PARALLEL REPORT
OF THE ALLIANCE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN GERMANY (WSK-ALLIANZ)

complementing the 5th Report of the Federal Republic of Germany on the International Covenant on Economic, Social and Cultural Rights (ICESCR)

IMPRINT

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PREFACE

The Alliance for Economic, Social and Cultural Rights in Germany (in German: WSK-Allianz) is an ad-hoc network with 20 member organization (NGOs) from various fields of work. The Alliance is mainly based in Berlin und began its work in fall 2008, according to a initiative by the German Institute for Human Rights. The WSK-Allianz was officially launched in March 2009 with the goal to compose a coordinated parallel report to the Fifth State Report on the implementation of the International Covenant on Economic, Social and Cultural Rights. The first product of the Alliance was a list of issues, which was submitted to the Pre-Sessional working group in October 2010 and presented by members of the Alliance in Geneva.

This Parallel Report has been made possible through an intensive working process of the member organisations, which were working either in small groups or on themselves on certain topics or articles of the ICESCR. In numerous meetings the findings were brought together and the report was formed.

The Parallel Report is a critical annotation and an up-to-date supplement to the Fifth State Report. Cross-cutting issues are the situation of migrants in Germany and the Equalization of men and women. The report is mainly structured along the articles of the Covenant.

SALVATORIUS CLAUSE

The statements and demands expressed in this report are supported by the NGOs sustaining the report according to their respective assignments and objectives. The participating NGOs are united by the aim of a joint report from the perspective of civil society. Notwithstanding, not all of the participating NGOs are able to support every single opinion and recommendation expressed here.

ACKNOWLEDGMENTS

Such a project couldn't be realised without the strong commitment of the people and the organisations involved. Special thanks to them.

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1. GENERAL QUESTIONS CONCERNING THE NATIONAL APPLICATION OF THE COVENANT

1.1. INVOLVEMENT OF CIVIL SOCIETY IN COMPILING THE REPORT

In its state report, the German Federal Government makes the following statement:

"The Federal Government involved civil society at an early stage in the drafting process when the fifth periodic report was being prepared. Back in December 2005, wide-ranging discussions were held with the representatives of the Forum Menschenrechte (Human Rights Forum), although they were not pursued by the umbrella organization of non-governmental organizations (Deutsches Forum Weltsozialgipfel – German Forum for the World Summit for Social Development) because of internal problems of coordination within the relevant non-governmental organizations."

This statement is not correct in the form it is made. It is true that a conversation took place between a representative of the Federal Ministry of Labour and Social Affairs (BMAS) and the Human Rights Forum in December 2005. At this meeting, the representatives of the Human Rights Forum addressed a number of topics they felt needed to be considered in the state report. Furthermore, they pointed out that the Human Rights Forum would not participate in commenting on the state report before publication but would instead present the committee with further information, as is the case with this parallel report.

The members of the WSK-Allianz want to point out that in Germany there is no "umbrella organization of non-governmental organizations" for the International Covenant on Economic, Social and Cultural Rights (ICESCR). Rather, it is one of the concerns of the members of WSK-Alliance that organisations of civil society from a diverse field of activity refer to the ICESCR and integrate it into their work. The type of coalition WSK-Alliance has formed as an ad-hoc network reflects this concept.

The fifth state report is neither accessible on the website of the leading Federal Ministry of Labour and Social Affairs (BMAS) nor on other websites of the Federal Government. As a consequence, it is solely available on the website of the German Institute for Human Rights (Deutsches Institut für Menschenrechte). The Federal Government is therefore not complying with its obligation of informing the population.

1.2. PROBLEMS OF IMPLEMENTING HUMAN RIGHTS TREATIES IN A FEDERAL SYSTEM

The Federal Republic of Germany signed the International Covenant on Economic, Social and Cultural Rights on October 9, 1968, its national validity was adopted by a statute requiring assent of the German Bundestag (parliament) in 1973. Per transformation law, the treaty therefore has the rank of a formal federal law. It is thereby valid for the entire Federal Republic, however, remains substantially and formally indefinite concerning the implementation by the federal states (Laender).

Given that Germany is a country organised within a federal system, the other sixteen protagonists, the federal state governments, are not directly indented. Rather, despite signing the treaty and adopting the act of asset, the questions remains, which of the federal protagonists – the Federal Government or the federal states (termed "Laender" in the Basic Law/Grundgesetz) – are obliged to fulfil the commitments agreed upon by signing the treaty.

Concerning national legislation, competencies are regulated in the Basic Law (GG). The legislative powers largely lie with the Federal Government, however, areas that are of importance for the implementation of human rights such as youth, culture and education, prevention of violence and counselling, equality and anti-discrimination are partly or entirely the responsibility of the Laender. In addition, administrative responsibilities and considerable authority concerning decisions on public expenditure rest on the Laender. Consequently, the Federal Republic of Germany is able to evade the responsibilities of the treaty in many situations by referring to the federal structure.

Instead of developing a political and financial framework, for instance for human rights education, counselling and human rights policies, instead of promoting a discourse in the public at large around equality and against marginalisation, the Federal Government generally does not take action at all, but instead, refers to the competence of the federal states. In part, there is even a lack of information concerning to what extent the sixteen Laender have actually complied with the responsibilities arising from the treaties. Hence, the implementation of rights and particularly the efforts against violence, discrimination and marginalisation fail in many instances due to the insufficient cooperation between Federal government and the Laender. From the perspective of civil society there is definitely a deplorable "federalism gap".

DEMANDS:

- The Federal Government should develop a political and financial framework for human rights education.
- In the areas of human rights education, measures to prevent violence against women, asylum law, youth work and youth protection as well as cultural and educational policy, the Federal Government should outline its intentions to structure the cooperation with the Laender and local authorities.
- The Federal Government should be obligated to document the implementation of human rights obligations by the Laender.

1.3. OPTIONAL PROTOCOL

On December 10th 2008, the UN General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which will enable the Committee on Economic, Social and Cultural Rights (CESCR) to receive and consider communications by individuals and groups of individuals who claim that their rights as protected in the ICESCR have been violated.

Despite the constructive role that the German government took during the last year of negotiations, ratification is still pending. The opening of the Optional Protocol for ratification on September 24th 2009 coincided with German parliamentary elections and a change in government. The German government started the review of ratification after the change in government and has on several occasions stated that the review is still ongoing. On several occasions, it has emphasised that it will ratify the Optional Protocol as soon as possible. In its Action Plan on Human Rights for 2010 to 2012 it announced that it will examine the ratification of the Optional Protocol with the aim of ratifying it quickly. At the moment, however, it seems possible that the ratification process will be unduly delayed due to the unwillingness of parts of the government to ratify.

The members of the Alliance for Economic, Social and Cultural Rights call on the government to use the state reporting process to give a strong signal to the CESCR as well as German civil society that it will ratify the Optional Protocol as soon as possible and without further delay.

2. NON-DISCRIMINATION (ARTICLE 2)

2.1. GENERAL ACT ON EQUAL TREATMENT (ALLGEMEINES GLEICHBEHANDLUNGSGESETZ – AGG)

In its Country Report, the Federal Republic of Germany refers to the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz - AGG) (p.21f) and, though it is positive that important steps towards equal treatment have been taken through the implementation of the EU Equal Treatment Directive, not all clauses of the UN Covenant have been met.

The UN Committee on the Elimination of Discrimination Against Women also noted this omission and in the Concluding Observations of February 2009 (cf. paragraphs 18, 36, and 40) the Committee, rightly, called on the State Party

- to carefully monitor the implementation of the General Equal Treatment Act;
- to take appropriate measures to ensure that discrimination against women is eliminated effectively;
- to consider the possibility of amending the General Equal Treatment Act in terms of
  - its application to appropriate aspects of the domestic and private sphere,
  - the reversal of the burden of proof,
  - full compliance with the Convention, for example, by including the termination of contracts into the scope of the General Equal Treatment Act;
- to provide the Federal Anti-Discrimination Agency with adequate human and financial resources, broaden the scope of the mandate of the Agency to endow it with additional investigative and sanction powers and, in order to enhance the independence and transparency of the Agency, design a different appointment procedure for the Agency's head.

Though the Federal Labour Court – Germany's highest court for employment issues – has made changes in its legal practice by correcting certain deficiencies applying to the protection against dismissal, there is no indication that corresponding measures have been taken on the legislative level.
The federal government states in paragraph 49 of the governmental report, that protection against ethnic discrimination would be guaranteed in the rental housing market. However, Art. 19 (3) of the Equal Treatment Act allows the possibility of an exemption with the objective to 'create and maintain socially stable dwelling structures as well as balanced economic, social and cultural conditions' in neighbourhoods. With this diversions from the protection from discrimination are provided. The CERD Committee has in its Concluding Observations of 13th August 2008 recommended the german government to reconsider the respective Article in order to comply with Art. 5 e (iii) of ICERD. A revision of the Equal Treatment Act has not been performed.

It is furthermore of concern that the General Equal Treatment Act covers only eight features of discrimination. Other characteristics mentioned in Article 2.2 of the Covenant, namely language, national or social origin, property, or birth, are not included. With reference to "political and other opinions" it is the intention of the Covenant, according to the apposite Committee, that trade union membership be included[1]. The Committee further regarded it as essential that "other status" included nationality, marital status, and state of health[2]. All this shows that the General Equal Treatment Act will have to be amended to cover (at least) these characteristics in order to achieve equal treatment.
That only some characteristics of discrimination are covered in the General Equal Treatment Act alone shows that Germany lacks a coherent policy in relation to equal treatment. As stated in the Committee's GC 20, each State Party is obliged to ensure that policies, plans, and strategies are in place[3] - all these are insufficient in Germany.

2.2. RESIDENTIAL OBLIGATION FOR ASYLUM SEEKERS AND REFUGEES WITH 'TOLERATION' VISA (DULDUNG)

Since the Asylum Procedure Law (AsylVfG) came into effect in Germany in 1982, the regulation of the so-called "residential obligation" determines that asylum seekers and migrants with a 'toleration' visa (Duldung – suspension of deportation) are allowed to remain only in certain areas. The regional restriction on freedom of movement applies to asylum seekers in accordance with Sections 56, 85 AsylVfG as well as people with a toleration visa in accordance with Sections 61 (1) and 95 Residence Act. Currently, close to 200,000

people in Germany are subject to the residential obligation[4], roughly 88,000 of them with a toleration visa, 70,000 otherwise obliged to leave the country (de facto Duldung), as well as 37,500 asylum seekers with a permission to remain during the asylum procedure (Gestattung).

Transcending the residential zone is permitted in exceptions, provided the Foreign Nationals Office has given its consent. In order to obtain such a permission to leave ("leave pass"), a personal application has to be handed in to the public authority, stating the reason and the destination of the journey. Apart from travel costs and expenditure of time, this involves fees in particular Laender which constitute a considerable burden for many migrants. With its decision of February 26, 2010, the Administrative Court in Halle ruled at first instance that there is no legislative basis for such fees (in this case 10 Euros). Violations of the residential obligation can be sanctioned with a fine and in case of recurrence with a prison sentence of up to one year. Regarding criminal policy, it is highly questionable that such case numbers are simply transferred to crime statistics and one repeatedly relies on such numbers for the unsophisticated argumentation of an (allegedly) higher delinquency of foreigners.

The assignment of a residential zone de facto brings along considerable constraints for asylum seekers and migrants with a toleration visa (also see chapters 4.1.1. and 4.1.2. – Right to work and professional training as well as chapter 12 – Right to cultural inclusion): Visits to relatives and friends outside of the designated area – even if it is the adjoining district – become just as complicated as for example going to worship, visiting a cultural event, taking part in sports activities or accessing information resources in a nearby city. Asylum seekers and migrants with a toleration visa residing in rural areas with few cultural activities and often limited linguistic/language resources for migrants are affected to a special degree.

No other EU member state regulates the designated residential area for migrants in this way and for the entire duration of the asylum procedure. According to its decision on April 10, 1997 (BVerfG 96, 10) the Federal Constitutional Court did not recognize an infringement of fundamental rights for this regional restriction on freedom of movement for asylum seekers as well as the respective threat of penalisation. Even the European Court of Human Rights in its decision of November 20, 2007 (44294/04: Sunday E. Omwenyeke versus the Federal Republic of Germany) could not identify an incompatibility of the residential obligation regulation with the European Convention on Human Rights.

When putting the residential obligation regulation into practice, Foreign Nationals Offices and police authorities apply racial profilinga. This includes e.g. the (federal) police specifically checking "foreign looking" persons for their residence papers in public transport services which has a significant discriminatory and stigmatising impact. Everyday problems due to the residential obligation and its application in practice should not be underestimated either. A plethora of individual case studies on the practice of residential obligation was published in 2009 in form of an inventory from a human and civil rights perspective[5]. The stigmatising effects of rigid approval and checking procedures to the detriment of the refugees in question were also documented in this context.

Currently, several federal states (Laender) are seeking to ease the residential obligation. On July 15, 2010, the Landtag (state parliament) of North Rhine-Westphalia decided on an extension of the freedom of residence for the entire federal state, a review of prospects for a permission to leave valid across federal state boundaries, and the immediate abolition of the administrative fee (Landtags-Drucksache NRW 15/46). Per decree, Berlin and Brandenburg have created the possibility of a "permanent permission to leave" (termed "Dauerverlassenserlaubnis") in both federal States, granting a crossing of the federal state boundaries between the two states. Since July 28, 2010, asylum seekers and migrants with a toleration visa in Berlin and Brandenburg may apply for a permanent permission, granting freedom of movement to the respective neighbouring federal state. This permission is free of charge, uncommitted and valid for the duration of the permission to remain during the asylum procedure (Aufenthaltsgestattung) it is based on. However, there are numerous exceptions: the relaxation of the residential obligation does not apply to convicted delinquents as well as "offenders against narcotics regulations" and refugees who "deliberately delay their repatriation".[6] Especially where the latter (rather obscurely defined) group of persons is concerned, the present approval procedure with its potential discriminating effects will probably remain in place. De facto, up to 50 percent of migrants with a toleration visa are affected by this accusation – in very many cases wrongly so. Even when persons affected don't have a valid passport, Foreign Nationals Offices regularly accuse them of a lack of cooperation. However, in many cases obtaining a passport is just not possible. Some countries of origin do not want to take back refugees for political reasons, certain embassies do not operate in accordance

a Identifying individuals according to ethnic attribution during police checks.

with regulations, some embassies issue passports only in exchange for high bribes and in many cases passport applicants are referred to the competence of the authorities in the country of origin. It is not seldom – more often e.g. with the successor states of the former Soviet Union – that none of the eligible embassies confirm the nationality. A malicious obstruction of the legal (asylum) procedure certainly hinders a permanent permission. What cannot be predicted in this context, is to what extent an active participation i.e. "good conduct" could become a prerequisite in the future. Furthermore, Berlin and Brandenburg have announced an initiative in the Federal Council (Bundesrat) aimed at "…generally consenting the freedom of movement of asylum seekers and holders of a toleration visa into neighbouring Laender…" (press release of the Berlin Senate Administration for Internal Affairs, dated July 28, 2010). Thus, this Federal Assembly initiative is limited to merely the territory of the neighbouring federal state. The solutions offered remain bilateral or local without a nationwide perspective.

For reasons given above, the liberalisation currently decided or discussed by individual federal states (North Rhine-Westphalia, Berlin, Brandenburg) falls short. Civil and human rights organisations as well as migrant organisations still demand that the residential obligation unparalleled in Europe be removed from asylum and aliens law. In early 2010, approx. 11,000 citizens demanded a cancellation without substitution of the residential obligation in an online petition addressed to the German Bundestag. Since late April 2010, the petition is being reviewed by parliament. Nothing further needs to be added to the text of the petition. It reads as follows:

The German Bundestag may decide that the "residential obligation", (…) which forbids asylum seekers and refugees with a toleration visa to leave their area of residence without an exceptional leave permit issued by the authorities, is abolished.

3. EQUALITY BETWEEN MEN AND WOMEN (ARTICLE 3)

3.1. INTRODUCTION

Article 3 of the ICESCR reads as follows: „The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." The only obstacle in relation to equal treatment of men and women examined in some detail and with reference to Article 3 of the Covenant by the Federal Government in its fifth Country Report (p.28) is the shortage of childcare provision. Other issues of equal treatment of men and women are considered separately in pertinent specific articles. They are also covered in this parallel report (see sections 4.1. and 5.1).

3.2. TRAFFICKING IN PERSONS AND TRAFFICKING IN WOMEN

The fifth state report addresses the topic of trafficking in persons and women as well as the recommendations of the Committee on Economic, Social and Cultural Rights (CESCR) on the fourth state report. The following comments need to be made on the Federal Governments' explications:

3.2.1. ON THE TRAINING PROGRAMMES ON TRAFFICKING IN PERSONS

Concerning the Federal Governments' comments on the "many in-service training sessions for judges and prosecutors" at the German Judicial Academy (Deutsche Richterakademie) and the Academy of European Law (ERA) in Trier, we would like to point out that while these trainings certainly take place, the following aspects need to be taken into consideration:

- It is doubtful if one can indeed claim that there are many in-service trainings. The 2010 annual programme of the German Judicial Academy only includes one four-day-training on the topic "international trafficking in persons"[7]; the Academy of European Law features another one on "investigation and prosecution of trafficking in persons"[8]. Furthermore, one needs to take into account that the judges are not obliged to take part in the trainings. Besides, the programmes are open, so that it is not guaranteed that judges respectively prosecutors whose primary focus is "trafficking in persons" actually take part in the trainings.
- Furthermore, we would like to point out that the CESCR recommends professional training programmes. However, the courses mentioned above are in-service trainings which are not part of the compulsory qualification of the respective professional group. They do not meet the requirements of such a complex and diverse topic as trafficking in persons.
- In this context, the current training concepts need to be re-examined. They should generally include trafficking in persons and consider all forms of such trafficking. Currently, the issue of trafficking in persons for the purpose of exploitation of labour but also related issues such as the right to compensation and aspects concerning lost wages of people affected by trafficking are not part of the programmes offered. The professional trainings and further training programmes for judges and prosecutors in the examination of witnesses should specifically take into account the potential minority and minimal formal education of victims of trafficking in persons.
- Recommendation no. 43 generally suggests an improvement of professional training programmes. An improvement of these programmes also includes the training of staff working in specialised counselling services for persons affected by trafficking. Specialised care implies the guaranteed provision of team supervision and advanced training to further qualify staff members in the care of traumatised clients. Since there is no guaranteed funding for such advanced trainings, the government should ensure that financing is provided.

3.2.2. CONCEPT FOR COOPERATION AND CARE ("LACK OF APPROPRIATE CARE FOR VICTIMS")

The existing national concept for cooperation (Bundeskooperationskonzept) is a positive step forward and part from the Federal Criminal Police Office, the association KOK e.V.[b] was one of the leading contributors. Concerning the points made by the Federal Government, we have the following comments to make:

b Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess e.V. (German nationwide activist coordination group combating trafficking in women and violence against women in the process of migration).

- The national cooperation concept only has a recommendatory function for the Laender.
- To date, only 12 out of 16 federal states have implemented this concept. What is more important, though, apart from designing cooperation agreements, is to put them into practice.
- The national cooperation concept does not include Section 233 of the Criminal Code (Strafgesetzbuch, StGB).

Recommendation no. 43 points out that an adequate care for persons affected by trafficking is essential, which we have constantly called attention to and scientific studies have repeatedly suggested[9]. However, this urgently required care can only be ensured if the existing support systems can be secured permanently and long-term. "Enforcing effective political and practical changes relevant to human rights requires a high degree of continuity and presence of the non-governmental organisations". "However, the resources are usually extremely scarce, since the funds at the disposal of the specialised counselling centres (FBS) are inadequate in many Laender."[10] Specialised counselling centres ordinarily need to apply for new funds every year and have to deal with the uncertainty of their further existence being guaranteed or not, as well as the negative effects this factor has on long-term and sustainable planning.

In our opinion, financing a sufficient number of counselling and shelter facilities should lie in the responsibility of the state. Achieving this, requires the development of new concepts. When approached about the necessary funds for the specialised counselling centres, the Federal Government often refers to the principle of federalism (see also chapter 1.2.) and therefore to the competence of the Laender. In this context, however, the following needs to be taken into account: even if the federal states are responsible for funding the FBS, the responsibility of pointing out to them the relevant political and financial options or concepts, respectively helping them develop them, still lies with the Federal Government. This was also addressed within the government-state work group "Frauenhandel" (trafficking in women) and these measures should be intensified with the support of the Federal Government.

3.2.3. RESIDENCE ACT ("RISKS AND DANGERS")

Regarding the CESCR's subject of concern no. 25, expressing fears concerning the risks and dangers for persons affected by trafficking when they are deported to their countries of origin, the Federal Government refers to the fact that the Council Directive 2004/81/EC of April 29, 2004, on the residence permit issued to third-state nationals, has been transposed into national law.

Different statements[11] have repeatedly pointed out that the Act of August 19, 2007, transposing the directives of the European Union concerning the right of residence and asylum, only partially complies with the requirements of a legitimate implementation of the directive it is based upon. The regulations regarding the right of residence for persons affected by trafficking still show considerable gaps. One of these gaps concerns how dangers and risks upon repatriation respectively deportation are dealt with. Upon termination of criminal proceedings, the residence permit ends and persons affected by trafficking as a general rule are obligated to leave the country respectively are deported. Only if specific reasons for danger to life and limb or freedom in the countries of origin in accordance with Section 25, (III) combined with Section 60 (7) Residence Act (AufenthaltsG) can be verified, a longer-term residence in Germany may be enforced. Experience has shown that the endangerment of persons affected is ordinarily immanent due to witness reports, and that it is extremely difficult to prove the specific dangers. In addition, returning to their home countries entails a host of problems for the persons affected. Social contacts must be re-established and persons affected are often unable to speak about their experiences due to fear of condemnation and prejudice. Therefore, it is repeatedly reported that persons affected once again incur relationships of dependence or fall victim to traffickers in persons. Furthermore, one needs to consider that a substantial number of the persons affected are underage respectively under 21 years of age (see the Federal Police Office situation report – BKA-Lagebericht 2009), partly belong to marginalised minorities in their countries of origin and in many cases have little or no formal education at all. Deporting affected persons without offering them a reasonable chance to obtain an educational/professional qualification in Germany or in their home country increases the risk for them to once more incur relationships of dependence and is opposed to the objective of preventing trafficking in persons.

Moreover, the so-called victims' protection directive only applies to third-state nationals. There are no legal statutory regulations for EU citizens affected by trafficking in persons. This has serious effects in practice. There are many issues concerning EU citizens that have still not been resolved. We have observed that the authorities are very uncertain and show significant divergences in their dealing with issuing residence

permits as well as granting social benefits to persons from the new EU states affected by trafficking. Essentially, this raises the question whether women affected by trafficking who are nationals of EU member states should receive benefits in accordance with the Asylum Seeker Benefit Law (AsylbLG) or under the Social Code (Sozialgesetzbuch – SBG) within SGB Book II or SGB Book XII. There is no nationwide uniform mode of dealing with the support of victim witnesses from EU member states. This has the effect that even within several federal states there are significant regional differences in the allocation of benefits. In some cases the persons affected receive support in accordance with SGB II, in some cases under SGB XII, in others under AsylbLG and in some cases not at all. Thus, EU citizens profit neither from existing statutory nor sub-statutory structures nor from their EU citizenship and, as a result, are even disadvantaged compared to third-state nationals. In many cases, affected persons from the new EU member states are granted a residence permit according to the Residence Act and not under the Freedom of Movement Act/EU (Freizuegigkeitsgesetz) which is principally prioritised in its application to EU citizens.

Although third-state nationals receive support under AsylbLG and this is regulated by law, experience has repeatedly shown that these benefits are not sufficient to ensure an adequate care which is in line with the needs of the persons affected. This specifically concerns the areas of accommodation, medical care and subsistence. Frequently, the persons affected need psychotherapeutic support to regain stability. However, the Asylum Seeker Benefit Law only allows for therapeutic assistance in individual cases.

3.2.4. ACCESS TO COURTS

Recommendation no. 43 states that the victims must have the possibility to invoke the courts. Affected persons principally have access to German courts. However, putting this into practice seems difficult. For example, persons affected have free access to labour courts in order to claim lost wages and compensation rights. Although this is even possible with an irregular residence status, the persons affected frequently do not have any knowledge of this. Or they have already returned to their countries of origin and – practically and financially speaking – it is hardly feasible for them to assert their claims from abroad. Furthermore, such a claim is often asserted by witnesses before the labour court after the penal proceedings. However, the residence permit of the witness is not extended for the labour law proceedings and then the problems stated above arise. We demand that persons affected must also be given the opportunity to claim their dues before the labour court in a secure context (concerning the residence status as well as funding).

4. RIGHT TO WORK AND PROFESSIONAL TRAINING (ARTICLE 6)

4.1. THE RIGHT TO WORK AND TRAINING OF WOMEN (PART-TIME EMPLOYMENT)

The UN-Committee on the Elimination of Discrimination against Women expressed concern as recently as February 2009 that the increase of women in the labour market which had been achieved has not resulted in an increase of women's share in the overall volume of gainful employment but rather an increase in part-time employment. It was noted with concern that women were concentrated in part-time, fixed-term, and low paid jobs. The Committee recommended measures to counter this situation[12].
In the German education sector, it is primarily women who work part-time: 85.4 per cent of part-time workers in schools are female, thus it can be said to be a preserve of women. Approximately every tenth teacher is employed by the hour, and here, too, women are in the majority with 66.4 per cent[13].

Part-time Teachers by Type of School 2006/2007

Type of school	Part-time employment in schools total	female	in %
Primary Schools	103,441	98,975	95.7
General-education secondary schools (Hauptschulen)	22,149	18,344	82.8
Schools with different courses of education	15,338	11,992	78.2
Junior high schools (Realschulen)	30,103	25,294	84.0
Secondary schools (Gymnasium)	65,788	48,581	73.8
Comprehensive schools (integrierte Gesamtschulen)	13,963	10,853	77.7
Special schools (Förderschulen)	24,392	21,448	87.9
All types of schools	**283,703**	**242,329**	**85.4**
thereof			
- West Germany	221,837	189,810	85.6
- new Laender (incl. Berlin)	61,866	52,519	84.9

Source: Tondorf et al. 2009, p. 53

Taking type of school into account, the ratio becomes even more significant, as set forth in Table 1. While the proportion of women in part-time jobs is 85.7 per cent in all school types, in primary schools the proportion increases to 95.7 per cent. Men constitute only a tiny minority of part-time workers. In secondary schools the picture is somewhat different: here every fourth part-time teacher is a man[14].

4.2. RIGHT TO WORK FOR ASYLUM SEEKERS AND PERSONS WITH A 'TOLERATION' VISA (DULDUNG)

In the first year of their stay in Germany, asylum seekers and persons with a 'toleration visa' are banned from working (Section 61 (2) Asylum Procedure Law (AsylVfG), Section 10 (1) Employment Procedure Act (BeschVerfV)). After the first year, persons affected only have subordinate access to the labour market, which is determined by the Employment Agency. The Federal Employment Agency examines whether there are privileged job-seekers, i.e. Germans, EU citizens or privileged foreigners who are available for the position (Section 39 (2) BeschVerfV). In effect, this review according to priority functions like a ban on working. Although individual areas of employment (Sections 2, 3, 4, 6 BeschVerfV in combination with the Employment Act (BeschV)) are excluded from this priority review, these are of little relevance to most refugees.

The hardship regulation under Section 7 BeschVerfV could for example provide an improved access to the labour market for traumatised refugees with a toleration visa in the context of a therapeutic plan. In accordance with Section 7 BeschVerfV, the prioritisation can be abstained from if in individual cases the refusal of employment would constitute a particular case of hardship. However, Section 7 BeschVerfV is seldomly practically applied in Berlin, since this regulation is only insufficiently known to case officers or

they are not willing to exercise their power of discretion. Apart from that, the regulation does not apply to asylum seekers.

A case study:

Mr X is a traumatised refugee who has regularly undergone psychological treatment in a treatment centre in Berlin for over one year. The treatment centre applies to the responsible Employment Agency to grant him a work permit for therapeutic purposes in accordance with Section 7 BeschVerfV, including a written confirmation by the attending psychotherapist, clarifying that the intended employment is part of the therapeutic procedure. The code of practice of the Federal Employment Agency relating to the procedure concering Section 7 BeschVerfV reads as follows: Traumatised refugees who have been granted a toleration visa/residence permit by the Foreign Nationals Office due to a traumatisation which requires treatment, can be granted access to the employment market if the attending medical specialist or a certified psychotherapist confirms that the intended employment is part of the therapy.

Even though the Employment Agency does not engage a specialised medical department to process the application, it insists on information concerning the causes for the clients' illness. Even when the attending centre points out that, for reasons of data protection, this information can only be passed on to authorised medical doctors, this is initially not accepted. The application is denied with the explanation that prioritised job-seekers are available. Even the legal department of the federal office of the Employment Agency initially cannot detect an infringement of data protection. Only after the centres' management repeatedly intervenes and refers to the code of practice of the Federal Employment Agency, the work permit is finally issued after five months.

After four years of staying in Germany, the priority review under Section 39 (2) Residence Act (AufenthG) is no longer valid for persons with a toleration visa. However, this regulation is not known to many persons. Besides, the processing of applications takes too long, so that job vacancies are often no longer available. This regulation does not apply to asylum seekers. And it also does not apply to persons with a toleration visa whom the authorities – often wrongly – accuse of not having a passport so as to prevent their deportation. The ban on working because of "lack of cooperation" is also frequently ordered when the responsible embassy(ies) is/are not even willing to issue a passport or the public authority is currently already abstaining from deportation for other reasons (illness, political reasons, etc.). In both cases this results in a permanent (in the case of asylum seekers, virtual) ban on working.

During the first three years of staying in Germany, a virtual ban on working (priority review) also applies to refugees allowed to stay for political or humanitarian reasons or under international law who have a residence permit, e.g. with subsidiary protection (residence permit under Sections 22, 23 I, 24, 25 III - V). This excludes only persons entitled to asylum and Geneva Convention refugees (residence permit under Section 25 I and II) as well as the (few) refugees admitted in the "resettlement" programme (residence permit under Section 23 II).

4.2.1. REGIONAL RESTRICTIONS

One of the obstacles when searching for employment is the residential obligation, which grants asylum seekers and persons with a toleration visa residence and movement only within a certain designated area, ordinarily encompassing solely the territory of the administrative district assigned to the refugee in the official allocation procedure (approx. a 30-km radius). This obligation can be suspended for persons with a toleration visa as soon as they receive a work permit after four years. However, this does not apply to tolerated persons whom the authorities – often wrongly, see above – accuse of not having a passport so as to prevent their deportation. Even after they have been in Germany for more than four years, these persons cannot be granted a work permit and the residential obligation remains in place for them.

Residential restrictions are also ordered for refugees allowed to stay for political or humanitarian reasons or under international law who have a residence permit, e.g. with subsidiary protection (residence permit under Sections 22, 23, 23a, 24, 25a, 25 III - V). The persons affected then have to continue to remain in the restricted area or administrative district they were assigned to as asylum seekers. Only persons entitled to asylum and Geneva Convention refugees (residence permit under Section 25 I and II) are exempt. In contrast to being bound to the "residential obligation" they are allowed to travel, but they continue to be banned from taking up residence somewhere else. Only when they can verify that they have a job offer

somewhere else, granting them a permanent income that will exceed the welfare needs respectively the unemployment benefits of all family members, are they granted permission to take up residence in another administrative district. The Foreign Nationals Offices of the current and the future place of residence and frequently the social welfare administrations (calculating the welfare entitlement) are involved in the approval procedure. Therefore, the potential employer must submit to the authorities detailed information concerning the labour contract, income, expected social security contributions and tax. In practice, the procedure takes several months – far too long for interested employers, especially considering that the employer naturally is unable to assess the chances for success. Consequently, even refugees entitled to asylum are in many cases permanently prevented from taking up employment due to the practice of "residential restrictions". In addition, in case of illness/disability/care dependency and traumatisation of the refugee or his/her relatives, the necessary regular contact with and support of family members, often living hundreds of kilometres away in another place in Germany, is obstructed and prevented.

4.3. RIGHT TO PROFESSIONAL TRAINING OF ASYLUM SEEKERS AND PERSONS WITH A 'TOLERATION' VISA

Taking up an industrial training in an officially recognised or a similarly regulated profession is possible for asylum seekers only after legitimate residence in the Federal Territory for one year and after the Employment Agency has given its consent (priority of German nationals in search of training vacancies and comparability of labour conditions for German nationals under Section 39 (2) BeschV). At the end of one year, subordinate access to professional training is granted, depending on the Employment Agency's consent. In reality, the Employment Agency's priority review virtually has the effect of a substantial exclusion from the formal training market for many asylum seekers. Finding a training vacancy is often also aggravated by the fact that the permission to remain during the asylum procedure (Aufenthaltsgestattung) is granted and extended only for three to six months each time.

With the Employment Agency's consent, persons with a toleration visa have the possibility to obtain permission to get professional training if they have been in Germany for one year legitimately, under toleration, or with a permission to remain during the asylum procedure. If, however, they are being accused of deliberately delaying their stay in Germany, they are not permitted to begin professional training after finishing school. In such cases, the Foreign Nationals Office frequently even withholds permission for internships without payment.

The revised regulation for tolerated persons in effect since January 1, 2009 is certainly welcome. It states that after a prior stay in Germany of four years without priority review, tolerated persons can be granted permission to begin professional training and can receive financial support for their training in accordance with the Federal Training Assistance Act (Bundesausbildungsförderungsgesetz – Section 8 (2a) BAföG) respectively professional education aid (Berufsausbildungsbeihilfe – BAB, Section 63 (2a) Social Code – SGB III). However, support under SGB III only applies to an industrial training. Inter-company training measures are not eligible for sponsorship, Section 245 II SGB III. For purely educational training – as well as university education – persons can receive educational aid in accordance with the Federal Training Assistance Act (BAföG). However, due to the long waiting period, the age limit for assistance eligibility is often exceeded.

For refugees allowed to stay for political or humanitarian reasons or under international law who have a residence permit, a virtual ban on working (priority review) still applies for the first three years.

4.3.1. REGIONAL RESTRICTIONS

One of the obstacles when searching for a training vacancy is the residential obligation for asylum seekers and persons with a toleration visa respectively the residential restriction for refugees entitled to asylum with a residence permit. This is especially true for structurally weak areas of the allocated regions, where no suitable educational institution or industrial training vacancy can be found, or the field of study corresponding with the vocation of the young refugee can only be taken up at a university in another city respectively another federal state. This results in a long-term professional downgrading and social immiseration of talented young people, as well as them slipping off not only into mental illness, but, especially in the case of young persons, into delinquent/criminal behaviour and illegal sources of income in consequence of the frustration of being banned from legal opportunities for professional training and earning a living.

4.3.2. EMPLOYMENT PROMOTION MEASURES

Another problem arises for refugees wanting to access employment promotion measures. On p. 37 of the state report, measures like the "federal information and counselling network for the integration of migrant workers into the labour market" ("IQ – integration through qualification") are outlined. These measures are aimed at providing persons with a migration background with better chances on the market for professional training. However, there is no mention of the situation of asylum seekers and tolerated persons. These persons do not have access to such programmes, Section 245 II in combination with Section 63 SGB III. In a few cities non-governmental organisations offer programmes providing vocational preparation courses for these groups of persons. However, these programmes are not funded by the state but e.g. by EU project grants limited in time and cannot make up for the existing deficit.

4.3.3. CONSEQUENCES

In many cases the enhancement of the legal residence status forbids affected persons from claiming social benefits and requires them covering their costs of living. Therefore, limited access to the labour and training market as well as a lack of access to German language courses exacerbate or impede permanent residence rights and future chances for integration. The persons affected are condemned to inactivity, which can lead to the development or aggravation of mental disorders such as depression, or even to mental conditions becoming chronic.

DEMANDS/RECOMMENDATIONS:

- Unlimited access to the labour and training market after three months as well as unlimited access to to training assistance after three months of being in Germany
- Immediate unlimited access to training, labour market and training assistance for migrants with a residence permit
- Vocational preparation programmes for asylum seekers and persons with a toleration visa as well as migrants with a residence permit after three months of being in Germany
- Quick approval procedures starting from the date of entry to the country when reviewing access to the labour and training market as well as access to German language courses
- Ensuring that counselling and information obligations are met through interpreting services
- Recognition of qualifications obtained abroad
- Abolition of residential restrictions, compulsory allocation and residential obligation

5. RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK (ARTICLE 7)

5.1. EQUALITY OF MEN AND WOMEN

5.1.1. EQUAL REMUNERATION

It is common knowledge that there are still significant pay differentials for work of equal value. The Federal Government itself acknowledged that women earn approximately 22 per cent less than men (state report, p.41) and this in spite of many binding international and European obligations[15] and the explicit reference the Committee made[16]. Likewise, the UN-Committee for the Elimination of Discrimination against Women considered this issue as recently as February 2009. It presented a strong case and urged the Federal Republic to take pro-active and concrete measures and to ensure that non-discriminatory job evaluation and job assignment systems be put in place and implemented[17].

In September 2009 a draft for a law concerning the ‚Improvement of equal pay for women and men' was published by the former minister of labour. The draft was however neglected after national elections and the new government was formed.

There are still pay differentials in the education sector; remuneration in primary schools, where the vast majority of employees are women, is in most of the Laender lower than in secondary schools, where male teachers far outweigh female teachers among full-time employees. And in some areas, part-time teachers – predominantly women – are still not paid pro rata with full-time teachers, contrary to judgements of the European Court[18].

According to the Federal Statistical Office (Press Release 331 dated 08.09.2009) in the last quarter of 2008 women in child care and teaching positions earned 15 per cent less than men. The hierarchical German education system is partly responsible for the comparatively high pay differentials in the educational sector as it leads to the unequal division of female and male employees by concentration in different occupations. Thus, childcare positions, with low pay a general feature, are almost exclusively held by women, while comparatively well-paid occupations (e.g. lecturers in higher vocational training institutes and universities) are largely held by men.

5.1.2. PROMOTION

Just as in the area of equal pay, problems exist in relation to promotion. The Committee expressed concern in its latest Concluding Observations and recommended relevant actions[19]. These measures also apply to the education sector as can be verified from a detailed study carried out in 2006 which found that the higher the remuneration and salary scale the lower the proportion of women[20]. The proportion of women among senior management of schools is generally lower than among other grades.

5.1.3. WORK-LIFE BALANCE

The Committee expressed concern about the shortage of childcare provision. The Federal Government accepted that there was a need not only for more, but also in some cases, for better childcare facilities (state report, p.28). The German Education Union is of the opinion that there is a considerable need to catch up both in terms of quantity as well as quality.
According to data from the Federal Statistical Office 20 per cent of under threes had places in nurseries in March 2009 (45 per cent in East Germany, 15 per cent in the West); the United Nations Committee also expressed concern about insufficient childcare provision. It seems likely that the target set by the Federal Government, a statutory right from 2013 to a nursery place for all children from the first year, will fail unless realisation of this specified goal is prepared as a matter of urgency. The challenge is for action on the federal, regional (Laender), and local level to ensure that the necessary financial resources are in place to train sufficient qualified staff as well as for the equipment of nurseries.

The Committee on the Elimination of Discrimination against Women expressed concern as recently as February 2009 that domestic and family responsibilities are still primarily borne by women, many of whom interrupt their careers to engage in part-time jobs to meet family responsibilities[21]. A further recommendation concerned the issue of work-life balance, namely that the Federal Republic should increase incentives for men to use their right to parental leave in order to achieve equality in domestic tasks (cf. ibid. paragraph 38)

TO NAME A FEW EXAMPLES:

- There is a need for investment in all-day schools;
- There is a need to expand services for people needing special care. People with special needs must be able to access services easily, so that other family members can combine work and care responsibilities;
- People who work in the personal service sector need to be valued more highly, both in terms of remuneration and status.

5.2. EQUALITY BETWEEN REGISTERED PARTNERSHIPS AND MARRIAGE IN TAX LAW AND CIVIL SERVICE LAW

The ruling Coalition announced in its coalition agreement in 2008, to eliminate inequality in taxation law and the civil service law for persons living in a registered civil partnerships. Soon after forming a government a draft was submitted but by the end of 2010 this draft was not presented to the Parliament for adoption. Legislation is therefore still pending. In parallel, however, several judgments have been issued by the Federal Administrative Court, clarifying that marriages and civil partnerships are treated equally in civil service law in respect to the surcharge for civil servants living aboard with their partners and their international health insurance coverage.

5.3. EQUALISATION OF THE INCOME GAP AND LIVING CONDITIONS IN EASTERN AND WESTERN GERMANY

Contrary to the statements made in the state report of the Federal Republic of Germany, there is a dynamic increase of employment relationships with wages in the so-called low-pay sector, which can no longer secure a reasonable livelihood respectively not without supplementary social benefits (working poor). Currently there are roughly five million people in Germany holding a job that does not even pay enough for them to get beyond the officially defined poverty line[22]. More and more women are ecpecially affected by this. Of the 1.3 million employed persons who in early - in order to have a subsistence-level income, 600,000 were full-time employees, according to data provided by trade unions[23]. Efforts by trade unions and other groups of civil society to call a halt to this development, e.g. by determining minimum, subsistence-level wages, have been met by uncompromising resistance on the part of the Federal Government. The government promotes state-subsidised wage dumping and thus, under the pretext of “free collective bargaining”, facilitates a steady growth of corporate earnings through low-pay jobs. As a result, the wage rate gradually declined from 72.9 % in 1993 to 65 % in 2007 with a corresponding rise of the profit share, whereby, in absolute terms, actual earnings in the Federal Republic of Germany (FRG) in early 2008 remained on the 1991 status[24].

This development concerns the entire FRG. In addition, gradual differences occur among the federal states (Laender) in the south and the north respectively the west and the east. Especially significant are the differences in the general standard of living respectively in salaries between the old and the new Laender, i.e. the West and the East.

In the past, the UN Committee on Economic, Social and Cultural Rights repeatedly took the opportunity to insist that stronger efforts be made to adapt the living conditons in Eastern Germany to those in Western Germany. In its consideration of the fourth state report, the CESCR once again addressed this issue:

“The Committee is concerned that, despite the great efforts made by the State party to narrow the gap between the new and the old Laender, considerable differences continue to exist, particularly in terms of generally lower standards of living, a higher unemployment rate, and lower wages for civil servants in the new Laender.” (Subject of concern no. 17)
“The Committee encourages the State party to continue undertaking measures to ensure that the differences between new and old Laender in terms of standard of living, employment and wages for civil servants are decreased.” (Recommendation no. 35)

In its reply (state report, p. 38/39), the Federal Government states that the issue concerning remuneration in civil service has been partly solved and otherwise is in the process of being solved. In this context, one special issue is singled out: the current pension value in Eastern Germany. According to the government,

it amounts to 88 % of the value in Western Germany and, "The pension adjustment in the new Laender is dependent on the actual adjustment of wages and income of employed earners."

Considering that, regardless of existing substantial differences in "wages and income of employed earners" also among the federal states in Western Germany (e.g. Bavaria and Schleswig-Holstein), the pension value in all western German Laender is still the same, it cannot be interpreted as anything but open discrimination that adjusting the effective pension value in the new Laender to the general standard in the FRG has been denied the eastern German population for almost 20 years.

The Federal Government does not respond to the general call for "measures to ensure that the differences between new and old Laender in terms of standard of living (and) employment (…) are decreased". The justification for this can be found on page 30 of the report: "Years after reunification, the situation on the labour market remains difficult in Germany... At the same time, however, centres of growth are increasingly emerging in Eastern Germany, while, in the West, there are regions that are experiencing increasing difficulties, with unemployment rates almost as high as the average for Eastern Germany. Given these developments and the time that has elapsed since reunification, continuing to differentiate between the old and new Laender only makes sense to a limited extent..."

We must absolutely disagree with this view of the Federal Government: numerous studies confirm that there are comprehensive problems and deficits in the new Laender which do not have the effect of the gap between new and old federal states becoming narrower but partly even wider. The fact that unemployment rates in the East continue to be twice as high as those in the West of the FRG, confirms the groundlessness of denying obvious differences between old and new Laender. Without specific solutions within economic and structural policies, in demographic policy as well as the further redistribution of income between Federal Government, Laender and municipalities, Eastern Germany will continue to lag behind economically for decades to come. After all, the increasing segmentation of economic and living conditions in the new Laender is taking place on a different level than similar developments in Western Germany. The discrepancies between the "area states" in the East and the West – the "city states" Berlin, Hamburg and Bremen were left out because of their special features – document the following facts[25]:

In May 2009 the unemployment rate in the FRG amounted to 8.2 %. The comparison of West and East (6.9 % in the West and 13.12 % in the East) shows the rate in the East is twice as high.
The national average of the average compensation of employees per working hour amounted to 25.27 € in 2008. However, comparing the old and the new Laender, there is a gap: 25.84 € versus 19.43 €.
The "risk of poverty rate" in the FRG amounted to 11.7 % in 2007. Again, compared to the western Laender (10.16 %), the rate in the East at 19.34 % is almost twice as high.

Considering this situation, stating that "continuing to differentiate between the old and new Laender only makes sense to a limited extent", indicates a considerable loss of reality.
Although indeed there was an economic catching-up process that could be registered until the mid-nineties – this period primarily served to reconstruct the infrastructure in Eastern Germany –, one has to say that there was no effective concept in place to sustainably advance the economic power and the living conditions in the eastern German Laender to match the western German standard. And such a concept still does not exist today. The gap in wages, pensions, tax revenue and the economic performance of businesses per capita has for the past ten years almost invariably amounted to 20 % and more in comparison to Western Germany.

In 2004, a study conducted by Deutsche Bank "East German Perspectives – 15 Years Later" (Perspektiven Ostdeutschlands – 15 Jahre danach) already established that the new Laender, "due to a series of factors that are hardly alterable, will not be able to develop the economic dynamics which would ensure their future alignment with the western Laender." According to the authors of the study, apart from demographic aspects, these factors mainly include the initial situation in 1990 and setting the wrong course in the process of economic reunification. The president of the Ifo Institute for Economic Research at the University of Munich reaches a similar verdict: "Instead of an economic miracle we have a second Mezzogiorno that has emerged in Europe, a limping economic region which is unable to align itself with the more developed regions of the country."[26]

Between 1991 and 2005 the transfer payments provided by Western Germany amounted to roughly 100 billion Euros annually – a gigantic sum in total. However, due to the insufficient tax and contribution

ratio in Eastern Germany, more than two thirds of these funds had to be utilised for social welfare benefits required by law and for the upkeep of the public sector, just about 20 % went into the reconstruction and development of the infrastructure, only about 10 % were directly used for promotion of the economy, meaning the bulk of transfer payments available for investments went into "concrete" and not into "employment".

Investments in all economic sectors per capita (comparison of East and West in Euros)[27]

	1995	1997	1999	2001	2003	2005	2006
Construction of new buildings							
New Laender	5100	4600	3900	3000	2700	2450	2410
Old Laender	2800	2600	2800	2800	2600	2490	2760
Equipment and other machinery							
New Laender	2000	1900	2200	1900	1500	1670	1870
Old Laender	1900	2000	2400	2700	2500	2620	2840

The deficit of equipment investments per capita in the new Laender between 1997 and 2006 is the cause for a persistently higher rate of unemployment.

The western German industry paid scrupulous attention to ensuring that the public "promotion of the East" did not produce competitors. And since the inherently insufficient subsidies for developing the economy were additionally distributed in a non-selective way over a long period of time, they had a very limited effect.

The "deindustrialisation" in the early nineties cemented Eastern Germany's economical and social backlog. The exodus of a significant portion of the qualified young population, which this ultimately resulted in, will hardly be correctable. The "demographic trap" is now becoming the greatest obstacle for future economic development and for an alignment of living conditions in East and West – those "folding up their tents" are predominantly young, female (the proportion of women is 63 %) and qualified. Eastern Germany did not only lose more than 1.5 million (approx. 10 %) of its inhabitants between 1989 and 2007 – but this simultaneously laid the foundation for decreasing birth rates in the future.

The factors leading to superannuation and dwindling of the population mutually reinforce each other – the lack of prospects in numerous eastern German regions leads to an exodus of mainly younger people and the migration in turn amplifies the lack of prospects. A shortage of skilled workers makes itself felt in different areas and already today the average age of the population in each one of the new Laender is higher than in each of the old Laender. All the new Laender display declining population numbers in the years between 1991 and 2008 – opposed to the old Laender, which, with the exception of Bremen and Saarland, profit from the migration and could boast a population increase between 3.1 % (North Rhine-Westphalia) and 8.6 % (Baden-Wuerttemberg and Bavaria)[28]. The exodus continues undiminished till today: In 2007, 138,100 people moved from Eastern Germany to Western Germany, in 2008 the number was 136,500. Until 2020 the Federal Office of Statistics projects another decrease of the population in the new Laender of 1.3 million. In spite of a decreasing number of persons potentially able to work (regarding their age), the unemployment rate in the new Laender remained very high. The record becomes even worse when one takes into consideration that, in net terms, there are 400,000 commuters who travel to work in Western Germany or abroad on a regular basis.

The issue of migration has taken the inherently serious structural deficits in Eastern Germany to another level – by now these will definitely be irreparable. What remains are partial improvements, not sufficient to bring about a self-supporting economic boom in the East.

5.4. THE SITUATION OF REFUGEES AND ASYLUM SEEKERS

Refugees who can only take up employment after a priority review often only find work under precarious conditions and for low pay, in jobs German fellow citizens reject (see state report p. 38 et seq.).

This also applies to refugees subject to a (virtual) ban on working, with the limitation that they receive social welfare benefits and medical care, albeit on a level far below the recognised subsistence minimum (also see chapter 9.5. – Right to an adequate standard of living). Given that asylum seekers in Germany, at least in effect, are practically not able to obtain any sort of legal assistance, many of them find themselves forced to work "illegally" just to be able to pay for their lawyer in the asylum procedure. Migrants who have been deported are not informed that they have the possibility of carrying on a lawsuit from abroad against their employer for exploitation or abuse.

DEMANDS:

- All public authorities must enlighten refugees and asylum seekers about the possibility of filing a suit against employers if they were exploited in their employment relationship even when their employment is illicit.
- Granting of legal assistance to asylum seekers without resources.

5.5. THE SITUATION OF MIGRANTS IN DIPLOMATS' HOUSEHOLDS

Every year, migrants come[29] to Germany in order to work as domestic workers in diplomats' households. According to the Ministry of Foreign Affairs there were allegedly 284 domestic workers of diplomats in the Federal Republic of Germany in March 2008. At the same a list was published, disclosing that at the same time, there were 5,955 embassy and consulate officials living the FRG, which makes a number of only 284 domestic workers seem rather unlikely. Beforehand, their empoyers have to affirm that they will treat the domestic workers according to German standards for employees.[30] After the workers have arrived, however, it is never verified if these norms are actually observed and, as a consequence, the statutory provisions are circumvented and in some cases even completely ignored. This is aggravated by the fact that, due to the diplomatic immunity status of the employers, it is not possible to solve these disputes juridically. As a result, this group of migrants' right to just and favourable conditions of work is violated on a regular basis respectively the violation of their rights is structurally facilitated.

DEMAND:

We therefore call on the Federal Government to take measures to supervise the compliance with these labour standards and to establish structures supporting persons affected in case of violations when claiming their dues (in labour law proceedings).

5.6. THE SITUATION OF UNDOCUMENTED MIGRANTS

The statement of NGOs commenting on the fourth state report in May 2001 already pointed out that labour rights are systematically being circumvented and therefore "undocumented migrants" are being economically exploited in various economic sectors, e.g. in private households, in farming, in the meat processing industry, in nursing, in the sex industry, as well as the construction industry. The situation has not changed in any respect since then. An investigation of the German situation conducted by the ILO in 2005 once more confirmed the violation of law verified at the time.[31]

In its fifth state report, the Federal Government postulates that a possible strengthening of employees' rights in the shadow economy would not solve the problem, given that even undocumented people are already granted all labour rights.

However, it fails to recognise that it is in effect very difficult for undocumented migrants in Germany to enforce their wage entitlement before a labour court. Only seldomly do they take legal steps against abuse by employers. For one, because they hardly have access to information about the respective proceedings, and on the other hand, because consulting a public authority or a court involves the danger of being reported to the Foreign Nationals Office under Section 87 (2) AufenthG. A report to the Foreign Nationals Office ordinarily results in measures terminating a sojourn, i.e. in deportation.

A series of studies in the past years, examining the living conditions of undocumented migrants in major German cities[32], are also concerned with the issue of labour. Those examining the implementation of labour rights more closely, criticise the reporting obligation for being a great obstacle in accessing labour courts.

In a review mission resulting from a coalition agreement, the Federal Government in 2007 established that the reporting obligation also applies to judges in a labour law procedure and once more declared the intention to adhere to this obligation as a necessary instrument of migration control.[33]

DEMANDS:

- Abolition of the reporting obligation under Section 87 (2) AufenthG for courts and for public authorities safeguarding the right to work and the right to just conditions of work.
- We call on the Federal Government to ensure that undocumented persons can enforce their labour rights without being endangered.

6. RIGHT TO TAKE PART IN TRADE UNION ACTIVITIES (ARTICLE 8)

6.1. THE RIGHT TO STRIKE FOR PUBLIC SERVANTS

International agreements which have been ratified by Germany and have thus come into effect, stipulate an unlimited right to strike for public servants. These include, among others, Convention No. 87 (freedom of association) and No. 98 (right to organise and collective bargaining) of the International Labour Organisation (ILO). The ICESCR urged unequivocally "that civil servants who are not engaged in providing essential services, should have the right to strike" – the Federal Republic repudiates this request (see state report, p.47).

6.1.1. DEBATE ON THE RIGHT TO STRIKE

The last time the German Education Union, with the support of the German Confederation of Trade Unions (DGB), complained to the ILO in Geneva was on 5th December 1994. The complaint dealt with the strike ban for public servants, as asserted by the Federal Government, an assertion not in accord with the cited ILO Agreement. The ILO had on several previous occasions found that the strike ban for public servants, as far as teaching staff is concerned, was contrary to international agreements.

The ILO Committee for Freedom of Association considered the complaint by the German Education Union at the beginning of 1996 and concluded that the Federal Republic's refusal of negotiating rights clearly constituted a breach of ILO Convention No. 98. The ILO Governing Body urged the Federal Republic in March 1996 to put in place measures ensuring comprehensive collective bargaining rights for public servants.

Far from acting on this request, the Federal Government refused to implement the ILO decision on the grounds of it being contrary to and incompatible with the Constitution. The strike ban for public servants was also repeated in the Fifth Country Report (p.47ff). The argument adopted was the same as that put forward when the ILO considered the complaint. The Federal Government distinguished between two groups of public servants: public sector workers covered by collective bargaining had an unequivocal right to strike while public servants whose rights and obligations were regulated by law could not claim the right to strike (cf. ibid).

The argument put forward by the Federal Republic was still unconvincing and insufficient to justify a strike ban. The Federal Government and the jurisdiction base their arguments on antiquated and outdated premises which are presented thus:

Article 9.3 of the German Basic Law guarantees the right to association which includes the right to combine for purposes of safeguarding terms and conditions at work and issues relating to remuneration; it includes the right to strike and applies in principle to public servants, albeit only in its core provision. This means in practice that, although public servants have the right to association and can found and join an association and take part in its activities, the right of public servants to take strike action for economic reasons is excluded. This argument is based on the consistent practice of the Constitutional Court which held that both custom and convention applying to public servants and enshrined in Article 33.5 of the Basic Law, and the Duty of Allegiance consequential on Article 33.4 of the Basic Law apply.

6.1.2. ASSERTING THE RIGHT TO STRIKE

The Federal Republic is party to international conventions. Yet from 1996 onwards, it ignored the conflicting international legislation by continuing to deny public servants employed at the federal and Land level the right to strike. The CESCR stated recently that it does not share the stance of the Federal Government that a strike ban for public servants arises from the Duty of Allegiance (cf. state report, p.47).

The German Education Union is committed to asserting the unequivocal right to strike for public servants; but in spite of conflicting European court rulings and ILO declarations as well as the concern expressed by the CESCR, the Federal Government continues in its negative stance. It appears that only a verdict by the European Court for Human Rights can persuade the Federal Republic to change its position.

In relation to the implementation of collective bargaining rights for public servants, the Federal Republic and only a few other countries – Turkey among them – trail behind the rest of Europe. Most states recognise the right of public servants to strike. At the international level an increasing number of international monitoring bodies criticised the absolute strike ban for public servants. The European Court for Human Rights found on 12th November 2008 and 21st April 2009 in the case of Turkey that the right to collective bargaining and the right to strike were protected as a human right by Article 11 of the European Convention on Human Rights. Among other international agreements and covenants, the Federal Republic has also ratified the European Convention on Human Rights. These Treaties are binding under international law. This applies in particular to the European Convention on Human Rights which is breached by the total strike ban. According to specialist legal texts the right to collective bargaining for public servants is conferrable to the Federal Republic. It is incumbent on the supreme courts, in particular the Constitutional Court, to comply with international law and thus interpret Article 9.3 in conjunction with Article 33.4 and 5 of the Basic Law, such that the unequivocal strike ban for public servants is overturned and the right to strike is put into place on the basis of the respective duties or office held by the (individual) public servant.

6.1.3. STRIKE ACTION BY PUBLIC SERVANTS

There have been several infringements of the right to strike in the Federal Republic. The German Education Union reported these to the ILO. It needs to be stressed, though, that public servants in Germany rarely go on strike as they are constantly reminded of the allegedly conflicting constitutional position – an argument used to put pressure on public servants.

The latest infringement occurred during a strike of teachers with public servant status in Berlin in 2000, to protest against an increase in mandatory lessons. Even following a decision to the contrary, which the ILO had reached after considering the unilateral increase in working hours imposed by the employer, the public servants had to resort to strike action to defend themselves against the imposed increase.

Public sector workers with collective bargaining rights took strike action in Bremen in 2009. Currently there is a dispute in Schleswig-Holstein. Teachers took part in strike action.
In these cases recourse to disciplinary measures was a regular feature, though not followed through to a conclusion by the authorities, as shown by the present situation in Bremen. Management continues, though, to ban notified strikes by public servants, using the same old arguments they have for decades. The ILO as well as the CESCR have severely criticised this practice, yet Germany continues to put forward the same worn-out arguments in its Fifth Country Report.

Almost 40,000 public servants have taken part in strike actions in the Laender since 2000.

7. RIGHT TO SOCIAL SECURITY (ARTICLE 9)

7.1. THE RIGHT TO SOCIAL SECURITY AND GERMANY'S SOCIAL POLICY

7.1.1. CONCERN AND RECOMMENDATION OF THE CESCR IN 2001

Article 9 of the Covenant on Economic, Social and Cultural Rights of 1966 reads: "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance."[34]

In 2001, the Committee on Economic, Social and Cultural Rights already feared that the reform of the social security systems in the Federal Republic of Germany could place certain groups of persons at a disadvantage and consequently phrased concern no. 23 and recommendation no. 41: "The Committee is concerned that the State party's reformed social security, and the pension system under reform, do not take sufficiently into consideration the needs of families, women, elderly persons and the more disadvantaged groups in society. ...The Committee urges the State party to ensure that the reformed social security system, and the pension system under reform, take into account the situation and needs of disadvantaged and vulnerable groups in society..."[35]

With respect to Article 9 (Right to social security) of the International Covenant on Economic, Social and Cultural Rights, the Fifth state report of the Federal Government explains the regulations regarding the reforms of the social security system, "Agenda 2010". The report does not respond to the concerns and recommendations of the CESCR. Since the Federal Government's report neither provides adequate answers to the question concerning the reason for the reforms nor to the question regarding probable social consequences respectively consequences that have already taken place, we will make up for this in the following.

7.1.2. CONSEQUENCES OF THE "AGENDA 2010" – REFORM OF THE SOCIAL SECURITY SYSTEM

The key social issue in Germany, now for the past decades, has been the trend towards a constant increase in mass unemployment: in the second half of the seventies, roughly 1 million persons out of the working population were unemployed, in the eighties the number rose to just about 2.5 million and after "reunification" in the mid-nineties to over 3.5 million. These are the unemployment figures of the official statistics. If one took into account the "hidden reserves", i.e. those persons who have given up looking for a job after many unsuccessful attempts and those without a job, who for various reasons are not counted as unemployed, then the actual number of unemployed would be at least 20 to 30 % higher.

The increasing number of unemployed resulted in greater demands on social security – concerning both expenditures and revenues. In addition, not least due to the influence of mass unemployment, the "normal employment relationship" is eroding – "full-time employment" is being replaced by "part-time jobs" and "mini-jobs" and the social security revenues are decreasing – either because the new employment realtionships are not "subject to social insurance contributions", or because employees receive lower pay. Continuing unemployment is not only the most serious socio-political issue – it is also reflected negatively in the fiscal context and concerning the economy as a whole.

Around the turn of the millennium, the next wave of rising unemployment rates was already looming ahead (see fifth State Report of the Federal Government: "The number of registered unemployed rose by 971,000 between 2000 and 2005, increasing from 3,890,000 to 4,861,000 unemployed.", p. 30), therefore, the Federal Government at the time decided to put the entire system of social security to the test.
Basically, there are only two ways of doing this. Either, one places the funding of the social security systems on a new foundation, opens up new respectively additional sources to finance the social insurances (concerning this, there are numerous knowledgeable proposals from Germany and experiences from comparable countries), or, one starts cutting down on benefits of the social security systems. The Federal Government opted for the second alternative. In doing so, it also followed the neoliberal doctrine, implying that social expenditures can only be to the disadvantage of a country's "international contestability". The consequences are devastating, with the imminent risk of a growing portion of the population becoming the "underdogs" of future economic and social developments in Germany.

The "reforms" of "Agenda 2010" have put into effect a paradigm shift regarding the social security systems in Germany. While in the past decades the social security systems were designed in such a way that in

the occurrence of a "risk event" former jobholders were able to maintain their standard of living without existence-threatening curtailments over a longer period, now they are rapidly sent into poverty respectively social welfare.

At the same time, the greatest cuts ever made in social services in Germany's post-war history were initiated. Unemployed persons are the primary group affected by cuts in social benefits, the second group are those employees forced to enter into precarious and underpaid, temporary, unprotected labour realtionships due to the pressure of competition on the labour market and the current labour market policy. Consequently the low-pay sector in Germany has expanded from 15 % of the working population to 22 % within one decade – so that Germany ranks on 2nd place of the OECD countries in this respect, just behind the USA and before Great Britain[36]. As a result of the reforms, a class of wage-earners has emerged in Germany, the "working poor" we had only known in the context of Anglo-Saxon countries in the nineties. This development of the low-pay sector in Germany was facilitated by the fact that Germany is one of the few countries in the European Union without a minimum wage regulated by law across the whole country. The part-time rate developed in a corresponding proportion to the low-pay sector – as far as it is more favorable for employers, more and more employees are pushed into part-time employment: while in the mid-nineties roughly 15 % of the working population held part-time jobs, the part-time rate in 2007 had already reached 33.5 %.[37]

With cuts in unemployment benefits, a reduction of the period of time unemployment benefits (Arbeitslosengeld I) are even granted, and the introduction of "Unemployment Benefit/ALG II" – basic social assistance (Grundsicherung) on the level of social welfare – massive pressure was put on dependent employees to accept wage waivers in order to retain their jobs at all cost, since unemployment now quickly leads to poverty. Despite an average annual economic growth of 1.9 %, the actual earnings sank by 0.8 % per year in the period between 2004 and 2008.[38]

Wage reduction and cuts in social services in Germany complement and mutually depend on each other.

7.1.3. REDISTRIBUTION FROM THE POOR TO THE RICH – INCREASE OF OLD-AGE AND CHILD POVERTY

The Federal Government's reforms initiated a substantial redistribution "from bottom to top": one of the most prominent characteristics of the socio-economic development in the Federal Republic of Germany in the period following 2000 was the quick shift in the national income ratio between the wage rate and the rate of corporate earnings and investment incomes – from 72.2 : 27.9 (2000) to 64.8 : 35.2 (2007).[39]

There has never been a similar redistribution of national income for the benefit of entrepreneurs and equity owners within just a few years in the history of the Federal Republic of Germany.

Above all, persons coming from the "centre of society" – that is to say, those with an income between 70 % and 150 % of the average income – are affected by the paradigm shift in the social security systems. Therefore, it is not at all surprising that the middle class, which until the year 2000 constituted a relatively stable proportion between 64 and 62 % of the total population, shrank by approx. five million persons to a percentage of 54 % between 2000 and 2006, while the low-income class increased by seven percentage points. The social decline of part of the middle class was and is bound to occur with the measures of cutbacks in the social security systems.[40]

On top of that, long-term unemployment, low pay and "pension reform" have laid the foundation for a massive increase in old-age poverty in the next decades – above all, because of the growing number of precarious labour relationships, because of phases of unemployment repeatedly interrupting professional biografies and because of the reduction of pension levels implemented with the pension reform, pension rigths of an increasing number of new retirees will then be below the social welfare level, meaning they will fall within the range of the state-funded "basic social assistance for pensioners", making it unnecessary to acquire pension rights by making pension contributions. At the same time, this discredits the state pension fund to such an extent that growing numbers of the population may refuse to continue to make payments to this pension system in the future. State sponsorship of private "individual pension plans" for old age, aimed at balancing the losses emerging from the reduction of state pensions, misses the target, ignoring the fact that the low-income class simply does not have the income needed to invest in such a private pension plan. Apart from old-age poverty, interest groups representing the socially disadvantaged and non-governmental organisations also call attention to the growing child poverty (see also chapter 9.4. on Article 11):

- The OECD study on child well-being postulates that every sixth child in Germany lives below the poverty-line, while the OECD average is "only" every tenth.
- According to the German child protection alliance (Kinderschutzbund) approx. 2.5 million children live on the social welfare level.[41]
- Single parents with children aged up to three years are subject to a poverty risk far above the average of over 50 percent. Also among young adults up to the age of 25 about one quarter survives on a household income below the poverty-line.[42]

The financial benefits persons receive with basic social assistance do not cover the subsistence minimum. Social responsibility for economically and socially disadvantaged people is increasingly reduced to a type of relief and charity for the poor whose recipients cannot invoke a legal entitlement: soup kitchens, charity and thrift shops as well as homeless shelters are booming.
An indication of the state's retreat from social responsibility, of increasing social inequality and growing poverty is the "food bank movement": excess food and groceries are collected by social organisations and socially involved citizens and then distributed to persons in need and social institutions for free. Today, roughly 800 food banks in the Federal Republic – already about three times as many as in 2000 – provide almost one million people with the basic necessities. And once again there is a social inequality: in Bavaria, which is a relatively rich state, there are more food banks than in the new Laender in the north.

The trade unions emphatically oppose the ever-growing polarisation of rich and poor: between 2000 and 2008 the richest ten percent of the population were able to increase their income by 18 %, while the poorest ten percent had to accept a loss of 18 %.[43] This will probably reinforce the polarisation in the distribution of wealth, and even though the available data concerning the affluence in Germany's society is vague, it can be assumed that 60 % of the private net assets in Germany are in the hands of the ten percent of the population with the highest income, while the lower half on the income scale have no assets worth mentioning at their disposal.

From our point of view, cutting down on the social security systems in the Federal Republic of Germany is also an obvious violation of Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights:
"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."
In the course of "reforms", the living conditions for numerous groups of the population (employees in precarious labour relationships and in the low-pay sector, unemployed, particularly long-term unemployed, single parents and children in families depending on "basic social assistance", recipients of "mini-pensions" and many others) have not improved but have deteriorated. Concerning the reforms, the political oppositon refers to them as "state prescribed poverty".

DEMAND:

The government and policy makers are challenged to counteract the polarisation of income and wealth, to provide more social equalisation and to develop and implement new concepts to combat poverty in Germany. Considering the desolate situation on the labour market, it's high time to replace the "reforms" cutting down on the welfare state by reforms to further develop this welfare state in order to counteract the social divide in society.

7.2. THE LEGAL POSITION OF LOW-INCOME GROUPS

The legal position of persons with a low income has significantly deteriorated since Book II Social Code (Sozialgesetzbuch – SGB) was introduced on January 1, 2005. This fact is suppressed in the German Federal Government's report. Financially independent persons who do not receive benefits from the"Jobcenter"[c], have a far better legal position than recipients of benefits – leading to the emergence of a two-class society.

c "Jobcenters" are regional institutions in which the Federal Employment Agency (Federal Government) and local authorities work together. Their responsibilities include counselling and placement of job seekers and low-income earners as well as disbursement of benefits. The job centres were developed in the course of the introduction of Book II Social Code.

Frequently, unemployed persons do not receive the benefits provided for by statute to the full extent and access to the courts is made difficult for them. Experiences from working with people who are dependent on the Jobcenter show that they are increasingly treated as second-class citizens (also see the following contribution).

The following examples document the deterioration of the legal position of persons with a low income.

7.2.1. SHARED HOUSEHOLD "COMMUNITIES OF NEED" (BEDARFSGEMEINSCHAFT)

In the past, the aim of social welfare was overcoming individuals' need for help. Today, several persons living in a shared household are subsumed under a so-called "community of need" (Bedarfsgemeinschaft; see Section 7 (3) SGB II). This means that as a rule, the income of individuals is no longer allocated to their individual requirements but to the requirements of the entire group. This leads to a de-individualisation when considering the need for assistance. For example, if a woman holding a job who is not dependent on the Jobcenter moves in together with her partner who is an unemployed, single father and receives benefits from the Jobcenter, then she has to provide her income for partner and child. Consequently, the woman becomes dependent on the Jobcenter as well and is virtually obliged to support the child, even though in accordance with Section 1601 et seq. BGB (Civil Code) she has no maintenance obligation. At worst, the minimum subsistence level of the shared household members is not covered if a member with income refuses to "take care of" the others, meaning to make the alleged payments. Conversely, sanctions of the Jobcenter (see in more detail in ch. 9.5. on Article 11) also have negative effects on all members of the shared household.

7.2.2. LEGAL CLAIMS IN BOOK II SOCIAL CODE (SGB II)

Book II Social Code (SGB II) merely provides for a legal entitlement to benefits for subsistence. There is no legal entitlement to labour integration allowances with the objective of integration into employment and some supplementary benefits such as loans. Especially the fact that labour integration allowances are unenforceable clearly shows that unemployed persons are not granted the right to assistance. At this point, the Jobcenter's clients turn into solicitants, a relationship of super-/subordination develops between the public authority and those in need of help, and the recipients become the object of state operation. This also becomes evident in the allocation of measures for qualification and integration. Here it is also the Jobcenter that in most cases decides on the type, amount and quality of benefits – despite the fact that the so-called freedom of choice and selection is firmly enshrined in SGB I. This is aggravated by the fact that legal protection options have successively been reduced for recipients of benefits. This especially applies to the suspensory effect of appeal and action of voidance. Access to legal protection as it is guaranteed in Section 19 (4) of the German Basic Law (Grundgesetz – GG), is no longer ensured. This principle applies for the entire social and administrative law – however, it was repealed for all benefit and transitional measures decisions of the Jobcenter (see Section 39 SGB II). In view of the fact that within SGB II roughly 60 % of the appeals are completely or partly granted and the success rate with actions amounts to approx. 50 %, this is a particularly striking grievance. With respect to counselling and legal aid, the rights of unemployed persons were also curtailed further.

7.2.3. CONLUSION:

The deterioration of the legal position of persons with a low income, who in many cases receive benefits under SGB II, may be characterised as a "systematic disenfranchisement of citizens in need of support". The practical interaction of public authorities with recipients of benefits also frequently shows that they are not treated like responsible citizens but in a derogatory way. They do not have the same rights as persons who do not draw benefits from the Jobcenter. This is an obvious violation of the principle of non-discrimination. This is not only laid down in Article 2 (2) of the ICESCR, but also elaborated in detail in the CESCR's General Comment No. 19 on the right to social security.[44]

DEMAND:

Persons entitled to benefits must be treated as individuals who have subjective rights. This means that the construct of the "community of need" (Bedarfsgemeinschaft) has to be abandoned. The legal position of persons affected must be reinforced by expanding the legal entitlement to labour integration allowances or qualification grants and other benefits. Sanctions should not be utilised automatically and for a fixed period of time, but must be monitored on a case-by-case basis, taking into consideration the proportionality, and then suspended after a certain goal has been reached. A complete cutdown of the subsistence minimum must be regarded as an obvious violation of the right to human dignity. We call on the Federal Government to reinforce the opportunities for legal protection and the legal position of recipients of benfits under SGB II by making an amendment to the statutory provisions.

7.3. MALPRACTICE IN DEALING WITH RECIPIENTS OF UNEMPLOYMENT BENEFIT II (ALG II)

The following remarks are based on a participant observation project within the masters programme "Social Work as a Human Rights Profession" (Soziale Arbeit als Menschenrechtsprofession) titled:
Die Würde des Menschen ist unantastbar (The Dignity of Men is Unimpeachable; 2009). In a total of eight reports, the visits of recipients of Unemployment Benefit II (ALG II) to the Jobcenter were documented and subsequently evaluated. This was done with the following question in mind: How do the Jobcenters in Berlin deal with the claims of ALG II-recipients in terms of human rights?

7.3.1. THE MOST SIGNIFICANT RESULTS

Only in one out of eight instances did the Jobcenter employees offer clients a friendly reception.
Despite at times long waits under unfavourable conditions, persons receiving benefits do not always have the opportunity to talk about their concerns with a case officer but are sent away at the reception desk, being told that they will receive a call, which does not always occur.
In four out of eight instances, the persons receiving benefits did not completely understand the content of their conversations with Jobcenter employees.
In four out of eight instances, Jobcenters requested the submittal of unnecessary documents.
In one case the application was rejected beforehand, and only after the enquiry of the author, who accompanied the instance, about this being legitimate, submittal of the application was finally allowed.
Documents are requested more than once; objectionable questions are asked (e.g. about pregnancy).
Below a more detailed outline of two examples:

First example:
One participant of the project applied for ALG II with the competent Jobcenter in Berlin in May 2009. Subsequently, she is asked to submit certain documents, which she does, but then she is requested to submit them again. In August 2009, after repeated, fruitless enquiries, she is told by the case officer in charge that she is not entitled to benefits. She is told her training certificate showed that she is disabled and therefore the administration for basic social assistance is responsible for her. The long time for processing the case was justified with the case officer being on holiday. However, none of the documents state that the client has any sort of disability, the case handler's allegation is based on ignorance of the state of facts and an assumption resulting from this. A respective clarification given by the applicant is not taken seriously. Only an action brought before the Social Court ensured that justice was done and the application was approved in January 2010.

The following points are objectionable:
- the long processing period,
- repeated request for documents that had already been submitted,
- lacking expertise of the case handler,
- stigmatisation of the applicant resulting from this,
- reluctance to hear her explanations and rectifications, thereby correcting the misjudgment of the state of facts.
- Such practice makes it difficult if not impossible for those in need of assistance to obtain the benefits securing their livelihood they are autonomously entitled to.

Second example:
Another project participant is preparing to move to another district within Berlin and therefore puts in a new application for ALG II with the Jobcenter that will be responsible for her in the future. In order to make sure that the application is processed in time, she submits it to the relevant department about six weeks ahead of the actual transfer to another authority. The case handler suddenly discontinues processing the application and declares that the application was submitted too early. She tells the applicant that before her application can be processed, she must first – according to an internal regulation – call on a placement officer to prepare an agreement for integration into the labour market (Eingliederungsvereinbarung). However, it is also yet too early for this and she must first wait for the end of her training in a few weeks before the placement officer can take action for her. Since the author was accompanying the applicant, she pointed out to the officer that accepting the application cannot be denied for legal reasons and asked about the precise legislative basis for her course of action. The case officer hesitated, became uncertain and asked one of her superiors for permission to accept the application. “Luckily” he was available and gave his consent.

This may be rated as an attempt to refuse accepting an application without first verifying a need for assistance. It is doubtful if the benefits recipient would have been able to challenge this on her own and if, after the denial, she would have been able to make another attempt. It may be assumed that such bureaucratic obstacles and pseudo-regulations that even employees of the Jobcenters hardly comprehend anymore prevent persons in need of assistance – be it because of shame, lack of legal information or misconceptions – from further attempts to apply for benefits and therefore deprive them of their right to social security.
The fact that the superior who was “luckily” available gave his consent after the legitimacy of the course of action was questioned enhances an impression of arbitrariness.

7.3.2. SUMMARY

Regarding the results of the project, the following generalisations can be made:

1. The claims of ALG II-recipients arising from international human rights documents are not always warranted within the system of basic social assistance for job-seekers (ALG II) currently existing in the FRG.
2. Many recipients of benefits are not able to enforce their entitlement to benefits without external assistance.
3. The current system of ALG II-benefits is too complicated to be fully comprehended by all involved parties and to allow for financial assitance in due time, which may result in persons affected e.g. incurring debts or losing their housing.
4. The Jobcenter employees are not trained in dealing with persons receiving benefits.
5. There is little understanding for the situation of persons receiving benefits on the part of the Jobcenter employees.

RECOMMENDATIONS/DEMANDS:

The administrative obstacles when accessing the system of basic social assistance for job-seekers need to be removed and made transparent to even make it accessible for disadvantagd persons.
Accordingly, the employees of Jobcenters and ARGEs (joined municipal welfare and employment centres) need to be trained to treat persons entitled to ALG II as legal entities and not like solicitants.
In order to curb arbitrary practice and derogatory treatment of clients, independent ombuds offices need to be established, so that persons affected cannot only obtain help to defend themselves against unjust treatment by public authorities, but also to relieve the social courts that are completely swamped with work.

7.4. THE RIGHT TO SOCIAL SECURITY FOR REFUGEES, ASYLUM SEEKERS AND PERSONS WITH ‘TOLERATION‘ VISA (DULDUNG)

Asylum seekers and tolerated persons as well as refugees allowed to stay for humanitarian reasons who have a residence permit under Sections 24, 25 IV S. 1, Section 25 V and 25a Residence Act (AufenthG) receive benefits according to the Asylum Seeker Benefit Law (AsylbLG) instead of social welfare. These amount to approx. 38 % less than the subsistence-level minimum standard rates of social welfare and Unemployment Benefit II (ALG II).

The persons affected do not receive health insurance coverage. Only when they have received social benefits under AsylbLG for a minimum of 48 months in Germany (the duration of stay is often longer due to e.g. temporary gainful activity) in accordance with Section 2 AsylbLG and additionally fulfil further requirements, can they choose a statutory health insurance and receive a health-insurance card and health care services in the same scope as persons with statutory health insurance coverage. Since they are not members of the health insurance, in accordance with Section 33 Book XI Social Code (SGB XI) they also do not receive benefits of the nursing care insurance (regarding the right to health insurance see chapter 10.2. – Right to health). Pregnant women and mothers receive benefits which amount to less than social welfare in quality and scope. Child allowance and parents money are not granted at all.

After 48 months of receiving benefits under AsylbLG, persons affected are only entitled to benefits in the amount and scope of benefits under SGB XII if the longer duration of their stay was not self-induced by abusing the law.

Support for developing or sustaining one's livelihood, preventive health care, integration grants for disabled persons, aid to the blind, assistance for household upkeep, support to overcome specific social difficulties, and assistance for the elderly are frequently not granted in practice. Access to further social welfare benefits is usually blocked.

DEMANDS:

- The Asylum Seeker Benefit Law (AsylbLG) needs to be abolished. There has to be a complete equalisation with German nationals regarding social legislation, in the alternative, benefits in accordance with AsylbLG must be raised to the level of Unemployment Benefit II (ALG II) respectively social welfare;
- Access to integration support for language, professional education and labour market under SGB II and III must be guaranteed under the same conditions as they are for German nationals, and access to regular health and nursing care coverage in accordance with SGB V and XI must be facilitated for asylum seekers.

8. RIGHT OF FAMILIES, MOTHERS, CHILDREN AND YOUNG PEOPLE TO PROTECTION AND ASSISTANCE (ARTICLE 10)

In its report, the German Federal Government refers to the high and continually growing value of families. It emphasises the importance and diversity of family-oriented programmes. While we appreciate these measures, we still have to point out that groups of persons are legally marginalised by family and descendants laws, that entitled persons coming from socially or economically disadvantaged groups do not receive sufficient support in assuming their rights, that there is a lack of programmes for empowerment and moreover there are a number of measures which enhance discrimination instead of alleviating it.
We would like to illustrate these marginalising forms of the Federal Government's family policy with three examples:

- Children, young people and families in need of child and youth welfare services
- Same-sex families
- Refugee children and families

8.1. CHILDREN, YOUNG PEOPLE AND FAMILIES IN NEED OF CHILD AND YOUTH WELFARE SERVICES

8.1.1. CHILD AND YOUTH WELFARE ACT

According to the text of the treaty, the States parties to the Covenant recognise that the widest possible protection and assistance should be accorded to the family. In this context, the actual exercise and realisation of rights guaranteed by the government is of special importance.

The Child and Youth Welfare Act (SGB VIII) offers families and young people in Germany support and opportunities to compensate or relieve existing disadvantages. It is aimed mainly at groups of persons who particularly stand in need of public support, especially children and young people growing up in difficult circumstances. Child and youth welfare agencies in Germany therefore have a very good national legislation available to them.

Benefits under the Child and Youth Welfare Act are granted by government institutions, the youth welfare offices. These decide if and to what extent those in need of help shall receive benefits. The youth welfare offices' decision is verifyable in accordance with administrative law and can be legally contested by the applicants. Young people and families therefore have a distinctive individual legal entitlement to professional support.

8.1.2. OBSTACLES IN APPLYING THIS LAW

Despite these good general conditions, children, young people and their parents needing public educational support or intending to apply for it, are confronted with specific problems when they actually want to exercise the basic rights formally granted them by SGB VIII (Child and Youth Welfare Act).[45]

When it comes to implementing the specific legal entitlement, a huge imbalance in power between those persons seeking assistance and the institution granting this assistance becomes evident in this procedure. Accessing benefits under the Child and Youth Welfare Act are impeded by[46]:

- inappropriately long reviews of applications;
- unlawful procedure directives of the administration to reduce costs (documented for Berlin-Reinickendorf and Halle);
- applications for assistance are illegitimately denied for cost reasons (not a permissible ground under SGB VIII);
- young people on the threshold of attaining their majority are not informed of the fact that they are entitled to benefits under the Child and Youth Welfare Act even beyond the age ot 18;
- ambiguity concerning competences are utilised by government authorities to refer those seeking assistance to other institutions or to turn them away.

The means provided by the German legislature to enter an objection in accordance with administrative law and to bring an action are not accessible to most of the persons affected.

Some of the reasons for this are:

- There are no independent advisory services and appeal boards, giving persons affected the opportunity to obtain impartial information on the legal situation when utilising respectively being denied public educational support.
- Those seeking assistance are not familiar with the complex legal principles and are not informed about their rights.
- Those seeking assistance are frequently in a situation of crisis or emergency when they call on the youth welfare office.
- Ordinarily, persons affected cannot make use of the possibility to contest the decision of the youth welfare office without external support.

Hence, the governments' responsibility to facilitate the right to access benefits in accordance with the Child and Youth Welfare Act is not fulfilled.

The necessary and lawfully codified principle of an approach geared to the needs of those seeking assistance is not put into practice if the advisory institution is at the same time responsible for the costs that arise from this advising. As a result, the procedure of granting support becomes highly liable to ideologic or financial ambitions of control.

8.1.3. INDEPENDENT OMBUDS OFFICES IN THE YOUTH WELFARE AREA

Therefore, independent ombuds offices and appeal boards need to be set up to cater to persons seeking assistance. Already in 2007, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, advised the Federal Republic of Germany to support and extend possibilities for out-of-court complaint procedures and to structure them in a transparent and citizen-oriented way.[47]

Furthermore, the work of independent ombuds offices and appeal boards needs to be legally secured by respective legislative amendments. An amendment of the law could possibly read as follows: "Young people and their families are entitled to have access independent of the youth welfare office to professionals qualified as ombudspersons in youth welfare counselling."[48]

The reports and documentations of the legal aid association "Berliner Rechtshilfefonds Jugendhilfe e.V." show that there is a constant and very urgent need for independent and impartial ombuds offices and appeal boards. Eight similar initiatives have formed in other federal states.[49] However, a long-term infrastructural and financial backup of these counselling institutions is yet to be seen and further support of policymakers is urgently needed.

DEMANDS:

- The Federal Government must be called upon to continuously control public authorities regarding their lawful implementation of the legal entitlement to youth welfare benefits.
- The Federal Government must be called upon to legally enshrine independent ombuds offices and appeal boards and to ensure the necessary infrastructural measures, so that children, young people and families can exercise their legal entitlement.
- The Federal Government must be called upon to provide persons affected with better access to independent information on their legal entitlement.

8.2. SAME-SEX FAMILIES

According to the text of the treaty, the States parties to the Covenant recognise that the widest possible protection and assistance should be accorded to the family, particularly for its establishment. This explicitly applies where the responsibility for the care and education of dependent children is concerned. The Federal Government recognises this too and in its report emphasises the high and continually growing value of families. However, it suppresses the fact that (1) same-sex partners starting a family are systematically obstructed in Germany, there is still no legal equality of same-sex couples with children, and this discrimination (2) is mainly to the disadvantage of the children in so-called rainbow families (LGBT parents and their children).

8.2.1. GUARANTEEING THE RIGHT FOR ALL TO START A FAMILY

Although with the civil partnership (Eingetragene Lebenspartnerschaft)[50] the German legislature has created a legal institution, which by civil law has the equivalence of marriage, civil partnerships are neither equal when starting a family nor concerning descendants law or family law.

Virtual ban on medically assisted reproduction by the German Medical Association (BÄK):

According to a directive of the German Medical Association's scientific advisory board regarding the execution of assisted reproduction, such methods of assisted reproduction should as a rule only be put to use for married couples with due regard to the best interests of the child. Beyond that, methods of assisted reproduction can be applied for an unmarried woman, if the attending physician comes to the conclusion that the woman lives together with an unmarried man in a steady partnership, and this man will acknowledge paternity for the child conceived in this way. In the case of two women in a civil partnership, however, physicians may not assist with artificial insemination, even though the women's partnership has the same commitment as a marriage and the legislature has in the meantime allowed the adoption of stepchildren.

Attribution to families is not regulated by law:

Under Section 1592 (1) no. 1 Civil Code (BGB) Children born of artificial insemination during a marriage are legally considered to be the children of the husband, even if they were conceived with the sperm of another man (heterologous insemination). The husband may not contest paternity if he agreed to heterologous insemination (Section 1600 (5) BGB).
Children born of artificial insemination to women in a civil partnership, however, are legally considered to be only the children of the biological mother. The legal parental relationship with the co-mother has to be established by a "stepchild adoption". This does not do justice to the living situations in the families, since the co-mother agreed to the insemination.

Ban on stepchild adoption of adopted children:

To date, in civil partnerships only the stepchild adoption of biological children of the partner is allowed, however, the adoption of adopted children is not. This contradicts the principle of equal treatment of Section 3 (1) of the German Basic Law (Grundgesetz – GG). One only has to imagine the situation of a mother who adopted a child and has now developed cancer. She therefore wants her female partner, who has been part of the "family" from the beginning, to adopt the child. Clearly, the best interest of the child in such a case would be the child's adoption by the partner. However, this is currently only possible if the mother who has fallen ill renounces her parental rights beforehand. If the child were not adopted but conceived by artificial insemination, she would not have to do this. In this case, the stepchild adoption would be easily possible.

RECOMMENDATIONS/DEMANDS:

- We call on the Federal Government to correct the restrictions of the right to establish a family and regarding family planning. This specifically concerns:
- Free access to medical services of family planning for all women, independent of their sexual orientation.
- Extension of the descendant law to include civil partnerships by amendment of Section 1591 BGB and Section 1600 (5) BGB and therefore legal attribution of children born of artificial insemination at birth to both civil partners.
- Extension of stepchild adoption to include children that were adopted by one of the civil partners.
- The right to joint adoption for same-sex couples in civil partnerships.

8.2.2. ENDING TAX DISCRIMINATION AGAINST RAINBOW FAMILIES

Currently, thousands of children in Germany are already being raised by their lesbian mothers and gay fathers. A study on the living situation of children[51] commissioned by the Federal Government proves that these children thrive very well in every respect. However, those rights that are a given for families with

married partners, are still being denied civil partners with children. Concerning financial and tax laws, there is also a striking inequality in the treatment of homo- and heterosexual families, which is especially disadvantageous regarding the sustenance and financial security of the children. While a heterosexual couple without children is entitled to couples tax splitting, two-mother families with children do not have the possibility of a joint tax assessment in accordance with Income Tax Law (EStG). A family of two women joined in civil partnership with a monthly gross income of 3,000 Euros therefore has about 300 Euros less every month at its disposal. This discrimination is objectively and legally unsubstantiated, since civil partnerships are fully equivalent to marriage according to civil law. The money is not available for the care and sustenance of the children.

Even when both mothers are in a civil partnership and equally split caring for and raising the children, the social parent is still considered as childless in all socially and financially relevant contexts (e.g. health care or pension system). For the children, this constellation amounts to a huge gap in social security, for instance regarding maintenance payment and inheritance law and in case of the legal parent's death. Furthermore, the children will get the impression that they are not wanted by society. This is no longer acceptable. Moreover, rainbow families are laso denied the fiscal support for old-age pension plans.

RECOMMENDATIONS/DEMANDS:

- The Federal Government is called upon to equalise civil partnerships with married couples regarding income tax.
- The Federal Government is called upon to include civil partners and stepchildren in the fiscal support for old-age pension plans.

8.3. REFUGEE CHILDREN AND FAMILIES

8.3.1. REFUGEE CHILDREN, SPECIFICALLY UNACCOMPANIED REFUGEE MINORS ARE PARTICULARLY IN NEED OF PROTECTION

According to the text of the treaty, special measures of protection and assistance should be taken on behalf of all children and young persons, and without any discrimination for reasons of parentage or other conditions. In practice, however, the need of fugitive children – unaccompanied refugee minors (URM) among others – to be protected is not sufficiently taken into consideration.

URM are extremely at risk. In Germany, already the determination of their age is carried out with ineffectual methods because the respective medical reference values originate from children and young people coming from industrialised western countries and are not easily transferable to children and young people from other areas of origin. Any doubts are frequently to the disadvantage of the person affected.
Advisers and guardians assigned to the children and young people are often overwhelmed with work. At the age of 16, the young people are classified to be "of age for asylum", meaning that according to aliens law they are considered to have legal capacity and not seen as minors (Section 80 AufenthG; Section 12 AsylVfG), have to pursue their asylum procedure on their own and have to live in communal accomodation although this is not in accordance with taking children into care in the sense of Section 42 I (3) SGB VIII. Former child soldiers do not receive special support or treatment.

In the asylum procedure, children's and young people's reports of their flight are frequently regarded as implausible a priori, and reasons for seeking refuge typical for children as well as age statements are not accepted. The relevance of certain types of persecution specific to children will only be recognised in the asylum procedure if children are actually granted the appropriate space to relate their reasons for seeking refuge. UNHCR therefore demands child-appropriate questioning as well as priority processing of claims for asylum made by child applicants.[52] Furthermore, it is of paramount importance to take into account child-specific information regarding the country of origin.

Even young people under 18 are taken into custody prior to deportation and the conditions of detention are not appropriate to the best interests of the child. Detention can last up to 18 months and has recently been increasingly employed as "detention before being taken back" within the scope of the EU regulation determining the Member State responsible for examining an asylum application (Dublin II Regulation).[53]

Germany has not developed a sytem of alternatives to custody prior to deportation, even though detention, particularly of young people, can lead to permanent impairment and abnormalities in their emotional development.

The situation of unaccompanied refugee minors in Germany has slightly improved in the past years[54]. In almost all of the federal states (Laender), children and young people are allowed to attend schools and other educational institutions during the asylum procedure (incidentally, this is also to be applicable to children whose parents live in the FRG without papers). However, the applied mode of dealing with refgugee children is not nationally regulated. For example, there are no clearinghouses for URM in some of the Laender.

Whether children fled separately or together with their families, in social isolation, poverty and the cramped situation of communal accomodation during the asylum procedure, structures of violence are bound to develop. Children experience violence as a strategy for survival. Particularly children are helpless in the face of such living conditions. Living under such circumstances is not oriented to the best interests of the child. Instead, as a consequence of the negative experiences they had in their countries of origin, these children need child- and youth-appropriate support, maturing and development opportunities. In specialised counselling centres and therapy institutions, the damaging effects of everyday strains, permanent stress, the insecurity regarding one's personal situation if deportation is imminent and the lack of loving care become apparent. Beyond that, Section 6 SGB VIII limits youth welfare benefits for refugee children. In contrast, the UN Convention on the Rights of the Child demands inter alia to refrain from discrimination of any kind (Article 2), that the best interests of the child be a primary consideration (Article 3), that the survival and development of the child is ensured (Article 6), and that the views expressed by the child regarding certain issues are respected (Article 12).

8.3.2. SUFFICIENT SOCIAL BENEFITS FOR REFUGEE CHILDREN

Children and young people for whom an asylum procedure is being conducted or who have a toleration visa or a certain residence permit do not – at least not within the first 48 months of their stay in Germany – receive benefits according to the general regulations of the German social security laws but only in accordance with the Asylum Seeker Benefit Law (AsylbLG). These benefits are generally far below the official subsistence minimum (see also chapter 7.4. – Right to social security). In the present context, one must keep in mind that the Asylum Seeker Benefit Law in no way sufficiently caters to the particular needs of children and young people. Hence, Gemany also denies refugee children, young people and their families the assistance they are entitled to in accordance with Article 10 of the ICESCR.

This particularly applies to the actual amount of assistance entitlement according to Section 3 AsylbLG. The Federal Constitutional Court, in its court ruling regarding "Hartz IV" (Unemployment Benefit II), has determined: "Children are not small adults. Their needs, which have to be met to guarantee a subsistence minimum that is in line with human dignity, must take a child's stages of development and a development of personality that is appropriate for children into account. The legislature has not ascertained the specific needs of a child in any way. Its reduction of 40 % from the standard benefit of a single adult is based on a free assertion without any empirical and methodical foundation."[55] This criticism may easily be transferred to the amount of benefits granted according to AsylbLG, given that, in this case, children and young people are also generally granted a lesser entitlement without a reasonable methodical justification for this.[56]

8.3.3. PROTECTION OF THE FAMILY UNIT IN THE CONTEXT OF SEEKING REFUGE AND ASYLUM

Also the "widest possible protection of the family", which is provided for in the ICESCR as well as in other human rights conventions, is all too often disregarded in the context of seeking refuge and asylum. Material security, assistance, support and emotional safety are not sufficiently taken into consideration when allocating places of residence and accomodation. There are often great obstacles, e.g. concerning the reunification of family members, as soon as they do not enter the country together and/or apply for asylum separately. The immediate living environment is restricted by regulations, the living space during the asylum procedure very limited (1-2 small rooms for a family of several persons), so that individual privacy and possibilities to retreat for all family members as well as the children's development are strongly compromised. Frequent, at times forced changes of location reduce the possibilities for child care, attending school or undergoing professional training as well as finding employment or obtaining medical care and treatment.
Particularly in connection with the Dublin II-procedure, temporary or permanent separations of families frequently occur. Furthermore, regarding persons with a toleration visa, a permission to remain during the

asylum procedure, and persons with a residence permit under Section 25 V AufenthG, family reunification is not possible. They are often separated for years.

DEMANDS:

- The Federal Government must be called upon to consistently make the best interests of the child a primary consideration in the legislation concerning foreign nationals, to ensure the realisation of child-appropriate asylum procedures and to draw the necessary conclusions from the withdrawal of the reservation regarding foreigners towards the United Nations Convention on the Rights of the Child in May 2010. Custody prior to deportation of refugee minors must be banned.
- The Federal Government must be called upon to systematically set up clearinghouses for URM. These must operate according to national standards and must ensure a screening of vulnerable groups. The practice of age assessment must be modified and a regular practice of taking refugee minors into care as well as providing refugee children with or without documents with medical care and schooling must be warranted.
- The Federal Government must be called upon to take into consideration the cohesion of refugee families when allocating living space, when considering requests for reallocation and in connection with Dublin II-procedures, as well as facilitating family reunification.

9. RIGHT TO AN ADEQUATE STANDARD OF LIVING (ARTICLE 11)

According to Article 11 (1) of the ICESCR, "The States Parties […] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right […]". According to the Federal Government, the indispensable foundation for providing equal opportunities in participation and personal fulfilment is, "guaranteeing the essential minimum income to cover socio-cultural and basic needs […] secured […] by the minimum income systems, most importantly the basic social assistance for job-seekers that has been in existence since 2005 (Book II of the Social Code) and social welfare (Book XII of the Social Code)."[57]. The following subchapters on Article 11 document that the social benefits do not facilitate an adequate standard of living for recipients of social welfare. The same applies to refugees whose monthly entitlement to benefits is even lower.

9.1. REFORM OF THE BASIC SOCIAL ASSISTANCE (GRUNDSICHERUNG)

On February 9, 2010, the Federal Constitutional Court (BVerfG) issued a groundbreaking court ruling regarding the structuring and implementation of Book II of the Social Code (SGB II). Following Section 1 of the Basic Law (Grundgesetz – GG) in conjunction with Section 20 (1) GG, the Federal Constitutional Court derives a basic right to be guaranteed a subsistence minimum that is in line with human dignity. Initially, three families went to court because they were of the opinion that the benefits for children that arise from SGB II are insufficient and not adapted to the actual needs of children. After a ruling of the Federal Social Security Court in January 2009, the procedure was passed on to the Federal Constitutional Court. The BVerfG found in favour of the suing families. Basic social assistance, which is disbursed by the Jobcenters, not only has to be sufficient for securing physical livelihood, but must also guarantee a minimum of social and cultural participation. The decision of the Federal Constitutional Court is not mentioned in Germany's fifth state report, since the report was already submitted in 2008. In several points, the Federal Constitutional Court clearly disagreed with the Federal Government's claim that basic social assistance for job-seekers guarantees the socio-cultural subsistence minimum in accordance with SGB II (see also chapter 7.1.). In their reasoning, the constitutional judges state that the regulations of SGB II concerning the standard benefits for adults and children do not comply with the constitutional requirements. Particularly benefits for children had been incorrectly extrapolated from the benefits of adults. "Children are not small adults,"[58] the court admonished. An individual need had not been defined, it said. The legislature will now have to make up for this. In a transparent, appropriate and objective procedure it will have to determine what children actually need. In the current calculation, for example, the expenses for education are not included in the account. However, the legislature must by all means take into account these needs when determining the standard rate[59]. The standard rates for adults must also be reexamined. The benefits as a whole must be made concrete and constantly updated by the legislature. Non-recurring and special needs have to be additionally covered. Therefore, it has to be verified if the benefits for securing livelihood are in fact sufficient for social and cultural participation. Among other things, this participation includes access to education, communication and mobility, as well as acknowledging cultural diversity and accepting a variety of lifestyles[60]. The court has set a term until December 31, 2010 for the legislature to accomplisch the necessary modifications.

In early 2010, about seven million persons were receiving benefits under SGB II, 1.7 million of them children, 600,000 single parents, and 1.3 million jobholders whose income is not sufficient to enable them to live above the poverty line, so-called "working poor". As the CESCR makes clear in its statement[61] on the connection between poverty and the ICESCR, poverty is not only an issue of the so-called developing countries. It must be feared that with the current structuring of SGB II, the German legislature will not comply with its core responsibilities which arise from a human rights perspective in the context of combatting poverty[62]. The Federal Constitutional Court's decision substantiates this concern.

The modified SGB II presented to the public by the Federal Government in early October 2010 and finally adopted in February 2011, even though the BVerfG set a deadline for the end of 2010, only partly comply with the mandate implied with the Federal Constitutional Court's decision[63]. In some areas there is even a deterioration of the situation of persons with a low income. For example, the assessment basis for calculating the needs of single persons was changed to the effect that now only 15 percent, instead of the former 20 percent of lowest-income households used as a reference group in the sample survey for income and expenditures, serve as a basis. Some areas were simply cancelled from the calculation. This leads to a

further reduction of needs in certain areas. Contrary to the constitutional judges' requirements, a transparent and methodically plausible derivation of the standard rates has not been introduced. In additon, there is no increase of benefits for children. The only reform is a voucher system that is to be implemented, however it is not yet clear how this will be organised and it does not include an assessment of the actual needs.

DEMANDS:

- The social infrastructure is the most important component of social security. It needs to be developed and secured. This is of particular and fundamental importance for the inclusion of socially disadvantaged children and young people.
- The Federal Government should set up a council of experts to ensure that when fixing the benefit rate granted with basic social assistance, the actual needs are taken into consideration. Representatives of collective bargaining parties, of academia as well as welfare and social organisations should be involved.
- The standard rates must allow self-reliant economic management on the basis of a realistic assessment of needs. Therefore, financial benefits must have priority over non-cash benefits. The social injustices that still exist regarding the calculation of standard rates must be eliminated.

9.2. REPORTS ON AN "ADEQUATE STANDARD OF LIVING" FROM THE VIEWPOINT OF SOCIAL WELFARE RECIPIENTS

Based on the latest reform of the social welfare system in 2005, the Federal Government assumes that 359 Euros per month provide recipients of social welfare with an adequate standard of living and beyond that ensure their participation in society. How this amount came about, more precisely: who participated in fixing this sum based on which reasoning and ultimately decided on it, would merit a separate investigation. The latest decision of the Federal Constitutional Court of February 9, 2010 gives a lead on this, stating that the assessment of the basic social assistance for job-seekers (ALG II) and social welfare, particularly concerning the development and needs of children, has no legitimate basis in fact. Based on extensive interviews with recipients of ALG II, this report is aimed at demonstrating the effects this arbitrarily fixed sum has on the daily routine and living conditions of persons dependent on social welfare.

9.2.1. BASIC SOCIAL ASSISTANCE FOR JOB-SEEKERS (ALG II) – ARBITRARY DEFINITONS OF POVERTY CONTINUE

Based on the fourth German state report, the CESCR in 2001 urged the Federal Government, "to establish a poverty threshold for its territory […]. In particular, the Committee urges the State party to ensure that social assistance provided under the Federal Social Assistance Act is commensurate with an adequate standard of living."[64] However, also in the fifth state report in 2008, the Federal Government does not establish a definition of poverty and declares that the new basic social assistance for job-seekers (SGB II), in place since 2005, as well as social welfare (SGB XII) guarantee the securing of basic needs as well as a socio-cultural subsistence minimum.[65] However, in the course of the social welfare reform addressed by the Federal Government, benfits for job-seekers were reduced. Although with the introduction of Unemployment Benefit II (ALG II) the standard rate for a single adult living alone was increased from 319 (including a lump sum for clothing) to 345 Euros, persons affected de facto have to manage with less money. This is due to the fact that non-recurring allowances which were granted by the former social assistance authorities, are no longer included: e.g. refrigerator, washing machine, furniture, bedclothes and renovation costs, when needed. In SGB II, non-recurring allowances are only granted for very few initial accoutrements (e.g. basic accoutrements for pregnancy). Extra needs are paid for in certain cases only in form of a loan with a monthly deduction from the standard benefits of up to 10 %. Therefore, the benefits of ALG II are distinctly below the level of the former Federal Social Assistance Act (Bundessozialhilfegesetz – BSHG).[66]

In accordance with Section 19 SGB II, ALG II comprises: "securing a person's livelihood including adequate expenditures for accomodation and heating". Furthermore, SGB II defines in Section 20 (1) that the standard benefit rate includes: "alimentation, clothing, personal hygiene, household goods, household energy excluding the amount allotted to heating, necessities of everyday life, and to a justifiable degree maintenance of contacts with the environment and participation in cultural life."[67] Currently, the monthly rate of ALG II amounts to 359 Euros for a single person living alone. In Germany, there are 4.92 million

persons respectively 8 % of the entire population receiving benefits according to SGB II. However, if family members living in shared household communities of need are included, the number rises to 6.78 million persons and a percentage of approx. 10 % of the population.[68]

9.2.2. EVERYDAY LIFE OF ALG II-RECIPIENTS

The following is a presentation of the results of the qualitative study "Leben mit Hartz IV"[69] ("Living With Hartz IV"). The authors sought to answer the following question: "Is the ALG II-rate a sufficient socio-cultural subsistence minimum to meet the bio-psycho-social needs of persons living in single households?" To this end, ten open, guideline-supported interviews were conducted with ALG II-recipients living alone in Berlin. Seven of them could be evaluated and summarised:

Alimentation: The results clearly show that all of the seven interviewees cannot afford a healthy diet. They eat cheap and processed foods because fresh products are not affordable for them. They are also not able to buy enough food, so that, on some days of the month, they often go without any food at all. Interviewee 9 commented: "My fridge has been empty for 8 days. Excuse me, where's my food? It seems, I'll have to consult God about that." Furthermore, they are constantly looking for special offers which comes with a lot of stress. Interviewee 9 says: "I went to the supermarket, I was so scared taking stuff, the people working there thought I was stealing!" All of the interview partners depend on support services (e.g. soup kitchens), borrowing money or even rummageing through waste containers.

Physical health: All of the interviewed persons also have problems with their physical health, caused or at least worsened by unhealthy eating and limited access to health care services. Due to the practice fee they cannot afford, as well as patient contributions for medication and preventive medical examinations, affected persons tend to endure the pain and postpone or completely refrain from getting treatment. Interviewee 1 states: "I should have gone out to buy an asthma inhaler for weeks but 10 Euros plus another 5 Euros, that's complete madness." When interviewee 8 had a cerebral haematoma that had not yet been detected and noticed the symptoms, she reacted in the following way: "I called an emergency doctor because I couldn't see a normal doctor at the time, since I just didn't have the money for that." Interviewee 9 states: "For example, I've been having difficulties breathing for ten days. The doctor diagnosed me with bronchitis. But I don't have the money [to go out and buy the medication]."

Emotional well-being: Furthermore, due to the lack of money, all of the persons affected suffer from emotional problems such as depressive moods, despair, constant stress, feelings of powerlessness and existential anxiety. Initerviewee 7 says: "You can easily despair with that little money, you may at times freak out, you can get into a panic." Personality changes are also mentioned. Interviewee 8 comments: "I used to be creative, I was adventurous and had many talents. Four years of Hartz IV have been enough [to destroy that]. I don't even know myself anymore." Even thoughts of suicide are mentioned by the respondents. For example, interview partner 2 states: "Suddenly you don't recognise yourself anymore. That's when you fall into this hole […]. You'll often be thinking like, 'I'm packing it in, it's over, I can't be bothered anymore.'"

Clothing: Adequate clothing is also a problem for all of the seven interview partners. Hardly anyone of them can afford new/almost new clothing. All of the persons interviewed depend on services such as clothing banks. Interviewee 5 comments: "I can't afford anything! Take clothing, for instance, you know, I can't afford that. I go to the clothing bank to get clothing for myself." Interviewee 3 even searches the streets for clothes lying around.

Housing/home: In addition, the respondents only have the bare necessities concerning home furnishing, things they have obtained from flea markets or bulk trash. They are not able to refurbish their apartments sometimes very much in need of renovation and faulty pieces of furniture cannot be replaced. In this context, interviewee 9 said: "I've had my TV-set for 13 years and now it's broken […]. So now, am I as a sick person supposed to sit here and stare at the wall? There's no justice in all of this. Yes, really, very disappointing and sad." And interviewee 5 says about getting a new washing machine: "What am I supposed to do? I really can't afford anything like that. Then I'd really have to win the lottery, then I would be able to buy a new one." Additionally, all interview partners have to save on utilities costs and are very restricted regarding washing clothes, heating, taking showers and using the light.

Leisure activities and cultural participation: The situation is similar regarding leisure activities and cultural participation. Most of the interviewed persons cannot afford attending an event, paying entrance fees, let

alone practising a hobby of their choice. Interview partner 7 says in this context: "At some point you just get fed up with things and you want to go out for a bit. After all, you can't sit indoors all the time […]. I mean, you're just sitting there and you're doing that every day, or month after month." Discounted tickets often have a problematic effect on self-esteem. Interviewee 1 comments: "[…] or going to the zoo. They also have discounts. And then you're always supposed to bring your Hartz IV-notification along, and that's like a stigma, and it's really defamatory and actually quite nasty, regarding one's self-esteem."

Mobility: Frequently, leisure activities and cultural participation are already impeded by a restricted level of mobility, since most of the respondents cannot afford to buy "BVG-tickets" (public transport tickets in Berlin). In this regard, interviewee 8 says: "When you're invited to go to a restaurant, or the movies, or to come along somewhere, and you're already thinking about how you'll pay for the metro train […]. That's illusory! […] Having to withdraw from other people because you can't take part in anything anymore, that brings along with it an isolation that's hard to cope with." For those that do decide to buy a monthly pass, this has drastic effects on other important areas of life. A personal vehicle in good order, for instance a bicycle, is not affordable for the persons interviewed. Interviewee 2 comments: "Sometimes you get lucky and someone you know has some spare parts. […] I've been going without brakes for half a year now."

Social environment and family: Many of the interviewed persons are supported by persons from their social environment, however, rather in an emotional than a financial sense, the circle of friends and acquaintances usually consisting of other ALG II-recipients. Occasionally, however, the interviewees mention withdrawing from their social environment because of feeling ashamed, and that they experience social isolation. In this context, interviewee 2 says: "When they realise it's taking too long, you're on Hartz IV for long, that's when they start cutting you off for fear that you might take them down with you. […]. They automatically think you're a lazy bum […]. And I actually go to work every day."

Career situation: The persons interviewed have different professional biographies and diverse levels of education. Furthermore, not all of the respondents are still capable of working. Interviewee 9, suffering from osteoporosis, says: "I am not able to work because of my medical condition. I would like to work. I worked for 40 years and paid a great deal of tax. […] And what I'm thinking about now, is: What am I supposed to eat? The fridge is empty because I have to use the money to buy medication. […] That's a glaring injustice." Those interview partners capable of working have the dominant desire to obtain a meaningful occupation on the primary labour market that corresponds with their personal skills. Apart from hoping for a professional prospective, the persons affected speak of resignation, anxiety about the future, and, regarding "job opportunities with compensation for additional expenses" (MAE-measures), such as "1-Euro-Jobs", they also speak of exploitation. Interview partner 2 says: "I don't really feel like someone who is unemployed, but I do notice it at the cashier. I go to work like every other normal person, but with Hartz IV, you're [on the second labour market], just a cheap slave."

Experiences with the Jobcenter: Treatment, requirements, regulations and laws: The persons interviewed did not feel they were getting competent advice and support from the Jobcenter employees. It can generally be said that the respondents almost invariably evaluate the structures of the Jobcenter and the Jobcenter employees' mode of dealing with clients as negative and very stressful. For instance, it takes too much time for letters and applications of affected person to be answered, or they do not receive any response at all, even after repeated requests. Furthermore, many documents are requested for submittal more than once because they allegedly never arrived or can no longer be found. The respondents also address the problem of frequent changes of the responsible case handlers due to an internal system of rotation. Consequently, ALG II-recipients do not have a steady contact person and are confronted with requests that are in some cases contradictory and confusing. "At the Jobcenter you get the feeling that you're constantly crashing into a rubber wall," as interviewee 8 describes it. Moreover, the Jobcenter employees cannot be reached by phone and send out impersonal, preprinted letters that always contain a threat of reducing benefit payments. Interviewee 8 says in this context: "I was in no way prepared for the sudden degradation I experienced from institutions and authorities. […] I took it so personally, although it was a preprinted letter. Every time it felt like an attack on the worthiness of a human being as such. I suddenly felt like I was living in a totally different country."

Affected persons also report that they were not informed regarding their rights and there are many calculation errors and wrong decisions on the part of the Jobcenter. Furthermore, they are subject to the willingness, respectively unwillingness, of the individual staff memebers. If the latter occurs, this can also lead to a personal attack or an insult on behalf of the staff. In interview no. 9, the following situation is described: „I'm

a nervous wreck. For a year now I'm being laughed at there. He fixes an appointment with me, then sits in another room and says, he didn't fix an appointment. Then I say: 'But I have an appointment notification here in my hand!' And replies: 'Nope, I'm on holiday.' And then I said: 'Where are you on holiday?! First you're in one room and then you walk into another room and are on holiday there?!'" The respondents describe the Jobcenter employees' attitude towards clients as being generally inhumane, condescending, degrading, unreliable, lowbrow and arbitrary. This on the other hand induces stress, fear, disorientation and resignation, but also rage and aggressions. For the persons affected, the fear of possible sanctions (reduction of benefits) plays the most important role here. Interview partner 2 explains: "You become defenceless, you no longer dare to defend yourself."

Pressure is also exerted with the constant requests to take up work and the threat of benefit cuts connected to this, as well as the obligation to take part in ill-paid job-generating measures. These measures are not regarded as being helpful to integration into the primary labour market. Furthermore, the respondents mention the threat of being forced to move, which also has an existence-threatening effect. Interviewee 9 states: "An apartment is allowed to cost up to 360. In the meantime, my apartment costs 390 including heating. Because of 30 Euros they virtually terrorised me. They terrorised my health. Every time I left the Jobcenter building, my blood pressure went up, my blood sugar went up, and I just broke down on the street."

Utilisation of support services: Since the persons affected can no longer cope with the problems in connection with the Jobcenter, almost all of the respondents make use of support services such as social counselling centres, or in a few cases even lawyers. Interviewee 5 says: "You need to get help, otherwise you can't manage at all. You need support."

Personal status and criticism of current politics: All of the persons interviewed see the cause of their precarious situation in German politics. They feel abandoned and betrayed because their concerns and interests are not represented and they perceive policies to be brutal. According to the respondents, the money is being distributed in such an unjust way that the rich are becoming richer and the poor are being deprived of their basis of existence. Interview partner 7 says: "If you already have a millon, you get another one on top, if we're talking about the ones at the top. And if you don't have anything, then they want to take that away as well." Interviewee 9 uses even harsher words: "The poor people are supposed to go, die. And the rich are supposed to live." Many suffer from the stigma of being self-imposed and lazy unemployed persons and in one way or another feel like second-class citizens. In this context, interview partner 3 is irked by the defamatory comments uttered by politicians and in media reports, and says: "It fills me with anger and hatred. […] And that's really bad because I hate violence. And when I'm having fantasies of violence, then that's terrible. Because somehow that's an indicator for how dehumanising this is." The respondents expect more understanding and empathy from politicians, an improvement of the situation on the labour market and a more just redistribution, in other words an increase of the standard rate. For, under the current circumstances, the interviewed persons say, they have little to no prospects for the future.

Finances: In summary, it can be said that according to all of the seven respondents, the standard rate (with or without additional income) is not sufficient to sustain one's livelihood. Many have no money at all at their disposal for longer periods per month. For this reason, all of them are in debt and are not able to save up money. Interviewee 3 has the following comment: "I just don't want to have the feeling that I'm being pulled through. Well, then, it's sad to say, I would really prefer […] just to be viewed as a criminal at some point." If the respondents decide to buy something urgently necessary in one area of their life (e.g. medication) this has an immediate negative effect on other areas (such as their diet), which they wouldn't have enough money for even without this discrepancy. For this reason, many of the inteviewed persons accept support services that are price-reduced or gratuitous in the areas of food, clothing or leisure activities, although this generally comes along with great discontentment, frustration, shame and even humiliation. Interview partner 8 comments: "You have to be careful about how you allow others to treat you and how low you let yourself get. I would prefer being someone who supports the food banks than someone soliciting for food. I can't bear to to see myself in that light as well, […] I would prefer to die of hunger."

9.2.3. SUMMARY

Contrary to the government's claims, the results of the qualitative study "Leben mit Hartz IV" clearly show that ALG II-recipients are not guaranteed an adequate standard of living in accordance with Article 11 of the ICESCR. What is remarkable here, is that the standard rate as a socio-cultural subsistence minimum is not

even sufficient to satisfy basic physical needs without one or the other existential need being compromised when another equally important basic need is met. The persons affected are not able to sustain themselves with enough food, to obtain the necessary medication, medical treatment and clothing. The persons affected suffer from existential anxiety and have to attempt to satisfy these physical needs at the expense of other basic needs, whereby the need for food is the most urgent. It is exactly this situation which according to the General Comment No. 12 of the CESCR is not acceptable. It declares the necessitiy of economic access to food at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. For a calculation of the standard rate of ALG II that is as realistic as possible, we recommend considering Lutz Hausstein's empirical ananlysis "Was der Mensch braucht" (What a Human Being Needs). In his calculations he detected a "striking funding gap" concerning the current standard rate and demands a monthly allowance of 685 Euros.[70]

DEMANDS:

- A poverty threshold for the federal territory must be determined, based on an empirically comprehensible, socially qualified and supported definition of poverty.
- The standard rate of Unemployment Benefit II (ALG II) has to be elevated to an extent that it guarantees a socio-cultural subsistence minimum and an adequate standard of living according to Article 11 of the ICESCR.

9.3. 100% SANCTIONS FOR RECIPIENTS OF SOCIAL WELFARE

Due to a legislation amendment effective as of January 1, 2007, recipients of social welfare can have all of their benefits cancelled. As before, the standard benefit is cancelled completely with the first breach of dutyd. What had changed, was that in case of repeated breaches of duty, the benefits for accomodation and heating could also be cancelled for three months. The suspension of all benefits (termination of payment of Unemployment Benefit II, termination of rent payments, termination of cost absorption for health insurance) ensues for three months and may be reduced to six weeks under certain conditions. The number of "total sanctions" imposed in Germany is not statistically recorded on a national level. In Munich alone, the number of total sanctions imposed in October 2009 amounted to 217.[71]

A study conducted by social scientist Anne Ames shows that sanctions can lead to homelessness, severe psychosomatic illnesses, and malnourishment.[72] Problems concerning health care and the threat of becomeing homeless are also confirmed in the study conducted by certified social pedagogue Nicolas Grießmeier, who also carried out interviews with persons affected.[73] Both studies observe that persons affected will resort to illegal means in order to financially cope with everyday life.

The information on possibilities of applying for food coupons is not disseminated in a transparent way.[74] Articles in the press as well as film documentaries repeatedly illustrate individual cases in which persons became homeless because of total sanctions.[75] One case even documented the event of someone dying of hunger.[76]

According to the authors, the statutory right to adequate food, clothing and accomodation is violated by total sanctions.

DEMAND:

100 %-sanctions are to be abolished in order to guarantee the socio-cultural subsistence minimum and an adequate standard of living according to Section 11 of the ICESCR.

d For example, missing an appointment, refusing a so-called 1-Euro-Job, a training measure, etc.

9.4. CHILD POVERTY IN GERMANY – COMPROMISING THE RIGHT TO FOOD

The number of children and young people in Germany affected by poverty has reached an alarming level in the past years. According to the German Federal Government's 3rd report on poverty and wealth[77], 12 % of the children and young people in Germany have to grow up with a poverty risk. In the report, the Federal Government at the time claimed that the welfare state was effective and the standard rates according to SGB II were meeting the needs of children and young people. Numerous studies of welfare organisations, children's rights organisations and initiatives of affected persons prove the opposite is true. For example, the German children's aid organisation (Deutsches Kinderhilfswerk) in it's 2010 report on children yet again establishes that, considering 3 million children affected by poverty, there is an urgent need for action[78]. Studies in which the children and young people get a chance to voice their concerns also make the urgency of the issue obvious. The 2nd World Vision Children Study describes the development of a 4/5 society among Germany's youngest generation: 20 % of the children and young people interviewed stated that they feel socially marginalised[79]. In February 2010, the Federal Constitutional Court (BVerfG) also confirmed the pressing need for action. The court came to the conclusion that the regulations of SGB II concerning the standard benefits for adults and children do not comply with the constitutional requirement following from Section 1 (1) of the Basic Law (GG) in conjunction with the Social State Principle following from Section 20 GG to guarantee a subsistence minimum that is in line with human dignity (see also chapter 9.1.). Especially relating to the so-called children's standard rates, lawmakers have to make considerable amendments. The judges expressed this in no uncertain terms: "The legislature has forborne undertaking any measures of determining the needs of children – even though everyday experiences already suggested that certain particularities apply when calculating the subsistence minimum for children."

A child-appropriate assessment of needs has to be established which not only covers the individual needs of securing one's physical livelihood but also facilitates participation in social, cultural and political life. Nevertheless, the groundbreaking decision of the BVerfG still lacked the dimension of human rights. Child poverty is also a human rights issue which jeopardises a series of elementary rights. Among others, the right to food is not guaranteed. As numerous studies have established, the standard rates currently effective do not fulfil the nutritional needs of children and young people[80]. Living under "Hartz IV-conditions", children and young people have between 2.76€ and 3.68€ at their disposal for food and drink every day. This is completely insufficient for an adequate, that is to say, a balanced and healthy diet, and leads to an inequality in the accessibility of a healthy diet. In this context, different law sectors often collide: for example, in the composition of standard rates, there is no designated amount for the field of education. In many cases this consequentially means: only those that save on food have extra money for necessary expenditures for education. However, the General Comment No. 12 of the CESCR makes it clear that governments need to adopt measures to guarantee the accessibility of food, "in a sustainable way and without compromising the use of other human rights". The legislature has to generally reassess the needs of children, however, it is doubtful if enough attention will be paid to the dimension of human rights in this context.

DEMANDS:

The standard rates according to SGB II have to be newly calculated for all persons living in Germany, particularly for children, hereby taking into account specific experiences of persons affected and interest group associations. The adequacy of the current statistics model needs to be put to the test. Human dignity and the respect and safeguarding of human rights need to be the main focus when calculating the subsistence minimum.

9.5. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING FOR ASYLUM SEEKERS AND REFUGEES

9.5.1. RIGHT TO HOUSING

In many of the federal states, refugees in an asylum procedure have to live in state-run accomodation facilities over a long period of time (Reference to the state report, from p. 72). The housing and living situation in such lodgings means being accomodated in cramped conditions. A family with two children, for instance, is provided with a room of 12-16 square metres in a habitable container. This room serves for

dining, living, sleeping, palying, as well as for doing homework. The complete domestic life takes place here. Neither the parents nor the children have possiblities to retreat. The kitchen, toilets and shower facilities also have to be shared with many other people. Frequently, the hygienic situation is desolate. Mould on the walls can be found time and again. The structural condition of the accomodation facilities leads to immense heat in the summer and cold in winter. The level of noise in the facility is extremely high. Furthermore, the residents' different needs, e.g. utilisation of the kitchen and sanitary facilities as well as varying needs for leisure activities and rest etc. are not sufficiently taken into consideration.

Due to the confrontation with violence, sexual assaults, fights, etc., living in an accomodation facility brings along more dangerous situations than living in a normal apartment. Particularly women and children are often afraid to use the sanitary facilites at night. Buckets in the room are a makeshift solution, or the children wet their beds. Being the weakest living in the house, children are often the target of verbal and physical attacks. Special institutions for the protection of women and children hardly exist.

The result of this imposed communal accomodation is insecurity, feeling forlorn, hopelessness and marginalisation, leading to depression or aggression and emotional strain on the parents all the way up to psychiatricisation. The isolation and hopelessness is a particularly significant problem in communal accomodation facilities in the countryside, due to of the lack of resources for the advancement of children, as well as lacking opportunities for integration, learning and jobs for young people and adults.

9.5.2. ADEQUATE STANDARD OF LIVING, RIGHT TO FOOD

Asylum seekers, persons with a toleration visa and refugees allowed to remain with a residence permit for humanitarian reasons under Sections 24, 25 IV (1), Section 25 V and 25a AufenthG receive basic benefits in accordance with Sections 3 et seq. AsylbLG. The basic benefits are to meet the need of clothes, food, accomodation, heating, household effects and furniture.

The basic benefits are principally rendered in form of vouchers or non-cash benefits. Only if it is necessary according to circumstances, the principle of non-cash benefits may be abandoned. Currently, the majority of the federal states, including for instance Berlin, make use of this option (unlike Bavaria, Baden-Wuerttemberg and Saarland > parcels, and Thuringia, Lower Saxony > vouchers). Not only are the non-cash benefits frequently of inferior quality, but the persons affected are deprived of the right to an autonomous way of life.

Apart from basic benefits, the persons affected are granted "pocket money" to be paid in cash. This sum in cash totals 40.90 Euros/month (1.36 Euros/day) and is supposed to meet all "personal" needs, including for instance public transport (mobility), legal assistance, phone costs, postal charges, information, internet, extra food, etc. Should recipients be accused of abuse according to Section 1a AsylbLG, the cash amount is completely cancelled. The limitation of the cash amount to 1.36 Euros/day restricts persons affected and frequently prevents their access to counselling services for refugees, cultural and religious events, postal services, telephone and internet, legal assistance, etc. Very often, the money needed to visit friends and relatives and to access the legal protection of a lawyer, as well as the essential fare for public transport, can only be acquired by working illegally.

For children, the portion of cash is reduced to 20.45 Euros/month and the nominal value of the basic benefit to roughly 60 % of the amount for adults. Neither the regular expenses for school can be covered by this, nor the fees for meals in school and kindergarten, or other personal needs, starting from baby care through to necessary fares.

	Head of the household	Family members aged 0-5	Family members aged 6	Family members aged 7-13	Family members aged 18 and older	two partners aged 18 and older
AsylbLG cash AsylbLG Section 3 II AsylbLG total	40,90 € 184,07 € 224,97 €	20,45 € 112,48 € 132,93 €	20,45 € 112,48 € 132,93 €	20,45 € 158,50 € 178,95 €	40,90 € 158,50 € 199,40 €	2 x 40,90 € 158,50 + 184,07 € 199,40 + 224,97 €
SGB II/XII	359,- €	215,- €	251,- €	251,- €	287,- €	2 x 323,- €
Reduction in %	37,33 %	38,17 %	47,04 %	28,71 %	30,52 %	34,31 %

Since the introduction of the law in 1993, the benefits in accordance with AsylbLG have not once been adjusted to the development of prices. They are between 28 and 47 % below the benefit level of Unemployment Benefit II (ALG II).

In its court ruling of February 9, 2010, the Federal Constitutional Court (BVerfG) has declared the calculation of standard rates of Unemployment Benefit II as irreconcilable with the Basic Law/GG (file no.: BVerfG 1 BvL 1/09, 1 BvL 3/09 and 1 BvL 4/09). Following Section 1 GG – in conjunction with the Social State Principle of Section 20 GG –, the Federal Constitutional Court derives a basic right to be guaranteed a subsistence minimum that is in line with human dignity. This basic right is exempt from man's command, has to be warranted by the state and is not restricted to nationals. With reference to this court decision, the Regional Social Court of North Rhine-Westphalia (LSG) has now requested the BVerfG to decide on the question whether AsylbLG is in line with the constitution (order effective July 26, 2010 – L 20 AY 13/09). The LSG's reasoning for this decision was that, in the face of such considerable divergences between the benefits for asylum seekers and those according to SGB II, it could be assumed that the benefits would obviously not be sufficient to guarantee a subsistence minimum that is in line with human dignity.

RECOMMENDATIONS/DEMANDS:

- Elimination of allocating persons to communal accomodation under AsylbLG, AsylVfG, AufenthG and laws of the federal states regarding reception of refugees. Allocation to communal accomodation should not last longer than six months (e.g. right to absorption of rent costs for apartments rented by persons affected after three months, in cases of hardship even earlier);
- Identification of traumatised parents as such at an early stage, so that they can receive adequate care and treatment;
- Development of appropriate, if necessary assisted housing facilities with staff accordingly trained to care for dependent persons especially in need of protection (e.g. for mentally or physically disabled persons);
- Elimination of non-cash benefits;
- Abolishment of AsylbLG, respectively adjusting the level and form of benefits to the standard rates under SGB XII (see decision of the BVerfG of February 9, 2010). The BVerfG demands a new determination of the subsistence minimum according to SGB II/XII until the end of 2010. At the very least, a considerable increase of benefits (alignment with the level of SGB II/XII), a reduction of the time these benefits are drawn, and the exclusion of migrants allowed to remain with a residence permit in accordance with AsylbLG is necessary.

10. RIGHT TO HEALTH (ARTICLE 12)

10.1 COERCIVE PSYCHIATRIC TREATMENT OF PEOPLE WITH OR WITHOUT DISABILITY IN GERMANY

"The States Parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

Aware of the General Comment No. 14 and No. 15 of the ICESCR and the documents of the General Assembly of the United Nations: A/HRC/10/48 of January 26, 2009 and A/63/175 of July 28, 2008.
The Fifth State Report of Germany does not mention the quickly growing number of people in psychiatric treatment. Neither does it take into consideration the rising mortality rate (since 1970) of patients with a psychiatric diagnosis that were treated with antipsychotic medication by coercion[81] or without informed consensus.
The German government is aware of the strategy of the WHO (see p. 51 E/C.12/DEU/5, French version), but considers these issues as part of responsibilities of the Ministry of Health.
The German government reports further, that the populations access to water is secured over the whole country (see p. 53 E/C.12/DEU/5, French version), but forgets the small but growing group of people treated with fixation or seclusion, for whom this unrestricted access cannot be secured.

The report on psychiatric coercion (see footnote no. 81) of the Federal Organisation of (ex-) Users and Survivors of Psychiatry in Germany (BPE e.V., member of the world association WNUSP) deals with children, adolescents, adults and elderly people. It is primarily concerned with people without disabilities, that are temporarily mentally handicapped or that have been and still are diagnosed wrongly. It is further concerned with people with long term mental disabilities, that they might have additional physical or intellectual disabilities.

In the light of new findings from independent pharmaceutical studies and epigenetics, and considering the high suicide rate and how long term pharmaceutical treatment probably increases the mortality rate of patients, the medicinal benefit has to be questioned. The current legislation has to be assessed and adapted, alternatives for coercive psychiatric treatment have to be established nationwide.

Approximately 150.000 people with or without disabilities underwent court-ordered compulsory psychiatric hospitalisations in Germany in 2008, that is about 175 people per 100.000.
This includes only compulsory hospitalisations that involved coercive treatment with drugs (see footnote no. 81). Hospitalisations in case of emergency, that involve a brief coercive treatment with drugs and are followed by a so called voluntary continuation[82], are not registered. Affected are very often elderly women, unemployed people, young men and people that had been hospitalized repeatedly before, over-represented is also the diagnosis of schizophrenia.[83] Statistically, women with disabilities are three times more likely to become a victim of violence than women without disabilities.
Coercive treatment, especially with antipsychotic medication, should be avoided[84], as it always leads to an aggravation of symptoms and traumatisation[85], from which chronic psychosocial disabilities commonly arise in the long run. After coercive treatment the right to health and other rights of the ICESCR are restricted, especially article 6, 9 and 11, which means that also the rights of family members are restricted.

Long term studies show, that the rate of therapeutic response did not improve significantly with the introduction of antipsychotic medication.[86]
In international comparison people with a diagnosis of schizophrenia living in developing countries (India, Nigeria, Columbia), where only 2,6 % to 16,5 % of those diagnosed are treated with antipsychotic medication, over all experience significantly less psychotic episodes and more full remissions.[87]
The World Health Organisation estimates that only 50 % of the medications prescribed for chronic diseases are taken by the patients. Thus not taking a medicine is not the exception.[88] None the less patients with the diagnosis of schizophrenia are commonly supposed to generally have no insight into the illness and are therefore forced to take highly dosed drugs.
Recommendations: 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 16, 17 and 18.

According to the German Medical Association only 0,5 % of medical malpractice suits apply to psychiatry. Tanja Afflerbach, damaged by antipsychotic medication[89], has filed a suit since 2005 on federal state

level. The small number of legal suits has several reasons: It is caused by the traumatisation (see also footnote No. 85) of coercive treatment or forced antipsychotic medication, by the poor quality of life of those addicted to antipsychotic drugs[90], by the extremely adverse legal conditions[91] and by the lack of alternatives to hospitalisation. Taking into consideration the very disadvantageous prospects of a lawsuit and further risks of health, a long term legal case is out of the question for most of the patients. Recommendations: 4, 6, 10 and 11

During involuntary detention[92], especially with fixation and seclusion, fundamental determinants of health such as the access to drinking water, adequate sanitation or the adequate provision of food are often neglected by medical staff. Symptoms of the illness are thus intensified. Recommendations: 1, 2, 3, 4, 5, 6, 7, 11, 13 and 18

Also, the incomprehensible language in legal correspondents to issue forced medication orders can aggravate symptoms. The legal support, necessary for patients to exercise legal capacity, is usually denied to the patients. Recommendations: 1, 2, 4 and 7

During hospitalisation in locked wards or half-open units, usually based on a court order for coercive treatment, the treatment of somatic illness often is not possible for organisational or economic reasons and is ignored by doctors.[93] Recommendations: 1, 3, 17 and 18

Until now there is no adequate education of psychiatric medical staff in Germany that involves also the relationship between health and human rights. Recommendations: 5 and 7

One of the intentions of the WHO regional office Europe is to improve the health of the population until 2020 and lower the suicide rate by a third... This goal can be reached, when human rights are respected and the quality of life for people with mental health problems, especially with chronic disorders, is improved.[94]
According to official statistics[95] around 10.000 people kill themselves in Germany every year: The suicide figure for men is about 19,7 per 100.000, for women about 6,6 per 100.000. The number of suicide attempts is even ten times higher.
Individuals with a diagnosis of schizophrenia are almost thirteen times more likely to commit suicide than the general population (SMR 12,86).[96]
Comparable epidemiological studies do not exist yet for Germany, even though they could help future improvements in the psychiatric health system. A central register of suicides[97], that illustrates the relationship between suicide rate and coercive psychiatric treatment, has not been established. Illegal treatments such as non-authorized coercive treatments and restraints or off-label[98] medication should be taken into account. Recommendation: 9

Antipsychotic medications often provoke depression and thus cause or aggravate suicidal tendencies.[99]
Depression, suicidal tendency, excitation states and deliria caused by antipsychotic medication often happen, even though the patient has taken the dose prescribed by a doctor.[100] However, antipsychotic drugs do not medicate the cause of the mental health problem, which are usually profound conflicts. They provoke a positive symptom, which is the postsynaptic block.[101]
Risks like irreversible tardive diskinesia, neurodegeneration, overweight[102], diabetes mellitus, metabolic syndrome and cardiotoxicity[103] are underrated. Serious consequences like the increased mortality[104] are ignored.
Because of the research, publicity, training and lobbying[105] financed by the industry, society underestimates the risks and dangers of antipsychotic drugs and misjudges them as a cure. Appropriate health information[106] regarding these issues are not accessible for the majority of the population. Recommendations: 10 and 17

On the 16th of October 2002 the charter of patients´ rights in Germany was provided to implement valid rights into practice. The charter describes the rights of patients to advisory, provision of medical care, Information and instruction. The patient takes part of the responsibility for his health and can prevent or overcome disease or disability by leading a healthy lifestyle, by participating in health prevention programs and by active compliance to therapies and rehabilitation. As a basic principle the patient has the right to choose freely or change doctor and hospital.
During coercive treatment it is usually denied to the patients to choose freely doctor and hospital. They are not informed about the serious effects and the remote damages of antipsychotic medication. Guidelines for dosage are ignored or avoided by poly-medication. There are no gender-related limits for dosage. Epigenetical issues and factors for health risk are not taken into consideration. Serious health risks are accepted. Even

though it is more efficient[107] and less dangerous, psychosocial therapy without pharmaceuticals is not offered to patients, because it is not permitted by the cost accounting system of the German health care. Interactions with other pharmaceuticals have rarely been investigated and are hardly calculable. There is a higher risk of mortality with antipsychotic poly-pharmacy.[108] Neither patients nor their court-ordered official or voluntary assistants nor the responsible judges are able to consent with competence to the therapy and make a qualified decision. Therefore the decision which risks are considered to be serious, and which are not, completely depends on the doctors. Serious mental and somatic side effects, the denial of sexual self-determination and tardive damages are usually considered as acceptable risks. The so called psychiatric psychotherapy serves to secure insight into the illness (psycho-education) and the long term consumption of pharmaceuticals (compliance).

Doctors are not acquainted with the basic recovery oriented approaches.[109] The traumatic experience of coercive treatment and the difficult living conditions afterwards are rarely taken into consideration. Patients are usually not informed about the devastating consequences of discontinuing or reducing antipsychotic medication.[110] Most doctors avoid talking about how to discontinue medications in a qualified and enduring way.[111] Health insurances put pressure on hospitals to release patients, a lot of them have to be resumed. Recommendations: 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 14, 17 and 18

The German law maker's intention to avoid hospitalisation as much as possible has been undermined in the last ten years, as most doctors do not know about preventive sociotherapie[112] (socialtherapy) and health insurances have contracted only a few providers.
Some hospitals use so called sociotherapeuts to secure outpatients` adherence to antipsychotic medication. According to article 74 no.19 of the German Constitution the job title sociotherapeut is not standardized.[113] Recommendations: 12 and 17

Law makers have facilitated the Integrated Care (Code of Social Law V), that allows alternatives to stationary care. This could develop to a user-oriented Therapy in permanently reliable structures, that are built in a coordinated, close meshed cooperation of the different institutions. Such alternatives have only started and are financed by only a few health insurances.
Following the compulsory long term care insurance (Code of Social Law XI) Soteria concepts[114] and approaches of preventive, qualified home-based treatment (that take need-adapted treatment[115] and open dialogue[116] into account) are rarely offered, because only a little number of health insurances have signed contracts according to the Code of Social Law. Until now the budget spent for alternative treatments is marginal in comparison to the budget for stationary care. The medication of clients[117] could be reduced.
Educated recovery assistants are neither financially nor professionally acknowledged, a need-adapted assistance that is critical towards psychiatry (peer support[118]) is rarely possible yet. The possibility of participation in the development of peer support education is not sufficient. Recommendations: 1, 3, 7, 8, 12, 13, 14, 15, 16 and 17

The high requirements on the professional competence of court-ordered official and voluntary assistants have not been regulated yet by law makers. Such directions would be of great importance to conciliate legal practice with legal status and to keep things in proportion. Recommendations: 2 and 13

The Bundesverband Psychiatrie-Erfahrener (BPE) e. V. recommends, that the committee takes up the following topics for a list of issues and for the dialogue with the German government about the Fifth State Report:

1. Construction of an effective network of legal and social support, that paves the way for a contemporary and adequate health care system, that enables recovery (see footnote no. 109) rehabilitation and empowerment and that is consistent with the articles 2 and 12 of the ICESCR and the articles 12(3), 13, 14, 19, 25, 26(1) of the CRPD (see also article 74, sec. 1, no. 7 German Constitution)

2. Assessment of the legal practice of restraint for coercive treatment in accordance the laws relating to guardianship §1906 and § 1631b of the German Civil Code as well as to the 16 Mental Health Laws and Laws of involuntary commitment of the federal states (Laender). Plus the specification of their concepts of law to facilitate rehabilitation and empowerment and to conciliate the mentioned laws with article 12 of the ICESCR and with the articles 4, 5, 12(3), 13, 14, 16, 19, 25, 26(1) of the CRPD (article 74 sec.1 no. 7 German Constitution).

3. Assessment of all forms of coercive treatment (Fixation, seclusion, coercive medication and restricted freedom of movement), whether they are consistent with a contemporary and adequate health care system, and creation of a nationwide network of coercion-free retreating spaces that are also outdoors[119] in accordance with article 12 of the ICESCR and the articles 4, 5, 16, 19, 25 of the CRPD and article 74 sec. 1 no. 7 of the German Constitution.

4. Nationwide establishment of patient's lawyers that are specialized in medical malpractice law, in the right to health and in independent pharmaceutical research, that are thus able to help people with disabilities or temporary disabilities to assert their right to health in accordance with the articles 2 and 12 of the ICESCR and the articles 5, 12(3), 13, 14, 25, 26(1) of the CRPD.

5. Nationwide securing of the education and secondary training of mental health personnel on human rights, research on psychiatric drugs that is funded independently from pharmaceutical companies and the social importance of the right to health in accordance with articles 2 and 12 of the ICESCR and the articles 4, 14, 16, 25, 26(1) of the CRPD.

6. Nationwide securing of the training of the judicial system personnel including police and penal system on the human right to health and independent pharmaceutical research in accordance with the articles 2 and 12 of the ICESCR and the articles 4, 13, 14, 26(1) of the CRPD.

7. Nationwide securing of qualified, enduring reduction and tapering of antipsychotic medication, of recovery-approaches and peer-support, and of human rights in practice in the curriculum and the education of doctors in accordance with the articles 2 and 12 of the ICESCR and the articles 25 and 26(1) of the CRPD.

8. Securing of the revision of the national health regulations for the treatment of schizophrenia taking into account recovery-approaches, peer-support and new findings of independent pharmaceutical research in accordance with the articles 2 and 12 of the ICESCR and the articles 4, 5, 12(3), 14, 16, 19, 25 and 26(1) of the CRPD.

9. Introduction of a national patient-oriented suicide register in cooperation with independent former psychiatric patients, that takes into account the involvement of pharmaceutical medication, electric shocks, isolation, fixation and other forms of previous psychiatric treatment, including illegal treatments in accordance with article 12 of the ICESCR and the articles 14, 16, 25, 26(1), 31 of the CRPD.

10. Introduction of a research register for quality assurance of pharmaceuticals to publish the negative results in accordance with the articles 2 and 12 of the ICESCR and the articles 16, 25, 26(1), 31 of the CRPD.

11. Drafting a national patient's law, that secures that psychiatric patients have the same rights as patients with non-psychiatric diagnoses in accordance with the articles 2 and 12 of the ICESCR and the articles 2, 12(3), 16 of the CRPD.

12. Nationwide securing of the norming of the quality standards for home based treatment, of the professional title and of the quality standards for socio therapists and recovery assistants[38] in accordance with the articles 2 and 12 of the ICESCR and the articles 14, 16, 25, 26(1) of the CRPD.

13. Nationwide obligatory regulation of the professional competence of court-ordered official and voluntary assistants taking into account new findings of independent pharmaceutical research and the human right to health in accordance with the articles 2 and 12 of the ICESCR and the articles 5, 12(3), 16, 26(1) of the CRPD.

14. Development of a national law for prevention that introduces a nationwide network for help, that reduces handicaps and enables recovery[26], rehabilitation and empowerment in accordance with the articles 2 and 12 of the ICESCR and the articles 5, 16, 19, 25, 26(1) of the CRPD.

15. Development of a national plan of action to build a coordinated, nationwide, close meshed cooperation of the different institutions for an integrated care that reduces handicaps and that enables recovery[29], rehabilitation and empowerment in accordance with the articles 2 and 12 of the ICESCR and the articles 2, 14, 16, 19, 25, 26(1) of the CRPD.

16. Nationwide allocation of funds to private and non-governmental organisations to build a patient oriented preventive health network in accordance with the articles 2 and 12 of the ICESCR and the articles 16, 19, 26(1) of the CRPD.

17. Adjustment of the standards and putting into practice the guidelines of the Federal Joint Committee as outlined in the Code of Social Law, book no. 5, book no. 9 and book no. 11 according to the article 12 of the ICESCR and the articles 2 and 25 of the CRPD.

18. Instant establishment of a federal commission for the nationwide prevention of violence, abuse and degrading treatment and punishment in hospitals that are under responsibility of the Laender in accordance with the articles 15 and 16 of the CRPD.

10.2. THE SITUATION OF REFUGEES, ASYLUM SEEKERS AND PEOPLE WITHOUT DOCUMENTS

In the fifth state report of the Federal Republic of Germany, it says on p. 87 that, "Disadvantaged groups among the population suffer more frequently from illnesses, pain, injuries and disabilities" and "they more frequently cite health-related obstacles to performing day-to-day activities and participating in socio-cultural life, and they have a higher mortality risk." However, neither here nor on the following pages does the state report address that – particularly for refugees – access to adequate health care is considerably restricted.

Health care for refugees is regulated by the Asylum Seeker Benefit Law (AsylbLG) and is subject to considerable restrictions compared to the benefits available to members of statutory health insurances. In accordance with Section 4 AsylLG, health care is limited to urgent or painful illnesses; according to Section 6, treatment that is essential for the preservation of health may be performed. In practice, this means that chronified organic and psychological illnesses are frequently not treated, preventive measures are not provided. Particularly in rural areas and in eastern Germany, psycho-social, medical, and psychological counselling and treatment are insufficiently available. Insofar, the regulations of AsylbLG are not in accordance with the EU directives for the reception of asylum seekers (Council Directive 2003/9/EC), which state that persons with special needs, like for example persons who have suffered torture, rape or other forms of severe psychological, physical or sexual violence, must be granted the necessary medical or other assistance.

Migrants without a legal residence status form a particularly disadvantaged group. All public authorities are legally obliged to report to the Foreign Nationals Office the identity of an "irregular" foreigner (persons who entered the country without legal status or whose legal status has possibly expired) staying in Germany. This has the effect that with the threat of deportation after accessing health care services, these services are not utilised, although in principle there is a legal entitlement to health care services according to the Asylum Seeker Benefit Law.

This constitues a violation of Article 12 of the International Covenant on Economic, Social and Cultural Rights, which, among other things, determines that the States parties have to see to it that in their territory conditions are created, "which would assure to all medical service and medical attention in the event of sickness". The United Nations Committee on Economic, Social and Cultural Rights stated in its General Comment No. 14 on the right to the highest attainable standard of health: "[...]

In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services ..."[120].

According to the Residence Act, persons obliged to confidentiality are not permitted to disclose data that was collected in the process of medical treatment to the Foreign Nationals Offices (extended data protection based on the obligation to discretion regulated in Section 203 StGB). On September 18, 2009, an amendment to the General Implementation Regulations affecting the Residence Act was made public. The amendment clarified that also administrations and accounting centres of public hospitals are subject to the extended data protection and therefore Social Welfare Offices are also not permitted to pass the respective data on to Foreign Nationals Offices.

What is objectionable here, is that so far, this type of extended data protection is not being uniformly practised and that there is no authority in place to control compliance with this regulation. Data protection is not applied when Social Welfare Offices receive data from persons not obliged to confidentiality (e.g. the refugees themselves). In such cases, the Social Welfare Offices are obliged to report the data to the Foreign Nationals Offices. Since this does not offer refugees a secure situation, they continue to hardly access health care services in practice.

Therefore, refugee organisations demand for Section 87 Residence Act, regulating the reporting duty, to be abolished in order to provide an unambiguous legal framework facilitating anonymous medical treatment.

This would be an important step, also because irregular migrants face particular dangers in the workplace. They primarily work in construction, the sex industry and as domestic workers and freqently have to cope with insecure working conditions posing a risk to their health. Every visit to a public authority is linked to the risk of being reported to the Foreign Nationals Office. The reporting duty provision has been frequently criticised by Amnesty International (2009) and other organisations (Deutscher Gewerkschaftsbund, 2009; Diakonisches Werk, 2009) because it implies a substantial restriction of people's access to health care, schools and other educational institutions as well as legal protection against violations of labour rights.

Premature denial of asylum claims, lacking identification as persons particularly in need of protection, and restricted access to health care, leads to protracted illnesses, complications, right up to suicidal tendencies; the security of the social environment is missing. In addition to the legal restrictions of access to health care services, which affect people without residence status and particularly asylum seekers in the first four years of their stay in Germany, as well as persons with a toleration visa, refugees are confronted with the situation that, because of the language barrier, they frequently do not find access to adequate medical or psychotherapeutic care. This is also true for migrants when they do not yet have sufficient command of the German language. In many regions in Germany, communication with a general practitioner or a psychiatrist already fails in terms of language because in these regions there are no pools of interpreters especially trained for medical issues. Moreover, coordinating appointments with interpeters and achieving the absorption of costs for interpeting is complicated, so that only few physicians and psychologists in private practice work with refugees and specifically provide psychotherapy to them. Theoretically, asylum seekers and persons with a toleration visa can also apply for the costs of their psychotherapy (for severe disorders) to be absorbed, even interpreter and travel costs can basically be applied for with the Social Welfare Office, however, they are frequently not approved. Regarding the discretionary provisions, including those of the Social Code, adequate health care is frustrated by the administrative practice, which can be very different, depending on the region.

Another factor is that medical as well as psychological psychotherapists shrink back from treating refugees with psychological problems not only because of lack of time or funds, but also because of the often severely traumatic histories of the affected persons, the interference with current stress factors due to their living in exile, the frequent need of accompanying social work, as well as the unfamiliar intercultural setting. Due to a lack of financial resources, the capacities of specialised therapy centres with an intercultural approach are limited. For instance, in 2009, the therapy centre Berlin had ten times as many requests for treatment than there were capacities for patients to be accepted (see annual report bzfo 2009). Some of the existing psycho-social treatment centres already had to be closed down because of lack of public funding, others are threatened by possible closure because the EU plans to stop paying subsidies, referring to the fact that the Member States are responsible. Funds of the ERF[e] which are relativey limited and are distributed by the Federal Office for Migration and Refugees (BAMF), do not provide sufficient and long-term financing for the therapies. As long as the FRG does not comply with its responsibility to fund the necessary treatment, treatment facilities depend on third party funding for counselling services, case monitoring, social work, low-threshold preventive and therapeutic group sessions as well as interpreter expenses – even when they are authorised by the Association of Statutory Health Insurance Physicians (Kassenaerztliche Vereinigung).

The following case studies are exemplary:

1. A man, a torture victim from Turkey, is placed in the federal state Brandenburg with severe post-traumatic stress disorder (PTSD). The local Social Welfare Office has neither granted him an absorption of costs for the pychotherapy he has applied for, nor travel expenses to Berlin where he shall get treatment. Psychotherapy or even a purely psychiatric treatment cannot be provided at the location of his placement because no

e ERF = European Refugee Fund

interpreting service is available. The interpreter-assisted psychotherapeutic treatment in a therapy centre in Berlin is then conducted with the help of third party funding and donations. However, the patient sometimes does not get permission to leave the administrative district so that in these instances the treatment cannot take place.

2. A young African man with an HIV infection is sent to a treatment centre in southern Germany with the help of the "AIDS-Hilfe" (German AIDS organisation). It was suspected that he was suffering from post-traumatic stress disorder (PTSD), a major depressive episode, anxiety disorder, as well es social dislocation. The competent Foreign Nationals Office denied an application for permission to cross the boundary of the administrative district for treatment, reasoning that therapy was also available in the allocated administrative district. Four weeks later, the Foreign Nationals Office provisionally relents because no place for therapy could be found in the allocated administrative district. However, by this time there has already been a considerable delay concerning further clarification and treatment.

3. A Kurdish man who has been severely tortured arrives at a therapy centre in southern Germany with a psychosis after being hospitalised. Since the competent Foreign Nationals Office denies him permission to leave the administrative district, he is forced to take the bus to the therapy centre without authorisation for almost a year. Only when he is granted a residence permit under Section 25 III AufhG, can he leave the administrative district legitimately. However, till today the competent Social Welfare Office refuses to reimburse the travel costs.

The restrictions of health care within the scope of the AsylbLG also concern serious physical illnesses and disabilities. Refugee initiatives criticise that, due to erronous application of the legal restrictions regarding health care, violations of human rights principles ocurred repeatedly. Examples are: a severe necrosis of the hip joint which was to be treated with opiates instead of surgery; a permanent dialysis treatment instead of a kidney transplantation; no hearing aids for a child despite of severe impairment of speech development (dyslalia); as well as refusal of a liver transplantation while hazarding the consequence of the patients' death.

Another example: A young Iranian man, placed in Brandenburg, tortured in his home country only a few months before, among other things by hanging by the upper limbs, complains of persistent intense pain in the shoulder joints when lifting his arms. The orthopaedist consulted at the allocated location neither conducts an ultrasound examination nor does he schedule the necessary magnetic resonance imaging (MRI), on the assumption that these kinds of expenses would not be absorbed under AsylbLG. Consequently, the necessary diagnosis and treatment are dealyed for months until the young man has obtained the entitlement to asylum and his treatment can be paid for by health insurance.

RECOMMENDATIONS/DEMANDS:

RECOMMENDATIONS/DEMANDS:

- Normal, statutory health insurance is needed right from the beginning; opening access to standard health care to refugees/migrants; provision of interpreters and absorption of costs for interpreters; access to adequate health care (geographically, in terms of capacity; especially in eastern Germany).
- Implementation of European directives, e.g. Council Directive 2003/9/EC of January 27, 2003, laying down minimum standards for the reception of asylum seekers in Member States. The right to health is of particular importance for persons especially in need of protection, for instance accompanied or unaccompanied minors, disabled and older persons, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other severe forms of psychological, physical or sexual violence. The following articles state:
  - Article 15: Applicants receive the necessary health care or other assistance if needed.
  - Article 17: In the national legislation implementing the provisions relating to material reception conditions and health care, the specific situation of persons especially in need of protection is taken into account after they are found to have special needs following an individual evaluation of their situation.
  - Article 18: Appropriate mental health care and qualified counselling when needed for minors who have been victims of violence.
  - Article 20: If necessary, persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment. This is taken into account by Article 7 (1) and Article 9 (1) of the victims' protection directive[121] and Article 13 (4) of the directive on temporary protection. [122]
- Identification/determination of groups especially in need of protection before the hearing by especially educated and trained health care professionals as is already being done in other European countries (according to Article 15/17 EU Reception Directive, also see rebuke in the report to the EU Commission 2008 as well as the decision of the German Physicians' Congress (Aerztetag) 2008). Starting in late 2009, non-governamental organisations initiated the pilot project "Berliner Netztwerk bzfo-zfm and Xenion" (in cooperation with government institutions, partly funded by the European Refugee Fund).
- Funding of the necessary complex forms of therapy: adequate care for victims of torture and violence involves complex efforts (extensive history/ diagnosis/assessment of impairment, psychosomatic-oriented and psychiatric medicine, psychotherapy, social work, family intervention, low-threshold resources, measures advancing integration).
- Interpreters must be provided when needed (cost absorption/pools) to ensure health care services for migrants and also for persons who have access to normal health insurance (health-insurance card), provided there are no adequate native-language health care services available.
- No deportation of sick persons undergoing treatment who according to the EU directive are in special need of protection. The non-qualified medical examination and reducing the examination to the question of ability to travel (fly) is in violation of elementary basic rights, as for example the right to life and to physical and emotional integrity, since deportation can involve severe danger to life and limb of the affected person. Despite suicidal tendencies having been diagnosed beforehand, deportation is often enforced with the attendance of a physician or security forces. Persons who suffer from mental illness due to traumatisation have considerable health impairments and are characterised by a vulnerability they carry for the rest of their lives. An assessment has to be conducted by qualified professionals in the respective native language in an anxiety-free environment.
- Abolishment of the reporting duty of data to the Forein Nationals Office under Section 87 (2) AufenthG for all public institutions responsible for guaranteeing and implementing social rights and enabling access to courts.

11. RIGHT TO EDUCATION (ARTICLES 13 AND 14)

11.1. SCHOOLS PROVIDING GENERAL EDUCATION

The statements on the right to education in the Country Report are open to criticism. The right to education is interpreted in a somewhat wayward manner with restrictions clearly contrary to international conventions. Whereas the Convention on the Rights of the Child states unequivocally "The States Parties agree that the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential." (Article 29) the Country Report diminished attempts to compensate for disadvantage with its statement that every person, independent of their origin and their social status, had the right to education and training, appropriate for him/her (authors' emphasis) (state report, p.94). Thus the "fullest potential" became, on the quiet, reduced to an appropriate education and training. In the selective German education system, the decision on appropriateness is made over the children's heads as early as the age of ten, at which stage they are transferred either to a demanding or less demanding type of school and by this procedure, vital preliminary decisions are made regarding their social status.

11.1.1. ACCESS TO EDUCATION (STATUTORY PRIMARY EDUCATION)

The Fifth Country Report devoted two pages to schools providing general education. According to Article 13 (2) of the Covenant, the States Parties agree that in relation to "the full realisation" of the right to education, "primary education shall be compulsory and available free to all". The Fifth Country Report stated, curtly but just as wrong, that all children receive primary education (state report, p.96). The truth is, and the United Nations Special Rapporteur called attention to this as before him had the German Education Union and several refugee organisations, that this did not apply to the children of so-called "illegals".

The report of the Special Rapporteur stated in this connection that, as far as non-nationals were concerned, undocumented or unregistered migrants in particular faced significant problems in the area of education. The Special Rapporteur was informed of the Federal Government's declaration on the occasion of the ratification of the Convention on the Rights of the Child: this stipulates that the classification as asylum seeker had precedence over the fundamental consideration of the child as having rights. According to information also available to the Special Rapporteur it is true that children with a refugee background are not covered by the legislation governing mandatory school education[123]. In reality, this means the children are not subject to compulsory education, they have no right to and neither receive teaching and learning materials nor free transportation. Often, the parents are not aware that there is a "right to attend school". In some of the federal states (Laender), heads are obliged to report illegal immigrants to the immigration authorities, so that the parents, fearing detection, do not exercise their rights. It is estimated that at present between 400,000 and 600,000 people live undocumented in Germany, of those approximately 30,000 young people are under the age of 16.

11.1.2. GENERAL ACCESSIBILITY OF HIGHER EDUCATION

The obstacles to study in higher education do not only apply to the children of so-called "illegals" but also to refugees whose leave to stay was insecure, although here, too, the Covenant (Article 13(2)b) unequivocally states that "Secondary education, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education." As a rule, refugees who have the right to remain are not issued work permits; this means that young people over 16 with that status can only study at schools providing general education or full-time vocational institutions; they cannot choose to train in the dual vocational training system (work linked training) as these courses require work permits. In addition, the position of these young people is further worsened in that they can be deported at any time, as they are no longer protected by the UN Convention for the Right of the Child. The Federal Government signed an opt-out agreement (reservation) to the ratification treaty, giving the German law governing non-nationals precedence over the Convention of the Rights of the Child. According to German law covering non-nationals, the status of child ends at age 16, not 18; thus any non-national can be deported after his/her 16th birthday.
Although the Federal Government resolved to revoke all opt-out agreements to the Convention of the Rights of the Child, restricting legislative provisions will continue until the relevant regulations are amended in all 16 Laender.

11.1.3. EQUAL OPPORTUNITIES (SELECTIVE EDUCATION SYSTEM)

The Special Rapporteur on the Right to Education drew the attention to numerous problems in the German education system with commendable clarity and referred to the selective and, to some extent discriminatory, characteristics of the system[124]. However, a (self)critical appraisal of this problematic and fundamental aspect of the right to education was lacking in the Country Report. Muñoz referred in particular to the institutional discrimination against migrants and socially disadvantaged children which he correlated with the early selection and transfer of pupils to different types of schools. "Indeed, the Special Rapporteur believes that the classification process which takes place at lower secondary level (average age of students is 10, depending on each Land's regulation) does not assess students in an adequate manner and instead of being inclusive, is exclusive; since he could verify during the visit that, for example, poor and migrant children – as well as children with disabilities – are negatively affected by the classification system" (Muñoz, p.2). In the period under review these findings were confirmed by numerous international school assessment studies such as PISA and the primary school study PIRLS.

Beside this principal problem, there is also the problem of segregation caused by socio-spatial factors; these exacerbate the early segregation of children into different lower secondary school types in terms of expectations and which lead to the familiar phenomenon of "double disadvantage"[125]. Children already disadvantaged by birth or disability are, contrary to intention (?) penalised again by selection and segregation practices in the German education system. The effect on school performance is that, for example, in the challenging setting of elementary schools (primary and lower secondary level) and special schools, the development of reading skills from year five to the end of statutory school age is inferior to that of schools with pupils from a socially and ethnically more advantaged background. Baumert and others[126] showed that so-called "statistical twins" with identical socio-economic status and the same cognitive abilities at transfer into the fifth year, differed by 49 test points in mathematical skills at the end of statutory school age, depending on the type of school they attend. This differential is higher than the difference of 46 points between the average performance of all German and all Finnish pupils and equals approximately the learning development of 1.5 school years.

11.1.4. TRANSFER BETWEEN TYPES OF SCHOOL AND SPECIAL SCHOOLS

It seems hardly comprehensible that the Fifth Country Report did not consider the grave problems mentioned above, considering that they were the subject of many official documents and public debates. Instead, a rescue attempt was made to justify the major problem of the lower secondary system; the Country Report referred to transferability, i.e. the option of switching between types of school (cf. state report, p.97). As research has shown many times, transfer between school types does not solve the fracturing; more accurately, transfers between school types are a sign of a systemic problem. They can mark the end of a wrong turn but they can also be the start of a wrong turn. It is not a rare event that students are "passed downward" because they may have experienced frustration and failure which, if not addressed, can lead to apathy and school absence. The option of a compulsory transfer to another school type favours a "waste disposal mentality" (Helmut Fend) in the German education system where, for example, downward mobility is on average three times more common than upward mobility. Roughly five times as many pupils are transferred to special schools as from special schools to general schools[127]. The transfer to a school type with a higher status usually includes a time factor with negative effects. Only downward mobility avoids loss of time.

A number of matters for concern are not even mentioned in passing in the Fifth Country Report: that in Germany there are special schools alongside schools providing general education – attended by approximately five per cent of a year group; that the rate of integration of disabled children and young people into the regular school system is rather low in international comparison – it consists of 15 per cent; that the Special Rapporteur on the Right to Education made a special point of the right to equal opportunities for this group in particular during his visit to Germany; and that in the period under consideration the Convention on the Rights of Persons with Disabilities was adopted by the United Nations. The only reference to the approximately 80,000 young people in special education can only be gleaned from a table in the appendix of the Country Report.

11.1.5. FREE EDUCATION AND TEACHING AND LEARNING MATERIALS

The few references in the Fifth Country Report on how to implement equal opportunities in education appear inane, belittling, even embarrassing. To paraphrase the comments on free primary education: lessons are free of charge. Not all Laender provide free teaching materials. Some parents are entitled to full or part subsidies. As a rule, schoolbooks are on loan; in some cases parents have to contribute according to their circumstances. (state report, p.96). It should be: lessons are not completely free of charge. On the one hand, the situation in relation to free teaching and learning materials has been undermined for years, on the other hand, education cannot be reduced to lessons in the classroom. School trips, outings, and other activities outside the classroom can cost considerable sums. In all-day schools additional costs for lunch need to be added, and often also for after-school activities. Such activities are formally not classified as education but as care, thus enabling the education authority to charge. Contributions vary from municipality to municipality. The effect of this is that in low-income local authorities, in which, as a rule, many families are poor, the expenditure on care is significantly higher than in affluent local authorities. Children and young people from poorer families in poor local authorities therefore participate less or not at all in school meals or after-school activities. Thus unequal opportunities are amplified, although the measures are meant to reduce inequalities.

11.1.6. TRANSPORTATION

The Fifth Country Report attempts comparatively extensively to show that equal opportunities can be comprehensively realised by regulations covering the transportation of students. It is, of course, important that parents do not have to pay for transportation to schools which can be quite a distance away and can involve substantial fares, but it is incongruous to assume that equal opportunities can be achieved by this measure alone. Yet this assumption seems to be the basis of the Country Report (cf. state report, p.97). There is also no recognition that transportation costs differ; only very few details are regulated in the legal systems of the Laender. Responsibility for implementation is passed on to local authorities, and in some cases there is considerable latitude. Differentials include: free transportation in relation to distance: this varied from 1.5 to 2 km for primary age children; 2.5 to 6 km for lower secondary pupils; whether or not parents were charged – in ten Laender there was no charge, in others the contribution could be up to 55 Euros per month; whether or not expenses for private schools or attendance at upper secondary school (past statutory school age) were charged to the students or their carers (50 per cent of the Laender charge for transport either in full or a contribution).

11.1.7. THE GERMAN FEDERAL SYSTEM

The Special Rapporteur also highlighted the obstacles to equal opportunities arising from the federal system. In relation to financing education he stated the per head allocation in education, for example, varied considerably between the Laender, and the Federal Government was not in a position to intervene decisively to bring about alignment[128]. And in relation to the 16 different education systems in Germany Muñoz wrote that the lack of uniformity caused considerable problems for pupils of families who moved from one federal state to another. Again, this dilemma was not mentioned in the Country Report.

11.1.8. CAPITAL SPENDING PROGRAMME „FUTURE EDUCATION AND CARE“

After the results of the PISA study were published, expectations were high that equal opportunities would improve with the introduction of all-day schools[129]. The Country Report responded with an objective, namely that by the introduction of all-day schools it could be possible to improve the quality of education by early and individual support and at the same time to break down the connection between social background and educational attainment through a new culture of teaching and learning. (state report, p.101). However, there are no binding quality standards for all-day schools, neither in relation to framework conditions nor to educational concepts. There is reason to fear that especially the objective to improve equal opportunities cannot be reliably reached because due to the poor framework conditions, only care can be guaranteed at best but not individual support. In this connection the reference to the capital investment programme Future Education and Care (Zukunft Bildung und Betreuung – IZBB) is comparatively detailed; the red-green Federal Government (1998 to 2005) earmarked four billion Euros for the expansion of all-day schools. Of the few sections which include concrete quantitative data for the education system, this is one.

11.1.9. INTEGRATION OF CHILDREN AND YOUNG PEOPLE WITH A MIGRATION BACKGROUND

The Fifth Country Report presents the situation of children and young people of immigrants in a rather simplified, belittling, and imprecise manner by stating that children from immigrant families formally have the same rights and duties as children who are not from a migration background. But because of their special linguistic, socio-economic, and cultural situation, children and young people from a migration background find it often harder to achieve educational success compared to children and young people without migration background (state report, p.96). Formal equality, however, applies only to those children and young people who have, or whose parents have secure residence rights in Germany. Undocumented people face a completely different situation.
At the time of transfer to the different vocational school types students, particularly from a Turkish, Iranian, or Afghan background who have poor grades, fail to find a placement in the dual training system while students from the EU, Russia and South-East Asia perform better[130]. Compared to children of the same age without migration background, children and young people without a German passport are less likely to attend pre-school institutions and are more likely to start primary school late. Young people from the Turkish community are three times more likely to attend the Hauptschule (primary and lower secondary) or a special school and less likely to attend more demanding types of school which provide upper secondary level education. They are also more likely to be delayed in their school career; in some Laender the proportion of children with a migration background who are delayed in their school career is twice that of children without migration background. More than twice as many young people with a migration background have no school-leaving certificate[131]. Even with good grades, migrants find it harder to find an apprenticeship or training position than the indigenous population. Given the same level of achievement, the opportunity to obtain qualifications at a vocational school is for German young people without migration background twice that of young people who are non-nationals; not taking performance into account, it is even five times as much[132]. Both at the time of transition to vocational training and at the time of transition to lower secondary level, the indications are that this constitutes discrimination[133].

11.1.10. MEASURES TO INTEGRATE CHILDREN AND YOUNG PEOPLE WITH A MIGRATION BACKGROUND

There are a number of findings which point to limitations of equal opportunities in education culminating in discrimination, not only for young people with migration background but also for socially disadvantaged children and young people of German origin – but these were not examined in the Fifth Country Report. What makes it more irritating is that the Country Report pointed to a wealth of measures for learning German, intending to convey that everything was done to ensure that disadvantaged sections of the population can achieve better in education. What the Report did not say is that in the meantime a broad academic debate about the effectiveness of these measures has been taking place and the evaluation of these measures is still in the early stages. Judging by the “success”, or rather, failure achieved so far, the resources and language programmes urgently need to be reviewed as to their effectiveness. It has been shown that the proportion of the so-called “risk group”, those who reach no more that language proficiency 1 in reading skills, is extremely high both for the first generation, of whom 42 per cent only reach this level, and for the second generation, of whom 44 per cent only reach this level. For comparison: the international average of young migrants who are in the so-called “risk group” is 25 per cent. In Germany 14 per cent of students without migration background are classified as belonging to a risk group[134]. Left out of the Country Report is a question crucial for equal opportunities, namely that of equal status of languages spoken by migrants with those of other foreign languages taught. German as a medium of instruction and languages spoken by Sinti and Roma, Danish, and Sorb minorities was given much space.

11.1.11. CONCLUSION:

The Fifth Country Report of the Federal Republic did not mention Special Rapporteur Vernor Muñoz’ visit to Germany in the spring of 2006; it also did not refer to the many international comparative studies published in the period under consideration. This is extraordinary, given that these triggered thorough public discussion about the state of Germany’s education system. Not mentioning the Muñoz’ visit can also be interpreted as an expression of conscious contempt.

11.2. ACCESS TO HIGHER EDUCATION AND TUITION FEES

The German education system is characterised by numerous thresholds, and once a decision on a course of education has been made, it can only be revised with difficulty. Isserstedt et al[135] identified the transfer from primary to secondary school (at the age of ten in most Laender) as the first threshold, the transfer from lower secondary to upper secondary level as the second threshold; the third threshold is the university entrance exam; the fourth threshold to be passed is entry into the tertiary sector, through making use of the qualification obtained, and the fifth threshold is the completion of a course of study in the tertiary sector, i.e. graduation. The following section will only concern itself with entrance into institutions of the tertiary sector. Below is a consideration of access restrictions and financial obstacles.

11.2.1. ACCESS RESTRICTIONS (NUMERUS CLAUSUS)

As early as 1972, the Federal Constitutional Court came to the conclusion that inflexible access restrictions were questionable in terms of the constitution (BVerfGE 33, 303; see also Achelpöhler)[136]. In order to offer places to as many potential students as possible, with the introduction of the capacity regulation (Kapazitaetsverordnung) Germany created a regulation which was intended to ensure the highest possible take up in universities and colleges[137]. But contrary to the intention to increase access to Institutes of Higher Education to more or all of those entitled to study, the proportion of courses with access restrictions actually increased. As of now, 54 per cent of the (new) courses leading to a Bachelor degree are access-restricted as are 49.7 per cent of courses leading to a traditional university degree equivalent to a Master degree[138]. The value of a university entrance exam was thus undermined by restricting the entitlement to higher education, and a further obstacle to access to higher education has been created.

11.2.2. FINANCIAL RESTRICTIONS (TUITION FEES AND GRANTS)

The Covenant suggests a sort of dual strategy for the realisation of the right to education. On the one hand, there is the insistence for education free of charge, on the other hand there is the obligation to establish a system of grants so that there should be no restrictions to access on the grounds of insufficient financial means.

At the time of ICESCR coming into force no tuition fees were charged in Germany. Step by step tuition fees were introduced, first in the Land Baden-Wuerttemberg where fees were charged once a specified number of semesters had been exceeded. Other Laender followed this example. As the debate on the general introduction of fees heated up, the Government in power at the time intervened in 2002 with an Act which was meant to disallow the charging of fees for first degree courses. However, the Federal Constitutional Court ruled in 2005 that the Federal Government did not have the power to intervene. The judgement overruling the Federal Act was based on a consideration of competency rather than on substance (cf. BVerfGE 112, 226; also Keller 2005)[139].

The Federal Constitutional Court referred in its judgement (BVerfGE 112, 226) to the Covenant and its applicability to federal law and assumed, with reference to the Covenant and other statutory regulations, that in introducing tuition fees, appropriate consideration be given to the needs of low-paid sections of society.
A further seven Laender introduced tuition fees, following the judgement of the Federal Constitutional Court, namely Baden-Wuerttemberg, Bavaria, Hamburg, Hesse, Lower Saxony, Northrhine-Westfalia, and the Saarland. Hesse abolished tuition fees in 2008. The Laender justified the introduction of tuition fees, among other rationales, on the basis of social acceptability. They also pointed to the availability of loans. Tuition fees, so goes the argument, fall due at a later stage, when both loan and interest have to be repaid. Regulations in the different Laender differ considerably, with some capping the amounts. Apart from these problematical separate regulations, the question arises how the loan repayments, which are even higher with the added interest, can overcome the problem of selection by social position. In relation to the alleged social acceptability, it is also mentioned that exceptions are made in hardship cases, though it has to be noted that the regulations here are hardly uniform; apart from problems in implementation it is often impossible for applicants to predict whether their application will be approved or not as exemptions from tuition fees are often interpreted restrictively.

Two interesting empirical studies have been conducted since the introduction of tuition fees. In one, a group of informants, who had fulfilled university entrance requirements but had not taken up studies, were asked the reasons for foregoing higher education. The other study explicitly examined the repercussions of

tuition fees. Of the first group, those who had chosen not to pursue their studies, 69 per cent reported that they could not afford tuition fees, 73 per cent reported – this was a multiple choice questionnaire – that they did not want to get into debt either by raising study loans or applying for Federal Training Assistance (BAföG)[140]. Women and men gave different reasons. Heine and Quast[141] found that these differences were associated with raising finance to pay tuition fees. Three quarters of women who did not intend to study but comparatively fewer men, 57 per cent, stated that tuition fees influenced them not to take up a course of study.

Heine et al.[142] conducted a study on the impact of tuition fees; they concluded that up to 18,000 of those entitled to study at tertiary level did not take up the opportunity because of tuition fees. More women (5 per cent) than men (3 per cent) did not go on to study for financial reasons. Children of parents of whom at least one parent had a degree (3 per cent) were less likely to be put off studying than children of highly specialised or skilled workers (6 per cent)[143]. This is empirical proof that tuition fees, despite provision for exceptional cases and for loans are not socially neutral.

11.2.3. UN-COVENANT AND COUNTRY REPORT

Article 13c of the ICESCR specifies unequivocally that "higher education shall be made equally accessible to all … by the progressive introduction of free education". The CESCR, after rightly criticising the introduction of tuition fees, "recommends that the State Party's Federal Government introduce a reduction of tuition fees in the national framework legislation regulating higher education, with a view to abolishing them". The Federal Government has no intention, though, to follow up on these recommendations. The argument put forward is that tuition fees are socially acceptable (cf. state report, p.94). This line of reasoning has been disproved; it is no longer valid.

The Federal Government's ignorance of the social repercussions which are always associated with tuition fees[144] is astounding. It would be propitious to examine the feasibility of legal intervention at the federal level to prohibit the charging of tuition fees generally, given the Federalism Reform I which redistributed the areas of competence between the governments at federal and federal states level. Alternatively, the Federal Government should exert influence on the Laender to pass appropriate regulations to fulfil their obligations in relation to the Covenant.

Apart from tuition fees there is the question of cost-of-living expenses, not mentioned in the Country Report. Even before the introduction of tuition fees, Dohmen and Hoi[145] calculated expenditure (mainly essential expenses) to be borne by the student as consisting of 49 per cent of total outgoings. Following the introduction of tuition fees, costs to be borne by the student increased further. The grant system in Germany is not extensive: grants are provided by private foundations, denominational agencies, and political parties with support from the government. It is estimated that only 2 per cent of students receive grants[146] – there is no legal entitlement to support. The national student grant programme which is in the planning stages, will make no difference[147].

In the official view, the Federal Training Assistance Act (BAföG) is an essential instrument in the support of students from underprivileged backgrounds. In addition, it is a statutory entitlement. BAföG support is based on the income of the student's parents and at the time of writing half of it is in form of a grant, the other half is paid on a loan basis. The BAföG came into force in 1971 in the form of grant payments; in 1982 it was amended and it was paid in form of a loan. This had a negative effect[148] as the total sum of up to 70,000 DM (approximately 35,800 Euros) had to be repaid. The BAföG thus lost an important function as the decision to study was now linked to the preparedness of the student to get into debt. After both German states were unified, the system was changed to consist to one half of a grant, and one half of a loan to be repaid. Yet the risk of debt was still an ever-present problem, especially for those from underprivileged backgrounds. In 2001 the Federal Government acted to limit the amount to 10,000 Euros. Still, 73 per cent of those not taking up studies gave as a reason for their decision that they were not prepared to get into debt to finance their studies (e.g. student loans, part-loan through BAföG)[149]. Getting into debt is therefore a problem for those entitled to study who lack the financial means necessary.

Support for students through BAföG has not only been reduced by the change from grant to loan – initially paid as a full loan, now as a part loan – but also because of insufficient adjustments of the assistance rates. The German Education Union pointed out in a report to the CESCR in 2007 that the adjustment of the BAföG rates was insufficient and did not even cover inflation[150]. The eighteenth BAföG Report states

clearly that the proportion of those receiving BAföG in 2008 was down to 24.4 per cent from 25.1 per cent in 2005[151]. It needs to be noted here, that the official figures refer to the number of BAföG-assisted students from the group of those who are basically and in principle entitled to support; the actual proportion is approximately 17 per cent – significantly below official figures. The average amount of monthly payments has been increased slightly from 2005 (304 Euros), 2006 and 2007 (301 Euros) to 321 Euros at present. BAFöG support, as can be seen, has been further undermined in recent years.

It is worth mentioning that the proportion of students, who have during the past twelve years been in receipt of BAföG support, has never exceeded 20 per cent (of the total number of students). It is fallacious, therefore, to suggest that a developed grant system is in place. At this point it is important to emphasise that in the first period of BAföG (1972-1975) more than 40 per cent of all students were in receipt of BAföG[152].

11.2.4. RIGHT TO ACCESS TO HIGHER EDUCATION?

Access to higher education in Germany is still linked to social background. Although the linkage between social class and higher education was reduced – though not overcome – during the 1970s, it is reasonable to assume that the cause of the change was the abolition of "Hörergeld" (tuition fees) and the introduction of the BAföG as a full grant. However, the course toward social mobility in higher education was not followed up. Initially, the BAföG was devalued step by step[153]. In addition, since the decision by the Federal Constitutional Court in 2005 some Laender introduced tuition fees. There are no known empirical studies on the general impact of this change for the worse but the introduction of tuition fees in several of the Laender has stopped up to 18,000 people from studying[154]. Further, access restrictions are firmly established in German higher education, there is still a shortage of university places. The change to a new system (bachelor and master degrees) increases social exclusion further especially as the transition from bachelor to master courses is not assured.

11.3. HUMAN RIGHTS EDUCATION

With regard to human rights education the CESCR requests that up-to-date information about the extent of human rights education in the German education system be included in the next country report.
The Fifth Country Report devoted more than three pages to human rights education in schools providing general education. No reason was given for the largely absent information on other types of school. With reference to higher education, there was just a terse note stating that information on human rights education in higher education institutions was not at hand, and that decisions on subjects and topics were a matter for universities in the context of their autonomy (state report, p.96). No mention was made of human rights education in childcare institutions, vocational schools or colleges, in adult education, and extracurricular youth work. The ignorance about extracurricular educational activities is incomprehensible.
Altogether it almost seems as if the comparatively extensive space given to human rights education was meant to draw the attention away from the sparse consideration of the right to material and equal opportunities in education. The amount of text cannot obscure the fact that the response to the actual question, namely to find out the extent of human rights education, is insufficient, even in relation to schools.

11.3.1. HUMAN RIGHTS EDUCATION IN SCHOOLS PROVIDING GENERAL EDUCATION

The section on human rights education in schools providing general education in the Fifth Country Report is based on a questionnaire by the Secretariat of the Standing Conference of the Ministers of Education and Cultural Affairs of the Laender[155]. Without identifying the source or even referring to it, the Country Report cites verbatim the preface of this survey.

The Fifth Country Report contains general statements such as that schools are of particular importance and have a special responsibility for human rights education (see state report, p.96), or to put this another way, that human rights education is anchored in the education act of each federal state (ibid. p.94). Examination of the KMK survey shows, though, that, at least in this context, anchoring of human rights education in the education acts of the Laender is not what is happening. Only the education acts of Bremen and Lower Saxony refer explicitly to human rights. A study by the German Institute for Human Rights (Deutsches Institut fuer Menschenrechte – DIMR) found in 2003 that human rights education was a relatively new concept in the German education system, both in terms of educational research and educational practice[156] This still holds true today. There are no indications that the situation has changed substantially since 2003.

11.3.2. THE TEACHING OF HUMAN RIGHTS

The Fifth Country Report describes in detail that, apart from the so-called "MINT-subjects" (mathematics, engineering, natural sciences, and technology), human rights education is integrated into most other subjects. When examining the contents, however, it becomes obvious that the point of reference is the Basic Law rather than the Covenant and that the courses consists largely of citizenship lessons (democratic values underpinning the constitution, responsibility towards society, totalitarian systems). In addition there are references to ethics and morality as well as economic and ecological issues.
In total, the statements made in the Country Report, as far as questions of the substance of human rights are concerned, give the impression of being disordered and unsystematic. The established system (learning about human rights, learning through human rights, learning for human rights) is as absent in the Country Report as it is absent in the curricula and timetables. Looking at it cursorily, a lack of concern is hard to escape. In addition, there is no evidence of their attempting to analyse what is meant by human rights education. This is absolutely necessary, though, as there are so many intersections and cross-linkages between human rights education and similar educational sub-disciplines. It would be rewarding and necessary to analyse the different aspects of the education acts, curricula and syllabi, guidelines, and educational standards of the Laender in order to describe systematically and, if possible, to clarify contents and methods, funding for and the scope of human rights education in the Laender.
The authors of the Country Report were aware that human rights education is far from being systematically anchored in the curricula and syllabi. They are correct in stating that, in spite of the topics taught in individual lessons, in most cases it is left up to the schools or other specialist bodies to decide how human rights issues should be taught. In principle, concepts of human rights can (authors' emphasis) be conveyed to all year groups, as long as both level and degree of complexity are appropriate to the age and maturity of the pupils (state report, p.94). The lack of binding guidelines is unfortunate, and it is astounding that this state of affairs should be accepted in the Federal Republic of Germany as an immutable fact, as appears to be the case. At any rate, there are no references in the Country Report which indicate that this area has been addressed seriously.

11.3.3. RESOURCES FOR HUMAN RIGHTS EDUCATION

As far as resources for human rights education are available to schools, the impression given is one of randomness and arbitrariness. Although all sorts of measures were listed to ensure effective teaching which also applies to the area of human rights education, such as further training for teachers, symposia, information sheets, projects, sponsorships, and school partnerships, under the heading of resources for further training for teachers only the federal state Hesse was mentioned in the KMK-Report. Here courses were offered which explicitly come under the heading of human rights education. The other Laender only referred generally to further training or in-service courses on human rights education which had been held. Out-of-school partners can be an important resource for human rights education. The Country Report mentioned UNESCO, UNICEF, churches, and other social facilities. The activities of a number of NGOs such as Amnesty International, Human Rights Watch, Welthungerhilfe (World Hunger Aid), or World University Service, however, were not appropriately acknowledged. Why, instead, the Country Report referred specifically to partnerships with private industry, although there was no single example mentioned of partnerships with private industry committed to human rights in the KMK-Report, remains to be answered.

11.3.4. EXTENT OF HUMAN RIGHTS EDUCATION

The CESCR requested information on the extent of human rights education in the German educational system. So, what did the Fifth Country Report say about the extent of human rights education in German schools? To put it bluntly: not much. The few reliable statements are as follows: The education acts of the Laender refer to the basic rights as enshrined in the Basic Law, not to human rights enshrined in United Nations Conventions.

Topics covering "human rights" are part of all curricula and guidelines, though "human rights education" is not an explicit part of curricula and guidelines.

All Laender offer teaching materials and further training for teachers around the subject of "human rights". No quantitative statements could be found on e.g., how many lessons were taught explicitly on human rights, how these were allocated according to types of school, subject, and age of pupils, how many student project days had been held by schools around the subject of human rights, how many schools were part

of UNESCO Associated Schools (ASPnet) or other networks around human rights education, how many teachers had taken part in further training on the subject of human rights, or how many diplomas or PhD-theses had been written on human rights topics.

The union's own research shows that only comparatively few schools in Germany take human rights education and human rights issues seriously – at least if the activities of a relevant network are acceptable as a conclusive indicator. To get an idea of the (few) schools which are explicitly involved with and focus on human rights issues, the exemplary UNESCO Associated Schools and the network Schools Without Racism – Schools with Courage should be consulted; both have their own homepage. The number of participating schools is under ten per cent; of approximately 40,000 schools in Germany only 174 participate in the ASPnet (0.4 per cent) and 729 schools (1.8 percent) have been awarded the designation School Without Racism – School with Courage. There is a further indicator of activities on human rights, namely the competition "Demokratisch Handeln" (Education for Democratic Citizenship) which is funded by the Federal Ministry of Education and Research (Bundesministerium für Bildung und Forschung – BMBF) and managed under the aegis of joint sponsors. In the 19 calls for bids since 1990, 3,739 project applications have been received. This is, however, not the place to provide a quantitative evaluation. As a rule the projects are of limited duration and cover a multitude of topics which are more or less related to human rights education. Even on the assumption that any school only takes part in one competition and that, generously, all projects are attributed to the area of human rights education, the proportion of schools which distinguish themselves by taking part, however sporadically, in human rights activities still lies under 10 per cent.

Overall we can state that human rights education in Germany operates rather unsystematically and haphazardly. There are hardly any reliable evaluations on the extent of human rights education. There is an urgent need for action.

11.4. RIGHT TO EDUCATION FOR ASYLUM SEEKERS, REFUGEES AND PERSONS WITH A 'TOLERATION' VISA

The improvement of education and training is the starting point for overcoming the fact that a migration background strongly influences educational results.

Holders of a toleration visa or a permission to remain during the asylum procedure (Aufenthaltsgestattung) principally have the possibility of studying for a degree. As of January 1, 2009, the possibility of studying with a toleration visa is even officially recognized by the "law for the regulation of labour migration". With these new regulations within the federal legislation, qualified persons with a toleration visa studying to obtain a German university degree have the right to stay in the country. In some places, asylum seekers and migrants with a toleration visa are issued with a "ban from studying" by the respective Foreign Nationals Office, which is only suspended in exceptions (inter alia evidence of funding without social welfare). As far as we know, this is only the case in Berlin, Brandenburg, and Thuringia.

Eligibility for Federal Training Assistance/BAföG (also see Section 8 BAföG/Section 63 SGB III): according to the 22nd amending law of the Federal Training Assistance Act, migrants with a residence permit destined to stay in Germany permanently, are since January 2008 entitled to Federal Training Assistance (BAföG) and professional education aid (Berufsausbildungsbeihilfe – BAB) in accordance with Section 8 (1) and (2) BAföG, even independently of a prior gainful employment of their parents. This for instance applies to holders of a residence permit in accordance with Section 25 II or Section 25 V Residence Act (AufenthG), although in some cases only after at least four years of staying in Germany. Another condition is a place of residence and "habitual" residence in Germany, which should also be fulfilled with a toleration visa after more than 3 years of living in Germany (Section 30 SGB I).

In order to facilitate studying also with regard to finances, persons with a toleration visa who have lived in Germany for at least 4 years, are since 2009 also entitled to training assistance in accordance with Section 8 (2b) BAföG/Section 63 (2b) SGB III. However, this regulation does not apply to asylum seekers. A virtual ban on studying for tolerated persons frequently results from the residential obligation they have to adhere to. According to the law, persons with a toleration visa are restricted to their respective federal state, but in practice these restrictions may often be extended further, e.g. to the administrative district (Section 60a AufenthG).

Migrants seeking asylum as well as migrants who do not fulfil the four-year waiting period are not entitled to training assistance because it is basically not permitted to receive social welfare, ALG II or benefits under AsylbLG while studying or undergoing professional training. In effect, with BAföG respectively BAB being excluded as well, and without vocational training pay – as is the case when someone is studying at a university or taking part in school training –, the (university) training offers no means of providing for one's livelihood and no health insurance. This is aggravated by the residential obligation, which asylum seekers are also subject to when they undergo training. Asylum seekers' permission to remain during the asylum procedure is principally restricted to the administrative/urban district.

Persons studying are basically not entitled to social welfare in accordance with Section 2 AsylbLG (Section 2 AsylbLG in conjunction with Section 22 SGB XII) or to basic social assistance for job-seekers (Section 7 (5) SGB II). Benefits can only be granted in cases of particular hardship (if necessary as a loan). However, a foreigner possibly not being eligible for BAföG or BAB alone does not yet constitute a case of hardship.

Children without legal status meanwhile have better access to public schools because the federal states have predominantly made it clear that schools are not subject to the reporting obligation to the Foreign Nationals Offices under Section 87 (2) AufenthG. Nevertheless, in most of the federal states, children without a legal status are still not entitled to have access to schools. It is actually at the schools' discretion if a child is accepted or not.

DEMANDS:

- Educational provision for all minor refugees and children without legal status in regular schools;
- Persons with a toleration visa must also have access to studying, (professional) training and the necessary financial assistance programmes;
- No restriction of training opportunities because of residential obligation.

The German Institute for Human Rights (Deutsches Institut fuer Menschenrechte) has issued comprehensive recommendations regarding children without legal status' access to schools.

12. RIGHT TO CULTURAL PARTICIPATION (ARTICLE 15)

12.1. DISTRIBUTION OF REFUGEES IN THE FEDERAL TERRITORY

The distribution of refugees throughout Germany according to the "Königsteiner Schlüssel"[f] (ratio of distribution) across the various Laender (and the different municipalities in them) as well as the residential obligation have the effect of a restriction of communication, social contacts and cultural participation. Both lead to persons affected being separated from relatives living in Germany who are not part of the nuclear family and were the reason for choosing Germany as the destination for seeking refuge. This can also lead to a separation of spouses and children, for instance when they entered the country at different times and/or have a different residence status. Distribution and residential obligation are principally questionable because health and social care are not available in many locations. Sharing the burden is also possible on other levels (e.g. financial redistribution).

DEMAND:

Elimination of distribution obligation, residence obligation and residential restrictions for refugees in accordance with AufenthG and AsylVfG.

f The "Königsteiner Schlüssel" regulates the proportion of the quota per federal state in jointly funded endeavours. The term traces back to the 1949 Königstein State Agreement of the Laender, which introduced the ratio of distribution for funding scientific research institutions.

13. APPENDIX: EXPERIENTIAL REPORTS

13.1. REFERRING TO ARTICLE 11 – THE RIGHT TO HOUSING ("THE HUNT")

It started quite harmlessly. I had been admitted to a shelter for homeless people with the assistance of the Social Housing Service. I had to return to the Social Welfare Office every three months to get a renewal of the confirmation that the costs for my place in the shelter would be absorbed. After several appointments there, I was asked: "Could you imagine moving out of the home and trying to live in a flat on your own?" Well, I could imagine that, but I reckoned I would not have much of a chance to get one, with my history: eight years without permanent residence, recipient of ALG II, currently registered in a homeless shelter, debts incurred in the past… At the time, I was living alone in a double room in the shelter. Therefore, I felt no urge to change my situation. But I am a cooperative person and support the concept of sustainability. I knew the daily rate for a bed in the shelter was at 16 Euros point something and was aware of the fact that the rent for a flat would be much cheaper than that. And, since I could actually imagine living in a flat on my own, I said just that. So, they gave me an approval-note for cost absorption valid for the next few months, and with this paper, I went to the "Frustration Centre" (Jobcenter). There, they gave me a brochure of the "Association for Ambulant Care" in Berlin-Hohenschoenhausen and told me to call the director.

This I did and got an appointment for a personal interview. However, the lady couldn't cope with me at all. Let's put it this way: seasoned social workers have their limits. So it took a while until I finally had a serious exchange with the social worker who eventually took on my case. After we had clarified some questions concerning money, the first obstacle was overcome. And after one more briefing, we were off searching for flats on the internet. Next, I was to make the first phone calls. I made the first one in the presence of my social worker. I am familiar with normal social interaction and am able to deal with people on the phone. So my social worker soon realised I could do this on my own. He gave me a whole bunch of contact persons and telephone numbers, and a new appointment. In the following week, I would call not all, but almost all of them – and the result was: I didn't get one appointment [to visit a flat]. I guess the fact that I had been homeless for several years and was possibly listed in a debitor's registry would have been enough to put people off, but in addition, I was receiving Unemployment Benefit II (ALG II). The combination was just too much. This went on for a couple of weeks.

IT'S GETTING SERIOUS

Then I got a new approval from the Social Welfare Office: permission to rent a flat in the "protected housing market sector". More than 20 years ago, the municipal housing development companies had been encouraged to provide about 3,000 flats a year for people who had no chance [to get a flat] on the free housing market. The flats offered in this framework were to constitute the so-called protected housing market sector. Over the years, the number of apartments provided in this framework has dropped to less than 1,500. So, with my "M-permission" and my social worker, I first went to see the housing company HOWOGE. In good faith, I put my permission on the counter right away. "I will have to ask someone about this", the lady behind the counter told me somewhat obsequiously, took the paper and disappeared. My social worker immediately understood: "Forget it, we won't have to ask here again!" We could have left right away, but I needed my paper back …

Next, we then went to see another housing company, the WBM in Berlin-Friedrichshain. This was very short and very clear. The WBM had no rental offers a (Job-)Center depending on the Federal Employment Agency in Nuernberg would be able to accept. This situation reflects the social transformation of this "hip neighbourhood". And stupid populist people need to be told about the fact that segregation and "ghettoisation" seem to aggravate certain problems.
My social worker later on took me to the housing company DEGEWO in Berlin-Marzahn, but they also didn't have any suitable flats.

It was on the "free" housing market that I eventually got my first appointment to visit a flat. The housing cooperative "Neues Berlin" offered some affordable apartments in Berlin- Hohenschoenhausen. My social worker had spotted one of their offers and didn't lose time to take me to the management office. At first, I was rather sceptical. But that changed when we were well-received by the company and they didn't hesitate to give us the name and phone number of the caretaker responsible for the flat. We fixed an appointment, I visited the flat, and it was absolutely shipshape. When the company promptly prepared a proposal, I could already imagine myself living there. As it turned out, however, I could not bank upon the "Frustration

Centre". The Jobcenter refused to absorb the costs for the obligatory cooperative shares. The costs of such shares are a little higher than the usual security deposit. But in exchange, the housing costs are extremely cheap. I was even willing to pay the difference from my own money. I had managed to save a little sum (as I do not have any addiction problems and have a fundamental distrust of state services). But of course, after not even a year of state support, I was not able to raise the whole sum at once. So, whether I liked it or not, I had to tell the housing company that I would not take the flat.

GOING MY OWN WAY

After that I was sort of hooked and began searching on my own. First thing, I went to the Gesobau housing association in Berlin-Pankow. They offered me a flat right away and gave me the contact details to arrange for a visit. Phone call, appointment, and off I went. I arrived on time and it turned out I wasn't the first. In the next couple of minutes, more interested persons arrived, and eventually quite a group of people followed the employee into the empty flat. After we had all seen the flat, the group had shrunk to about half its size. As the company had given me some other rental offers, I went to see those apartments as well.

After a series of such visiting appointments, I just felt I didn't have a chance here. So, I started to look out for offers of other associations. I tried the HOWOGE again, as this company has further service centres in Berlin-Lichtenberg. Although, in contrast to the office in Berlin-Fennpfuhl, I even succeeded to get registered there, they never offered me anything. Who knows why. I also went to the housing company GSW in Berlin-Reinickendorf, where they made clear right away that someone like me… I went to the DEGEWO at Gesundbrunnen (Berlin-Wedding) where I was also received only once, and to the Gesobau in Berlin-Wedding, which, as it turned out, does not offer any flats in the price category accessible to ALG II-recipients.

After researching online, I found out that I did not need to try the companies Gewobag or Stadt und Land. Apparently, they are not interested in ALG II-recipients.

I also contacted several estate agents, housing managements and private landlords via the Internet platform "Immobilienscout24". But, at some point, it got impossible for me to handle it all: up to five flat viewings a day, more than 100 offers per email later on. That was just too much. I missed some appointments, wasn't always able to call back because I had other things to do. Somehow, I had to keep the whole thing manageable...

After a while, I even went to see the former municipal housing company Gagfah. I had at first presumed I didn't even need to try there, as the Gagfah – due to filthy lucre – was no longer under the direct control of the municipalities. As it turned out, here of all places I was treated in a much fairer way than, for example, at the HOWOGE.

MY ODDS WITH REGULAR LANDLORDS

I also had made contact with some regular landlords respectively estate agents acting on behalf of small private landlords.
I had been almost everywhere in the city. Of course, I left out posh neighbourhoods like Berlin-Dahlem or Friedenau. Once, I was very close to visiting an apartment in Berlin-Oberschoeneweide – if I hadn't been a recipient of ALG II. I had an appointment with an estate agent and arrived there almost on time. I apologised for being late and said I just couldn't get away from another appointment in time – this happens quite often to active people. The lady from the agency seemed to appreciate that at least one of the five persons who were supposed to come had shown up… But then it turned sour: She needed "proof of earnings" and I spoke of an "approval notification". "The landlord does not accept recipients of ALG II as tenants", she said with some regret, and added as if in explanation: "He had some bad experiences in the past."

I had been expecting such reactions. In the committees of the Berlin Homeless Welfare Association, I had learned that landlords are not really keen to offering apartments to people who receive social welfare or unemployment benefits ("Hartz IV"). One of the social workers at the counselling centre for homeless persons knew one private landlord with whom he was able to cooperate. However, this is an exception.

Another private landlord told me he would accept me as a tenant despite the fact that I was a recipient of ALG II and even if I was listed in the debtor's registry – unless an affidavit or worse, a warrant had

been issued against me. As he had entrusted the management of his properties to a house management company, I contacted this company for further information. And there I was told that a warrant against me was listed in one of the debtor's registries (ICD Check Infoscore).

I do know that small landlords often behave in ways that discriminate against people in need. However, making an appeal will not be enough. In the past, they have been left to their own devices too often. Recent reports on commercial TV about so-called "nomad tenants" who move from one flat to another without ever paying rent certainly do not contribute to solving the problem. As for me, I prefer a frank response to the covert rejections the housing associations tend to express.

IN THE TREADMILL – STRUGGLING WITH THE "FRUSTRATION CENTER"

I do know the centre has a different name, officially. But just imagine finding a flat, then the housing management tells you a contact person, you inspect the flat and decide you could live there, the housing management issues a proposal and you happily return to your competent centre: you queue at the counter, then go on to the benefits department, and you wait another while until an employee takes your documents. The employee promises that, of course, your documents will be reviewed immediately and you will receive a reply by tomorrow at the very latest. At best, the reply comes two days later, usually a letter of refusal. In some cases, you will be told that the notification would have been sent out earlier, but it took longer because there were some differences to be settled... In 2007, the Berlin Senate Social Welfare Administration issued a "regulation for implementing the granting of benefits according to Section 22 SGB II and Section 34 SGB XII (implementation regulation for housing)". Following a table included in this regulation, a gross rent (including the heating costs) of 360 € is supposed to be adequate for a single person living alone. On March 1, 2009, the margin was raised to 378 €. The funding requests in my applications exceeded this level. I happened to be present when Ms. Adler, a member of the Senate's Social Welfare Administration, explained the "implementation regulation for housing" which was not yet in force to a group of social workers, so I knew this regulation provides for exemptions on social grounds. One exception is homelessness. As a rule, the costs for a place in a shelter are much higher than the social allowances for housing. The rates in the shelter I was living in were relatively cheap. Still, my place in the shelter cost almost 500 € a month. Therefore, I assumed a discrepancy of 10 % to be adequate. However, the competent centre in Gotlindestraße concluded otherwise. Mr. Schröder, the responsible team leader, told me in the presence of my social worker: "You can find apartments for less than 378 €, I have several housing offers meeting the requirements". Long before that appointment, I had already read and printed out the "implementation regulation for housing" (of February 10, 2009) and had organised some wrapping paper, and I would have expressed my annoyance by presenting them as a gift to the responsible officer. But I didn't because my social worker had arranged the appointment with the aforementioned subordinate officer.

And it got even worse. An authority that denies so many applications and gives its "customers" a hard time, inevitably ends up being overwhelmed with further applications. As a consequence, the authority changed the rules from one day to the other. Meanwhile, I had a proposal from the Gagfah housing company for an apartment in Marienfelder Allee. When I arrived at the counter of the Jobcenter, I was asked to leave the proposal right there. When I received a positive reply more than a week later, the rental agreement for the flat had long been signed – by someone else. Had I said the magic words "exception homelessness" when I handed in my application, I would have been allowed to go straight to the benefits department. This I was told later by Mr. Schröder, following my complaint. The useless positive reply turned to be another obstacle because the authority can only issue one positive reply at a time, and I therefore had to give back the useless paper before applying again.

HAPPY ENDING

Eventually, I did find a flat for myself. No, I did not find it. In the church community I am active in, I met a mason. He sometimes helps the owner of the house he lives in with refurbishing. One day, he told me an apartment was vacant in this house. He talked to the owner and so, with the help of my community brother, I could move in.

I succeeded in moving into this flat not thanks to but despite the "support" of the "Frustration Centre" of Berlin-Lichtenberg. The centre had even refused my application for an allowance to buy basic furniture and household supplies.

13.2. REFERRING TO ARTICLE 12 – THE RIGHT TO HEALTH (COERCIVE PSYCHIATRIC TREATMENT OF PEOPLE WITH OR WITHOUT DISABILITY IN GERMANY)

Ms. R. F. reports: Some of these experiences still stress me today, in particular in phases when I get psychotic and the people around me consider a hospitalisation would be best for me. Because of my previous experiences, I tend to vehemently refuse to go to a psychiatric hospital – with the consequence that what I fear most eventually happens: a forced hospitalisation on court decision, in the worst case with police intervention and in handcuffs.

In 1988, when I had my second psychosis, I stopped a police car on the Heiderhof-Ring in the city of Bad Godesberg one evening at about 9 pm because I felt I was being persecuted and I feared for life and limb. To make sure the car would really stop I stood in the middle of the road and waved both my hands in the air. The police car stopped and the officers took me to the station where I had to spend hours and hours waiting, and nobody took care of me. Then, two officers came in and told me to follow them, and a police car took me to a psychiatric hospital. Just after midnight, I got my room in the hospital. I discovered three drill holes in the bathroom, which seemed terribly frightening to me in my state of paranoia. I told the nurse so. The next day I woke up restrained to the bed. A judge was bending over me and kept asking me questions, and I readily told him my whole story – still believing in law and justice at the time. I was truly convinced the judge would at last take action and have me untied from the bed. But after his interrogation, the judge just disappeared without a word and I was left on my own again, lying in my bed, tied down with restraints. My mouth was dry and got drier all the time. My bones felt like lead and I was terribly tired. Around midday, I was transferred to the Fritz-Lessner-Haus (psychiatric hospital) in the city of Guetersloh. They did not restrain me and put me on a bed on the corridor next to the toilets. When I woke up, a lawyer a friend of mine was standing next to my bed. He told me he had taken charge of my legal representation. He was the first person to inform me that I had actually been hospitalised on a court decision according to the laws for mental health patients (PsychKG).

I suddenly realised the situation I was in: I had been deprived of my civil rights, I could not leave the hospital of my own accord, and I had no means of refusing medication or being restrained or the like. I had been deprived of my right to self-determination. I was at the mercy of others, an object others could decide upon at will. [With my lawyer's help], the court decision was then suspended quite rapidly, so legally, I was again free to decide where I wanted to go. But, deep in my bones, I can still feel this shock until today. It still took a while before I got back my freedom of movement in terms of my physical mobility. These neuroleptics I had been given at the hospital had a very strong effect on me. They worked like a chemical straightjacket. On one hand, they had an extremely restricting effect on my physical mobility and on the other, they forced me to constantly keep moving, as I was not able to sit still or lie down.

My second experience with psychiatric institutions occurred in 1990 in Lessner-Haus II (psychiatric hospital). I got along quite well with Mr. M., the physician responsible for me there. But the second physician on the ward, Ms. B., constantly interfered with Mr. M's treatment methods. As a result, I was massively overdosed (according to what I know about medication today) and no longer had my motor functions under control. I was not even able to do simple things like spreading butter on a bagel or turning around in my bed without help, and when I walked, my legs kept slipping away, so I had to crawl on all fours. One day, Ms. B. told me there was a letter for me and I should go and pick it up at the reception. It was a terrible effort for me to get to the reception from the Lessner building. About thirty metres before reaching the reception, my legs gave way. I slipped to the ground and continued crawling on all fours, until I reached the reception. There I somehow pulled myself up to reach the window. I picked up my letter and fought my way back. I even managed to reach the station walking upright, but then my legs gave way once more. Then, suddenly, Ms. B. was standing in front of me, shouting at me that I shouldn't make such a fuss. I didn't need to make a big scene, she said, only because I had just gone to pick up my court decision. What unlawful type of court decision was it? I could not remember having seen a judge at all. So, where did this court decision come from?

The third encounter was in 1993 during my admission to the psychiatric hospital of Guetersloh. I had come to the hospital voluntarily with a doctor's referral, accompanied by a friend. Again, the physician admitting me to the hospital wanted to give me some very strong medication right away. He insisted on doing so despite the fact I, as mentioned before, had not had good experiences with psychotropic drugs in the past, with the exception of a follow-up treatment I had had at the psychiatric institution of Flachsheide in the city of Bad Salzuflen in 1990. I told the physician about this treatment and asked him to call this institution and

find out what they had given me, as I was willing to take this medication again. But he just replied: "You will either take what I give you right now or I will ask for a court order." So, of course, I took the pills I was given because I couldn't have taken another court order depriving me of my right to self-determination.

The fourth hospital episode happened late in the summer of 1999. Because of my volunteer-based commitment to the development of the Soteria (alternative treatment centre for psychotic patients) in Guetersloh, I knew about some negative trends concerning some major changes in the staff of the Soteria. So I could not trust them fully anymore that my personal treatment agreement deposited there would be accepted and agreed. I was fully aware of the fact that I was ill and that I needed professional help. I had gone to see a doctor and had asked for a sick note. Although I had been quite successful with a voluntary treatment at home, some relatives felt I should not be treated at home but needed treatment in an institution. So, eventually I was handcuffed and taken in an ambulance from Herford to Guetersloh, where I had to stay in the car in the blazing heat at the gate of the hospital for another hour. Nobody gave me anything to drink or loosened my handcuffs, although I kept telling the paramedic that this was a deprivation of liberty. The worst thing about such unnecessary traumatisations, however, is that they seriously disrupt the healing process and the treatment of the primary problems or traumata that triggered the psychosis. When you suffer new injuries, you will suppress the original trauma into the unconscious, because in the present situation you have to focus on defending yourself against the acts of injustice you are being confronted with at this moment (in form of court decisions, fixations, forced medication, etc.)

Ms. T. A. reports: When I went to see someone in a psychiatric hospital recently, I started to tremble from fear once I had entered the premises – I was dizzy, nauseous. I wanted to get out of there immediately. The male nurses kept me in suspense before they finally unlocked the doors... In these few minutes, I had the feeling I was about to completely lose control of myself. The sensations I had had at the time came back. There was all that contempt, arrogance, arbitrariness, being locked up.... I thought, "I must be crazy to choose to come back to this place where I suffered pain to last for the rest of my life, where I was abused in the very worst way..." At home, I had to throw up.

Ms D. Steenken reports: The psychologist supervising the sheltered workshop for disabled people (WfbM) where I was working at the time had arranged for my involuntary commitment to the psychiatric clinic of Osnabrueck under the pretext that I was suicidal. At the clinic, a co-patient was telling jokes and we laughed loudly. A male nurse threatened me in an aggressive tone I'd better get a grip or else they would come and restrain me.

Luckily, several co-patients were very clear about what was going on and spoke up for me, so I was not restrained just yet.
A few hours later, a nurse asked me if I needed Atosil. I said no, I did not. In the evening at about 11 pm, six nurses came to the lounge where we were watching TV to restrain me. The reason they gave for doing so, was that I had not taken the Atosil. I was dragged to the corridor against my will, I was restrained and I was given an injection with Diazepam. After that, they pushed me into the dark bathroom where there were no windows. I screamed in fear because I could not take the complete darkness. Then a nurse came in and told me that if I took some drops of Neurocil, they would remove the restraints in the next 15 minutes or so. So I took the Neurocil, but they still kept me restrained in the bathroom all night long. At about 10 am, I was at last "liberated" from the restraints. I then wanted to take a shower and have breakfast.

They refused both in a harsh tone, alleging it was too late for that now. When the ward physician did his round, he said I would no longer be allowed to leave the room on my own. When I wanted to smoke or go to the bathroom, I had to ask a staff member. I got very angry and upset about this because the decision didn't make sense to me. My first reaction was to shed tears. As a result, the physician came back with several nurses and they wanted to restrain me once more in order to give me an injection of Ciatyl Z – Akutphase. As I was already traumatised by my first experience of forced restraint and did not want to experience this again, I just let them inject me. I then had to stay in the observation room for a whole week, isolated from the other patients and even had to eat my meals in there. (Later, one of the nurses accused me of theft for no reason, so I was again shunted off to the observation room.) Later on that evening, I had a severe seizure, which the nurses simply ignored. After I had been having cramps for an hour and a half, a nurse came to see me. He said I shouldn't make such a fuss and that I was just having a hysterical temper tantrum. A few days later, I had serious stomach pain that was getting worse and worse. I was in such pain that I could not eat anything. Although I repeatedly asked to be given at least some chamomile tea, I did not get any. Finally, I was handcuffed and taken to a nearby hospital several times to have my heavy stomach examined. In the

end, I was supposed to get surgery. One day before the operation, a psychologist came to see me. Taking into consideration what I had experienced in the psychiatric ward, she concluded my stomach pains might be psychosomatic. She suggested I should immediately be transferred to a different ward and to a normal patients' room, so that hopefully my stomach pains would disappear and I would be able to eat normally again. I accepted the psychologist's proposition and the operation scheduled for the following day was cancelled for the time being. I felt very relieved, and I was so grateful to the psychologist for finally ending this horror. The experiences I had at the psychiatric ward were so traumatic that I continued suffering from severe nightmares, anxiety attacks and bouts of sweating for another year. From my own experience, I can say that unfortunately you cannot erase the terrible experiences in a psychiatric institution and that they will be with you and persecute you for the rest of your life.

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