their specific investigative and doctrinal role played since the first Session in Palermo, the PPT thanks symbolically two of them, Flore Murard- Yovanovitch and Fulvio Vassallo Paleologo.

ATTACHMENT 1

Permanent Peoples' Tribunal

45° Session on the Violations of Human Rights of Migrants and Refugee Peoples

The Human Right of Health of Migrant and Refugee Peoples

Berlin Hearing, 23-25 October 2020

Program

Opening

Welcome Speeches:

IPPNW, Carlotta Conrad

Borderline-Europe – Menschenrechte ohne Grenzen e.V., Julia Winkler, Julia Türtscher, Theresa Woicke

Transnational Migrant Platform–Europe, Jille Belisario

La Via Campesina, Federico Pancheco

Inauguration of the Panel of Jurors, Gianni Tognoni, PPT Secretary General

Intervention by PPT Jurors

Presentation of the Indictment, Susanne Dyhr/IPPNW e.V.

Hearing 1 - Access to Health Care in Germany

Access to Health Care for Refugee Women, Fatuma Musa, United Action e.V.

Access to health care for people without health insurance, Inga Sell & Friederike Löbbert, Medibüro Berlin & Medinetz Mainz (GER)

For the Right to Health without Discrimination for Refugees with Special Needs, Karsten Dietze, Handicap International (GER)

Access to Mental Health Care for LGBTIQ+ Refugees and Migrants, Syrine Boukadida, LesMigraS (GER)

Integration and Regularization, CoraSol (GER)

Questions from the PPT Jurors

Hearing 2 - Access to Health Care (Europe)

Violations of migrants' and refugees' right to health during the COVID-19 pandemic, Frances Webber, Institute of Race Relations (UK)

Migrant and Refugee Health matters! Violations of the Right to Health and the Access to Health Care for (undocumented) Migrant & Refugee Peoples in the Netherlands, Transnational Migrant Platform-Europe/Migrant & Refugee organisations (NL)

Questions from the PPT Jurors

Hearing 3 - EU Border Politics

The Simplicity of Complicity–Smuggling, Human Trafficking and the EU Border Politics, Philip Ishola, Love 146 (UK)

Cooperation with EU neighbouring Countries despite Human Rights Violations?, Muhammad al-Kashef, Alarmphone (GER)

Questions from the PPT Jurors

Hearing 4 - Situation on the Greek Islands

Introduction, Ramona Lenz, Medico International

Video message, Legal Centre Lesvos (GR)

Medical expert assessment on living conditions and Health Care in Moria Camp, Jessica Horst, vdää & Gerhard Trabert, Armut und Gesundheit e.V. (GER)

Two Testimonies, Stand by me Lesvos (GR)

Video message, Pikpa Camp (GR)

Questions from the PPT Jurors

Hearing 5 - Criminalization of Solidarity

Harald Glöde, Borderline-europe – Menschenrechte ohne Grenzen e.V. (DE)

Questions from the PPT Jurors

Hearing 6 - Racism and Criminalisation of Refugee and Migrant People

Consequences of Racism on (Mental) Health, Black Visions and Voices (GER)

Experiencing Police Violence, Two testimonies (GER)

Deportation of a Survivor of a racially-motivated Hate Crime, Flüchtlingsrat Berlin

On the situation of Sans Papiers, Sissoko, CISPM (FR)

“Oury Jalloh – that was Murder!”, Alain Charlemoine, Initiative Oury Jalloh Berlin/Mannheim (GER)

Questions from the PPT Jurors

Hearing 7 - Living under Stress – Encampment and Risk of Deportation in Germany

Complicity and Silence, Testimony of a witness from Mecklenburg-Vorpommern (GER)

Refugee struggle in Bavaria, Flüchtlingsrat Bayern (GER)

Age Assessment of Minors, Testimony (GER)

Insights from Monitoring Deportations at Airports, Elena Vorländer & Dalia Höhne, Monitoring Group of Forced Returns at Airports in North-Rhine Westphalia (GER)

Questions from the PPT Jurors

Hearing 8 - Migrant Workers' Rights

Impact of the COVID-19 crisis on Workers, those with problematic Immigration Status and on Migrant Communities, Angie Garcia, Waling Waling/PPT London Steering Group (UK)

Testimony on the Situation of Domestic Workers in Madrid, Julissa Jauregui, SEDOAC-Servicio Doméstico Activo (ESP)

LAB Trade Union (ESP) & El Colectivo “Hitzarme na Orain Trabajadoras de Hogar en Lucha” (Basque Country)

Migrant Workers in Agriculture, ECVV/Confédération Paysanne SOC-SAT/ LVC Almería

Exploitation and Discrimination of Migrant Workers in Germany, ALSO Oldenburg & Guilia Tattarini (GER)

Questions from the PPT Jurors

Comment on the EU Pact on Migration and Asylum

Wiebke Judith, Pro Asyl (GER)

Flore Murard Yovanovitch, Comitato Verita Giustizia per i Nuovi Disparacidos (IT)

Federico Pacheco, La Via Campesina (ES)

Brid Brennan, Transnational Institute (NL)

Jury's Comment on the Berlin Hearing

Open Space for Questions to the Jurors

Attachment 2

Permanent Peoples' Tribunal

45° Session on the Violations of Human Rights of Migrants and Refugee Peoples

The Human Right of Health of Migrant and Refugee Peoples

Berlin Hearing, 23-25 October 2020

The Jury

Teresa Almeida Cravo (Portugal)

Teresa Almeida Cravo is an Assistant Professor in International Relations at the Faculty of Economics of the University of Coimbra and a Researcher at the Centre for Social Studies. She is currently the Head of the International Relations Department and the Coordinator of the Undergraduate Degree in International Relations at the University of Coimbra. She holds a PhD from the Department of Politics and International Studies of the University of Cambridge. In the last years, Teresa has been a Visiting Fellow at the African Studies Centre of the University of Oxford, at the University of Westminster, in the UK, at the University of Monash, in Australia, and a Predoctoral Fellow and later an Associate at the John F. Kennedy School of Government at Harvard University. Her research interests include peace and violence, security and development, global interventionism, and foreign policy, particularly within the Lusophone context.

Leah Bassel (UK)

Leah Bassel is a Member of Haringey Welcome, a campaign group working for fairness, dignity and respect for migrants and refugees in the London borough of Haringey. After her BA, MA, DPhil and ESRC Postdoctoral Fellowship she joined the department in 2011 as New Blood Lecturer in sociology. She was previously lecturer in sociology at City University London (2008-11) and held Postdoctoral Research Fellowships at the Refugee Studies Centre/Queen Elizabeth House, University of Oxford funded by the ESRC and with the Group for the Study of ethnicity, racism, migration and exclusion at the Institute of Sociology, Université Libre de Bruxelles, Belgium. She is author of: *The Politics of Listening: Possibilities and Challenges for Democratic Life* (Palgrave, 2017), *The Politics of Survival. Minority Women, Activism and Austerity in France and Britain* with Emejulu Akwugo (Bristol: Policy Press, 2017) and *Refugee Women: Beyond Gender versus Culture* (Routledge, 2012).

Luciana Castellina (Italy)

Luciana Castellina is a journalist, writer and has been a representative of the Italian Communist party and the Party of Unity for Communism. She served as an MP in the Italian Parliament for several legislatures and an MEP on different occasions. She had previously been the vice-president of the Commission on Latin and Central America of the European Parliament and is the honorary president of ARCI and a member of the Permanent Peoples' Tribunal.

Marina Forti (Italy)

Marina Forti is a journalist based in Rome. She worked with the daily newspaper *il manifesto* from 1983 until 2013, including as Foreign Editor and Editor-in-chief. As a Foreign Correspondent she travelled extensively in South and South East Asia and in Iran. Her environmental column *TerraTerra* ("Earth to Earth") was awarded the journalistic prize known as Premiolo. Her book *La signora di Narmada* (Feltrinelli 2004) was awarded the Elsa Morante Prize for Communication. She also published *Il cuore di tenebra dell'India* (Bruno Mondadori 2012) on the social conflicts in rural India. Her latest book is *Malaterra. Così hanno avvelenato l'Italia* (Laterza, September 2018). She contributes regularly to *Internazionale.it*.

Domenico Gallo (Italy)

Magistrate, he has been serving in the Court of Cassation since 2007, recently taking on the role of President of the Chamber. He was elected Senator in 1994. He has actively participated in the association life and civil society movements active on the theme of peace and the defense of human rights. He has edited numerous publications on issues related to institutional and human rights issues. In 2013 he published "Da sudditi a cittadini il percorso della democrazia" (Ega). He collaborates with the newspapers *Il Manifesto* and *Il fatto quotidiano*.

Kira Kosnick (Germany)

Kira Kosnick is a Professor of comparative cultural and social anthropology at the European University Viadrina. Before her current position, she acted as a Professor of Sociology at the Goethe-University Frankfurt focusing on migration and culture. In recent years, she acted as a junior professor assistant of Cultural Anthropology and European Ethnology at the Institute for Cultural Anthropology and European Ethnology at the Goethe University. In 2013/2014, she taught as a Hannah-Arendt DAAD Visiting Professor for German and European Studies at the Munk School of Global Affairs at the University of Toronto. Her research focuses on migrant media production in transnational spaces, new forms of urban sociality, European cultural policy, neoliberalism and the transformation of labor society, cultural theories.

Sarah Lincoln (Germany)

Sarah Lincoln is a human rights lawyer at the *Gesellschaft für Freiheitsrechte* (GFF) and responsible for the legal assessment and coordination of cases in the area of social rights and migration. Prior to this, she worked for six years as a human rights officer at *Brot für die Welt*, where she was particularly active against human rights violations committed by (transnational) companies. She has also worked as a research assistant and in voluntary counselling with a focus on migration and asylum law.

Philippe Texier (France)

President of the Permanent Peoples' Tribunal. He is an honorary judge at the Cassation Court of France. He was a member of the Committee on Economic, Social and Cultural Rights of the United Nations High Commission for Human Rights from 1987 to 2008 and its Chairperson from 2008 to 2009. He was director of the Human Rights Division of ONUSAL (UN Mission in El Salvador) from 1991 to 1992, and an independent expert of the Human Rights Commission in Haiti from 1988 to 1990.

**INDICTMENT
SUBMITTED TO THE PERMANENT PEOPLES' TRIBUNAL**

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

“MIGRATION AND HEALTH”

BERLIN HEARING, 23.10.-25.10.2020

The defendants to this indictment are:

the **European Union**, in particular

- Ursula von der Leyen representing the EU Commission
- the Council of the European Union, with Germany as Presidency
- the European Agency FRONTEX

&

The **government of the Federal Republic of Germany** (in its own right and as a member of the European Union and as representative of the 'Global North') and the **governments of the 'Länder'**, in particular

- Horst Seehofer on behalf of the Federal Ministry of the Interior, Building and Community (BMI)
- Hubertus Heil on behalf of the Federal Ministry of Labour and Social Affairs (BMAS)
- Jens Spahn on behalf of the Federal Ministry of Health (BMG)
- Gerd Müller on behalf of the Federal Ministry for Economic Cooperation and Development (BMZ)

Content

1. Preamble	4
2. Explanation/description of the situation to be challenged	8
(1) Access to health care	8
(2) Effects of living conditions in mass housing on mental and physical health ..	11
(3) Deportation and health	14
(4) EU Border Policy and Germany's Responsibility	16
(5) Criminalization of solidarity	21
(6) Racialization & Criminalization of migrants and asylum seekers	22
3. Specific charges against the German government (in its own right and as representative of the EU and member states and the global North)	24
4. Questions for the Tribunal.....	26
5. Signing Organisations.....	27

1. Preamble

This session calls on the Permanent Peoples' Tribunal (PPT) to consider whether the policies of the Federal Republic of Germany and the European Union in the field of migration and asylum, amount to serious violations of the right to health and physical and psychological integrity of migrants and refugees, in particular the articles enshrined in the Universal Declaration of the Rights of Peoples signed in Algiers on 4 July 1976; to serious violations of the rights of the individuals as enshrined in particular in the Universal Declaration of Human Rights of 1948; and, in their totality, to a crime against humanity within the meaning of Art. 7 of the Rome Statute.

The current indictment is presented as one of a series of indictments against the governments of the EU member states, and institutions of the European Union within the framework set out at the introductory hearing on "Human Rights of Migrant and Refugee Peoples" in Barcelona in July 2017.

These indictments taken together set out the ways in which the governments of the global North, and the institutions of the EU have (a) created conditions making life unsustainable for millions of people in the global South, thus causing forced migration; (b) treated those migrating to the global North as non-persons by denying them rights owed to all humans by virtue of their common humanity, including rights to life, dignity and freedom; (c) created zones which are in practice excluded from the rule of law and human rights within the global North.

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, and expropriation or displacement caused by a system of global exploitation. This system is supported by labour and migration policies which permit freedom of movement for capital and for citizens of the global North while denying such freedoms to the citizens of the global South. This has created a migrant and refugee class of illegalized, super-exploited, deportable people, and workers who are exposed to (state) violence, and repressive and racist policies, and practices.

By virtue of their common experiences of oppression and repression, it can be said that migrants and refugees constitute a 'people' for their own purposes of the Universal Declaration of the Rights of Peoples (the Algiers Declaration), which provides that every people has a right to existence, and that no one shall be subjected, because of his or her national or cultural identity, to ... persecution, deportation, expulsion or living conditions such as may compromise the identity or integrity of the people which he or she belongs.

The following sub-articles of Art. 7 of the Rome Statute (crimes against humanity) are relevant to the considerations of the Tribunal, in particular to the determination of the violation of the right to health and physical and psychological integrity of the Tribunal:

- c. Enslavement;
- d. Forced deportation or transfer of the population;
- e. Imprisonment and other serious forms of denial of personal freedom in violation of fundamental norms of international law;

- g. Rape, sexual slavery, forced prostitution ... and other forms of sexual violence of equal seriousness;
- h. Persecution against a group or a collective possessing their own identity, inspired by reasons of a political, racial, national, ethnic, cultural, religious or gender-based nature;
- i. Forced disappearances of people;
- j. Apartheid;
- k. Other inhuman acts of the same nature aimed at intentionally causing great suffering or serious prejudice to the physical integrity or to physical or mental health.

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 1946 and upheld at the Alma-Ata Conference in 1978 , continues to be regularly invoked.

As a binding document the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR)¹, 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;*

¹ International Covenant on Economic, Social and Cultural Rights (ICESCR), 19.December 1966.

- (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*²

In its General Comment No. 14 of 2000³ 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 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)⁴, Art 11 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁵, 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)⁶. 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.⁷ Further provisions can be found in the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) which,

2 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.

3 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.

4 Cf. Article 5e) ICERD.

5 Cf. Article 11 Paragraph 1 lit. f, Article 12 CEDAW.

6 Cf. Article 11 EU Social Charter.

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

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 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)⁸, the right to respect for privacy and family life Art 8 ECHR⁹ or the prohibition against torture or inhuman treatment in Art 3 ECHR¹⁰.

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.¹¹ The German constitutional court made it clear that the right to the subsistence minimum is a human right and extends to non-

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

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

10 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.

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

nationals. Under no circumstances can migration policy considerations justify lowering the standard of benefits below the constitutionally required minimum standard of living.¹²

Against this background, the current indictment calls on the Permanent Peoples' Tribunal to examine the policies of the EU and its Member States in the field of migration, asylum, health, safety and labour which lead to exclusion and marginalisation and deny migrants and refugees access to fundamental and human rights at Europe's external borders and within the EU. In addition, the Tribunal is asked to examine the legal structures underlying German migration policy, which perpetuate unequal access to basic rights.

The following presents some of the characteristics of the discriminatory policies and practices applied in Germany towards migrants and refugees.

2. Explanation/description of the situation to be challenged

(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 highly problematic from a medical and humanitarian perspective. 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
- refusal of further treatment by doctors or hospitals if the assumption of costs is not ensured
- longer and more severe courses of illness, chronicities, and more frequent emergencies
- psychosocial effects on the dependent social environment of the person
- loss of employment, poverty and homelessness.

Additionally, it can be assumed that the more frequent use of emergency care in hospitals will lead to higher costs in the overall healthcare system. For asylum seekers, it has been shown that the reduction of benefits they are subjected to leads to increased costs, for example, because preventive measures are not perceived.¹³

- 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

¹² BVerfGE 132, 134 (173).

¹³ Bozorgmehr, Kayvan, and Oliver Razum. "Effect of restricting access to health care on health expenditures among asylum-seekers and refugees: a quasi-experimental study in Germany, 1994–2013." *PloS one* 10.7 (2015): e0131483 <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0131483>

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, for example, 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 AsylbLG¹⁴. 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 on why persons subjected under the AsylbLG have a lower need than others. 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 to the right to 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 conclusion, when it expressed concern about the restricted and unequal health care for asylum-seekers in Germany¹⁵. Additionally, Art 11 and 13 ESC, Art 4 of the Istanbul Convention as well as Art 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.

14Cf. § 5 Abs. 1 Nr. 2a SGB V, § 264 SGB V, § 48 SGB XII; BVerfG, 13.2.2008 – 2 BvL 1/06, BVerfGE 120, 125.

15 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 especially vulnerable persons like pregnant women and children are seeking medical assistance, the provisions and policies may violate Art 25 (2) UDHR, Art 12 (2 Nr. 1) ICESCR, Art 11 (2) CEDAW, Arts 25, 26 CRPD and Art 24 CRC.

Measures deliberately depriving anyone of the means of life may further breach Art 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, 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 estimates, 180,000-520,000 people were 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, Art 2 (2), 9, 11 and 12 ICESCR, Art 2 and 5e (4) ICERD, Art 11, 13 ESC and Art 4 and 35 CFR in connection with the provisions on health care laid out in the EU Return Directive.

Where pregnant women, 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 Art 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 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, refugees 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.

Refugees 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. An example is 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 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 former Swiss 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 possible refugees who successfully made the sea crossing from Turkey to Greece as soon as possible. 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 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.

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 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 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.¹⁶

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

¹⁶ Ibid., Article 43, paragraph 3.

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. 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.¹⁷

If someone in a deportation situation rebels against these coercive measures, physical violence (beatings, shackling, blindfolding, insults)¹⁸ is usually used, which has led to the death of people in the past.¹⁹

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

¹⁷ Cf. Example Adama K. and others; miscarriage: Frau O., 3.2.18.

¹⁸ Bericht an die deutsche Regierung über den Besuch des Europäischen Ausschusses zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Strafe in Deutschland (CPT), 13-15.08.2018, S. 21-24.

¹⁹ For Example: Bundesministerium des Innern, Bericht an den Innenausschuss des Deutschen Bundestages über den Tod des sudanischen Staatsangehörigen Aamir Omer Mohamed Ahmed Ageeb bei dessen Rückführung am 28. Mai 1999.

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 CJEU²⁰, 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 Declaration²¹ 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 Malta. The proposal, however, was rejected the following month by EU interior ministers in the Justice and Home Affairs Council.²²

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

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

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

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

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")²³. 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 656/2014²⁴, 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)²⁵. 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."²⁶

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) 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:

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

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

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

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

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.²⁷ 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 Guard²⁸ which was also at the scene: the A1411 Berlin.²⁹ 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.³⁰

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"³¹ This is by definition 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.³²

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.^{33 34} 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.³⁵

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

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

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

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

30 https://twitter.com/Alarm_Phone/status/1273206437959938048?s=20

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

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

33 https://twitter.com/Alarm_Phone/status/1268579446199660545?s=20

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

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

cannot be disclosed as it could have "adverse effects on NATO activities [and] bilateral relations between Germany and Greece".³⁶ Andrej Hunko, MP for the Left party, had also recently asked whether German navy ships under NATO or FRONTEX command had observed pushbacks.³⁷ 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,³⁸ 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.³⁹ 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.⁴⁰ In 80% of the cases there are indications of disproportionate use of force up to cases of torture⁴¹ 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 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.

In 2018, Chancellor Angela Merkel even praised the actions of the Croatian security forces as "outstanding work"⁴² and in January 2020, Interior Minister Seehofer donated surveillance equipment for border protection to Croatia.⁴³ 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.⁴⁴ Additionally, Germany is participating in FRONTEX training missions for Croatian border guards, most recently in December 2019 in

36 <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>

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

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

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

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

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

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

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

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

Sankt Augustin⁴⁵ and in February 2020 in Valbandon in Croatia.⁴⁶ 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.⁴⁷

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. 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 was set to run until at least 2018.⁴⁸ 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 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.⁴⁹ The European Agency for the management of Operational Cooperation at the External Borders (FRONTEX) will also open a liaison office in Niamey this year.

By developing, signing, enforcing and maintaining the above agreements and policies without giving 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 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. To comply with their international obligations in relation to Art 12 ICESCR, State 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

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

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

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

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

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

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 or seek unjust profit even if they do so for humanitarian purposes. 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 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."

- 1) All the following groups could be accused of facilitating irregular migration:
- 2) NGO or merchant ships conducting search and rescue operations.
- 3) NGOs and volunteers in the border zones providing food, shelter, showers, medical assistance, access to justice, etc.
- 4) Individuals giving a lift or providing shelter, smuggled migrants (including family members and friends) helping each other
- 5) Lawyers, Doctors.
- 6) Journalists and filmmakers, making a story about the situation in border/transit zones.
- 7) Taxi, Uber, other shared car services, bus drivers.
- 8) Landlords, people renting their houses through Airbnb, etc.
- 9) Shelters and other service providers that take small fees/donations for their services.
- 10) 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 entry⁵⁰. Even though the press statement does not name the NGOs or the individuals, there were several media reports stating that the Watch The Med Alarm-Phone is among Mare Liberum, Sea Watch and FFM e.V. (Which all are German NGOs), that are targeted.⁵¹ 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.⁵²

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 organizations above Germany as well as other responsible EU countries 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 exercise 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.

(6) Racialization & Criminalization of migrants and asylum seekers

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

⁵⁰http://www.astynomia.gr/index.php?option=ozo_content&lang=%27..%27&perform=view&id=97610&Itemid=2509&lang=

⁵¹ <https://vimapress.gr/telos-sti-drasi-evropaikon-mko-pou-diefkolynan-tin-diakinisi-metanaston-apo-tin-tourkia-sti-lesvo/>

⁵² 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

security and order⁵³ 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.⁵⁴ 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.⁵⁵ Policing 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.⁵⁶ As a consequence, Black People and People of Colour have to expect counter-indictments and sanctions if they report 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.⁵⁷

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 1990.⁵⁸

53 Cf. Jef Huysmans (2000): The European Union and the Securitization of Migration. In: Journal of Common Market Studies. Vol. 38, No. 5. S. 751–77.

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

55 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

56 Cf. 36

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

58 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

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 CRC. 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.

3. 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.⁵⁹ In the EU, an area of open borders and freedom of movement, countries share the same fundamental values. 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 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.⁶⁰ And in 2001, the Temporary Protection Directive⁶¹ allowed for a common EU response to a mass influx of displaced persons unable to return to their country of origin. The Family Reunification Directive⁶² also applies to refugees.

1. 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, through:

- 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:

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.

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

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

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

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

- 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 by legal and operational measures including:

- 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
- 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 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.

4. 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?

5. Signing Organisations



Carlotta Conrad
IPPNW e.V.



Harald Glöde
Borderline Europe e.V.