

*Parallel Report on the 19<sup>th</sup>–22<sup>nd</sup> Report submitted by the Federal Republic of Germany to the UN Committee on the Elimination of Racial Discrimination under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination*



# Racial Discrimination in Germany

Manifestations and  
Human Rights Obligations  
to Protect Individuals and Groups  
Against Racial Discrimination

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## Preliminary Remarks

The Parallel Report to the UN Committee on the Elimination of Racial Discrimination on the 19<sup>th</sup>–22<sup>nd</sup> Report submitted by the Federal Republic of Germany is a collective project led by civil society organisations, comprising the Büro zur Umsetzung von Gleichbehandlung e.V. (Office for the Implementation of the General Equal Treatment Act), Humanistische Union (German Civil Liberties Union), Initiative Schwarze Menschen in Deutschland (Initiative Black People in Germany), Ini Rromnja, LesMigraS e.V. and the Netzwerk gegen Diskriminierung und Islamfeindlichkeit (Network Against Discrimination and Anti-Muslim Racism). Diakonie Deutschland, the Social Service Organisation of the Protestant Church in Germany, provided the organisational framework for the project. Forum Menschenrechte (FMR), a network of more than 50 German non-governmental organisations (NGOs) committed to better and more comprehensive protection of human rights, supported the project and made available the resources needed in order for the project website: [www.rassismusbericht.de](http://www.rassismusbericht.de) to be built and managed. The research, writing and project management of the Parallel Report to the International Convention on the Elimination of All Forms of Racial Discrimination was funded by the German lottery organisation “GlücksSpirale”.

The basis upon which the various actors worked together was defined by the Terms of Reference. According to this, each of the actors had a voice in the consensus-oriented decision-making process of the report’s content. A safeguard clause ensured that the organisations involved could endorse or specify contents within the scope of their respective mandates.

The Parallel Report complements the German State Report by providing additional analysis of complex forms of racial discrimination and recommendations for action aimed at strengthening human rights obligations to protect individuals and groups against racial discrimination.

The main focus of the report is to make visible the perspectives of those who have experienced racism and of those with expert knowledge on the subject of racial discrimination in Germany. This is ensured by in-depth expert knowledge imparted in the form of background papers to which the Report refers as sources. These reports were submitted by the Büro zur Umsetzung von Gleichbehandlung e.V. (Office for the Implementation of the General Equal Treatment Act), Corinna Gekeler of Humanistische Union (German Civil Liberties Union), Elsa Fernandez of Ini Romnja, Damaris Uzoma of the Initiative Schwarze Menschen in Deutschland Bund e.V. (Initiative Black People in Germany), Aliyeh Yegane of Inssan e.V., and Bea Cobbinah of LesMigraS e.V. In addition, Dr. Bilgin Ayata, Cengiz Barskanmaz, Fortuna Ghebremeksel, Daniel Gyamerah, Dr. des. Eddie Bruce Jones, Dr. Kati Lang and Dr. Amma Yeboah have submitted background papers. The full content of all background papers cited are accessible online: [www.rassismusbericht.de](http://www.rassismusbericht.de). The production of the Parallel Report was coordinated by Joshua Kwesi Aikins.

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## List of Abbreviations

ADS	Antidiskriminierungsstelle des Bundes Federal Anti-Discrimination Agency
AGG	Allgemeines Gleichbehandlungsgesetz General Equal Treatment Act
AsylbLG	Asylbewerbungsleistungsgesetz Asylum Seekers Benefits Act
BMI	Bundesministerium des Innern Federal Ministry of the Interior
BVerfG	Bundesverfassungsgericht Federal Constitutional Court
BUG e.V.	Büro zur Umsetzung von Gleichbehandlung (eingetragener Verein) Office for the Implementation of the General Equal Treatment Act, registered NGO
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CERD	Committee on the Elimination of Racial Discrimination
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU-MIDIS	European Union Minorities and Discrimination Survey
FRA	European Union Agency for Fundamental Rights
FRG	Federal Republic of Germany
GG	German Basic Law
GDR	German Democratic Republic
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISD e.V.	Initiative Schwarze Menschen in Deutschland (eingetragener Verein), Initiative Black People in Germany, registered NGO
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MB	Migration background
PMC	Politically motivated crime
RiStBV	Richtlinien für das Strafverfahren und das Bußgeldverfahren Guidelines for Criminal Proceedings and Proceedings Concerning Regulatory Offences
SVR	Sachverständigenrat deutscher Stiftungen für Integration und Migration Expert Council of German Foundations on Integration and Migration
UDHR	Universal Declaration of Human Rights

## Introduction

This Parallel Report highlights a broad range of human rights violations as a result of racial discrimination in Germany. It is the outcome of a collaborative process aimed at including the organisations and experts belonging to groups of people who require specific protection under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) but who until now have seldom been heard in the context of human rights-related aspects of anti-discrimination work. In Germany, on account of the country's specific racist tradition, these groups of people include Sinti and Roma, Jewish people, people who are exposed to anti-Muslim racism, Black people and other People of Color.<sup>1</sup>

The main focus of the Parallel Report is racial discrimination and its impact on groups that experience racism, specifically in the education and the health care systems, on the labour and housing markets, as well as in the criminal justice system. This focus emerged due to the involvement of group-specific analyses of racial discrimination combined with an intersectional perspective, highlighting multiple layers of discrimination as experienced by lesbian, gay, bi-, trans- and intersex people who are exposed to hetero- and cissexism<sup>2</sup> as well as racism.

Certain manifestations, dynamics and consequences of racial discrimination can only be properly understood through the accounts of individuals and groups that have experienced such discrimination. A comprehensive picture of racial discrimination in Germany is only possible if first hand experiential knowledge from the aforementioned groups provide the foundation for analysis. The Parallel Report cross-references comprehensive analyses (developed in the reporting process) in order to make visible perspectives which to date have received. These analyses bring to light the realities of discrimination as experienced by people living in Germany, from a human rights perspective – particularly in the context of ICERD.

The full extent of the racist NSU serial murders, perpetrated by a terrorist organisation which called itself the “National Socialist Underground”, was only discovered in 2012 when some of its members gave themselves up after 14 years of terrorist activity. The enquiry was obstructed for many years by the security and law enforcement agencies that attributed the crimes to relatives of the victims, thereby thwarting attempts to bring the investigation to a rapid conclusion.

The deep involvement of the security and law enforcement agencies as well as their refusal to acknowledge institutional racism as a problem are symptomatic of deep-rooted structural racism in Germany. There is ample evidence of this and it is repeatedly confirmed by the findings of studies and opinion polls. Despite clear evidence of structural racism, German law and politics, at both federal state and national levels, have been lagging behind with regard to the fulfilment of human rights obligations arising from ICERD, which was ratified by both German states existing at the time of its adoption (the FRG in 1969 and the GDR in 1973). Though racial discrimination in Germany is structural, it continues to be too narrowly defined in national debates and is not discussed as a systematic violation of human rights.

This Parallel Report will draw particular attention to specific fields in the State Report that lack a more detailed description; i.e. the situation of the aforementioned groups requiring special protection under ICERD, as well as people who are exposed to the most extreme forms of human rights violations as per the analytical framework of intersectionality. This is defined, for example, as racism interconnected with heterosexism, or racism in asylum law and practice.

A central demand of this Report is the need to disaggregate data on discrimination and equal treatment in order to reflect discrimination against those groups requiring special protection. One of the manifestations of the problem posed by an insufficient collection of data is the use of concepts such as “migration background”. This concept encompasses members of a given diaspora community up to the second and sometimes third generations, but denies membership to generations beyond that.

Thus, with only a single indicator consistently applied by the federal government to measure racial discrimination, a growing number of people who require specific protection pursuant to Article 1 of ICERD are not taken into consideration. This has a significant impact on the collection of data on structural and institutional racial discrimination given the fact that violation of the obligation to collect and report data under ICERD renders racist structures invisible and therefore leads to a persistent weakening of the protection against discrimination.

1 The term “People of Color” has a strategic, self-determined definition for people who experience racism in Western societies. It emerged in the US context, acquired a new political dimension and content during the civil rights struggle and is increasingly used in Germany. See Ha, Kien Nghi (2007): *People of Color – Koloniale Ambivalenzen und historische Kämpfe*, In: Kien Nghi Ha, Nicola Lauré al-Samarai, Sheila Mysorekar (eds.): *re/visionen. Postkoloniale Perspektiven von People of Color auf Rassismus, Kulturpolitik und Widerstand in Deutschland*, Münster: Unrast, pp. 31 – 40.

2 Cissexism refers to the rejection, marginalisation and discrimination of trans\*people by people whose gender harmonises with the gender they were assigned at birth and/or has never been questioned.

The lack of disaggregated data on groups that are affected by racism, including the data contained in the 19<sup>th</sup>–22<sup>nd</sup> Report submitted by the Federal Republic of Germany to the UN Anti-Racism Committee, demonstrates the limited scope of the definition of racial discrimination in Germany. Racial discrimination is considered first and foremost as an aggregate of individual, interpersonal and intentional acts. This once again reveals a narrowly construed understanding of racism. As a result, protection pursuant to Article 1 of the Convention, which also includes protection against the discriminatory effect of legal provisions, policies, interpersonal and institutional acts or omissions, is only taken into account in a marginal way.

People who experience racism in Germany are not systematically informed about the legal provisions governing the protection against racism in the context of European law, nor are they adequately included in analysing racial discrimination in German society. Due to the dominant perspective reflected in the State's 19<sup>th</sup>–22<sup>nd</sup> Report an incomplete analysis of the problem is provided. The impact of this is also revealed in terms of the language and analysis used: the word "xenophobia," which is used in the State Report, is problematic because it reduces the scope of racial discrimination by referring to the idea of "xenos" (i.e. "stranger, foreigner"). The perpetrator's concept of 'foreign' is employed and thus legitimised. In addition, the concept is an integral part of the systematic collection of data on hate crime. Part of the statistics on politically motivated crime (PMC) make a distinction between racial and xenophobic attacks. This conceals the true extent of racial violence in Germany. When "xenophobia" is used as an analytical framework in the German context, a wide range of racial incidents and crimes are made invisible and a debate about institutional racial discrimination is rendered impossible. However, institutional racial discrimination has been identified as a structural feature of the German education system in numerous (national and international) reports. It is significant that the State Report contains no statistical data on cases of racial discrimination, the frequency of complaints filed under state-level anti-discrimination law, or even of complaints submitted to the anti-discrimination institutions at the state and federal levels.

This Parallel Report broadens the perspective of the State Report by including several perspectives of those who have experienced racism. These bring to light the multifaceted aspects of racial discrimination in Germany. This reality contradicts the State's argument that German Law provides sufficient protection against racism simply due to the fact that the prohibition of racial discrimination is a principle enshrined in the German Basic Law, and protection is also guaranteed under the General Equal Treatment Act (AGG). CERD has regularly pointed out that the lack of concrete steps taken to ensure protection under Basic Law, as well as the limited scope of the AGG in civil law, leave blatant gaps in the protection against discrimination. In Recommendation 48 on Germany, CERD made it clear that, for the purposes of fulfilling the state's obligations under ICERD, it is insufficient for the German State to "merely to declare acts of racial discrimination punishable on paper". Rather, legal provisions to guarantee the human right to protection against racial discrimination must also be effectively implemented. As this report shows, this important distinction between rights on paper and effective implementation has not been given the priority needed in the State Report or in everyday legal and political practice. This report does not only comprise findings and analysis; it also includes concrete suggestions for alternative courses of action. Therefore all stakeholders hope that this report will contribute to bringing about effective changes in the field of human rights protection against racial discrimination.

# I. Re Article 1 ICERD (Definition of racial discrimination)

## Definition of racial discrimination (Art. 1 para. 1 ICERD)

There is no definition of racial discrimination pursuant to Article 1 para. 1 of ICERD in German law. The definition of racial discrimination according to Art. 1 para. 1 of the Convention has a wider scope than the definition of direct and indirect discrimination under the General Equal Treatment Act (AGG) because it includes protected characteristics, including "race", colour, national and ethnic origin. Concrete steps to ensure the prohibition of discrimination in civil and penal law as outlined in Art. 3 para. 3, clause 1 of the German Basic Law have not been taken.

Though the definition of Article 1. para. 1 of the Convention is an applicable law in Germany, the human rights based definition of racial discrimination is only partially applied, if it is applied at all.<sup>3</sup> There is a general assumption that racism only occurs in the form of direct or intentional acts of discrimination. This does not conform with the human rights understanding of racism. This common political discourse and institutional practice in administrative bodies, including in the criminal justice system, leads to a situation where, even in those court cases where the respective investigation files reveal the possibility of pursuing a right-wing motivation,<sup>4</sup> this factor was considered in less than half of the cases and in only twelve percent of judgements [See: V. 1. Criminal provisions and their effectiveness].

This understanding of racism, one which does not conform to the principles of human rights, became particularly apparent in the case *Türkischer Bund in Berlin-Brandenburg versus Germany* (48/2010). The Berlin public prosecutor's office terminated the proceedings to a large extent because of this misunderstanding of what racism<sup>5</sup> and hate speech actually is.

## The concept of "Rasse"

The protracted controversy over whether or not the term "Rasse" should be deleted from the text of the German Basic Law illustrates the limited scope of human rights obligations under the Convention in the political debate and public opinion when it comes to ensuring that protection against discrimination is firmly rooted in the legal framework. Deleting the word "Rasse"<sup>6</sup> without substitution would create a vacuum in protection.<sup>7</sup> Considering that racial discrimination involves the act of someone making a judgement about someone else, it cannot simply be replaced by the phrase "discrimination based on ethnic origin."

In the framework of its constitutional reform, the state of Brandenburg has removed the term "Rasse" as a constitutional principle of non-discrimination, so that instead of Art. 12 para. 2 of the Constitution of the State of Brandenburg now reads as follows: "No one may be given advantage or disadvantage because of origin, nationality, language, gender, sexual identity, social origin or status, disability, or religious, philosophical or political convictions or on racist grounds." Furthermore, the constitutionally defined objectives of the State of Brandenburg have been expanded correspondingly, so that Art. 12 para. 1 now reads "the state protects the peaceful coexistence of people and counters the dissemination of racist and xenophobic ideas and views."

These constitutional amendments are very welcome except for the fact that, in the German context the phrase "racist and xenophobic" often means that a debate about the existence of racism is rendered impossible. The wording leads to the issue of racism being ignored, downplayed or denied. Notwithstanding these reservations, the constitutional amendment of Brandenburg should serve as a reference for corresponding amendments in the constitution of other federal states and the German Basic Law. [On the problematic issue of the collection of data on racist crime, see: V. 1. c) Shortcomings in data collection on racist crime]. In the German Basic Law, the constitutions of the federal states and all other laws, the term "Rasse" should be replaced by the German word for "racist", which is "rassistisch".

3 See BayVerwGH, Urt. v. 24.11.2011, 4 N 11.1412, administrative court, judgement 24.11.2011 – "Ausländerbeirat", i.e. foreigners' advisory council, in connection to which the administrative refers to ICERD in its erroneous interpretation of the concept of "nationality" and applies, with due consideration, to exclusion from citizenship pursuant to Art. 1 para. 2 and 3 ICERD, a reference which was equally misconceived.

4 This category encompasses the overall majority of racially-motivated crimes.

5 See the comprehensive statement of the German Institute for Human Rights on the CERD/C/82/D/48/2010 in "Stellungnahme des Deutschen Instituts für Menschenrechte" on the procedure before the UN Anti-Racism Committee in the case *Türkischer Bund Berlin-Brandenburg e.V./ Deutschland* (48/2010), December 2011 and *Türkischer Bund Berlin-Brandenburg e.V./ Deutschland* (48/2010), December 2011, [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Stellungnahme\\_DIMR\\_im\\_Verfahren\\_vor\\_dem\\_UN\\_Antirassismus\\_Ausschuss\\_TBB\\_Deutschland.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Stellungnahme_DIMR_im_Verfahren_vor_dem_UN_Antirassismus_Ausschuss_TBB_Deutschland.pdf).

6 See also the ECtHR judgement of 13.12.2005, 55762/00 and 55974/00 – *Timishev et. al. vs. Russland*, Rn. 55, where the Court makes following statement on the term "race": "the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics". The word "Rasse" was not translated into "race" as the German term does not include the social-construct concept implied in the English word "race".

7 See also Cremer (2008) "... und welcher Rasse gehören Sie an?" – "Zur Problematik des Begriffs "Rasse" in der Gesetzgebung", Policy Paper No. 10, DIMR, about the problems of the term "Rasse" in the legislation.



Using this approach, the protection of human rights, including the prohibition of discrimination, would be maintained, in a way that would conform with ICERD. At the same time, it would clarify the law, as it would then no longer imply the existence of human “races.”

### **Exclusion from citizenship (Art. 1 para. 2 and 3 ICERD)**

Regarding the issue of citizenship as defined in ICERD (Art. 1 para. 2 and 3), the report of ECRI (European Commission against Racism and Intolerance) calls upon Germany to ratify Protocol No. 12 of the European Convention on Human Rights. Germany has refused to ratify this protocol because, according to the decision of the European Court of Justice, its restrictive regulation on foreign citizenship would no longer be applicable. In 2012, the German Constitutional Court declared that the exclusion of foreign citizens from being eligible to receive a state child-raising allowance to be unconstitutional.<sup>8</sup> In the same year, the Court found that a regulation of the Asylum Seekers' Benefit Act (AsylbLG), under which asylum seekers were not guaranteed a minimum subsistence, was also unconstitutional, as it contravened human dignity as outlined in Art. 1 para. 1 of the German Basic Law (GG).<sup>9</sup>

### **Affirmative action (Art. 1 para. 4 ICERD)**

It should be stated that, with regard to the special measures listed in Art. 1. para. 4 of ICERD, Germany has made hardly any efforts to implement an effective policy for the advancement of people who experience racism. This contrasts sharply with the affirmative action measures that have been implemented for decades with the aim of ensuring gender equality. The recent draft law of 10 December 2014 to ensure the equal participation of women and men in management positions in private and public sectors<sup>10 11</sup> is based on a narrowly-defined policy of affirmative action, which does not take into consideration the structural character of discrimination.

#### **Recommendations**

In order to strengthen protection against racial discrimination, the concept of “Rasse” should be replaced by the phrase “on racist grounds” in the text of the German Basic Law as in the texts well of all the federal states' constitutions.

A definition of racial discrimination must be agreed in order to facilitate the incorporation of the provisions of the Convention into national law. This definition should be binding and conform to the definition of racial discrimination under the provisions of the Convention, including institutional discrimination by effect (i.e. institutional discrimination under Art. 1 para. 1 of ICERD).

In its Communication 48/2010, the German Institute for Human Rights stressed that the German legal obligations to ensure the protection of human rights arising from ICERD should be applicable in practice and not only by law. The German government must be required to answer how the special regulations applicable only to foreign citizens, including asylum laws, conform to Art. 1 para. 2 and 3 of ICERD. These regulations should be assessed in the light of the CERD General Recommendations (Citizens and Non-Citizens), 22 (Refugees and displaced persons) and 30 (Discrimination against Non-Citizens).

The German government must fulfil its obligation under ICERD Art. 1 para. 4. Efficient measures must be taken to protect people who experience racism in the private sector and public services.

<sup>8</sup> BVerfG decision dated. 7.2.2012, 1 BvL 14/07 – “Bayerisches Landeserziehungsgeld”, Bavarian child-raising benefits.

<sup>9</sup> BVerfG decision dated 18.7.2012, 1 BvL 10/10 – Asylbewerberleistungsgesetz, Asylum Seekers Benefits Act.

<sup>10</sup> Federal government on a draft law aimed at promoting the equal participation of women in management positions in the private and public sector, “Entwurf eines Gesetzes für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst”, last accessed on 4 February 2015, [http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/GE-FRAUENQUOTE.pdf?\\_\\_blob=publicationFile](http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/GE-FRAUENQUOTE.pdf?__blob=publicationFile).

<sup>11</sup> “Merkel will sich bald mit Angehörigen der NSU-Opfer treffen – Spiegel Online”, on the issue of Chancellor Merkel's meeting with the relatives of the NSU victims, last accessed 4 February 2015, <http://www.spiegel.de/politik/deutschland/merkel-will-sich-bald-mit-angehoerigen-der-nsu-opfer-treffen-a-902403.html>.

## II. Re Article 2 ICERD (Prohibition of racial discrimination and protection of specific groups)

The Federal Republic of Germany does not take sufficient action to ensure the protection of all the groups requiring special measures pursuant to ICERD Art. 1. This is demonstrated by its refusal to collect relevant data on discrimination broken down by group, from which to derive information and implement protection and affirmative action policies pursuant to Article 2-1-e. The disparate and fragmentary data contained in the State Report is evidence of the fact that there is a failure to recognise the fact that specific groups are exposed to specific forms of racial discrimination. Racial discrimination takes various forms that are specific to particular groups, which is why a group-specific analysis of racial discrimination is a precondition for obtaining a comprehensive picture of human rights violations.

### Obligation to provide information on groups requiring specific protection under ICERD

The collection of disaggregated, i.e. group specific data, on discrimination, as well as socio-demographic data on education, revenue and the lived experience of groups requiring specific protection under ICERD is a pivotal tool for the protection against racist discrimination. This data is gathered according to strict standards for the protection of privacy rights and individual data and on the basis of voluntary self-identification.

The obligation to provide this information is consistent with the guidelines laid out in Art. 2 of the Convention and the General Recommendations on the form and content of State Reports under Article 8, as well as the Concluding Remarks Nr. 14 of the Committee<sup>12</sup> and ECRI's renewed recommendations. The present 19<sup>th</sup>-22<sup>nd</sup> State Report fails again to include the relevant information. The only data provided are incomplete demographic data, mainly related to "migration background".

The category defined as "migration background" is in many ways an inappropriate concept for identifying racial discrimination: on the one hand, it includes groups in the population who usually do not experience racial discrimination; i.e. people who are not Jewish, Black, Muslim or Roma, as well as Germans born abroad. Group-specific experiences of racial discrimination cannot be captured using this category.

Secondly, many people, who are exposed to racism, are part of the German population and have no "migration background", for example Sinti and Roma, Jews, as well as people of African descent and Black people in Germany. They are not referred to by this category. The use of the term "migration background" renders a historically-conscious recognition and proof of the specific, persistent racial discrimination against the aforementioned groups impossible.

Furthermore, the "migration background" category does not apply after the second, and in a few cases after the third generation, depending on the method used for the collection of the relevant data. This leads to a growing number of people who belong to groups requiring specific protection under ICERD and still experience racial discrimination are being excluded from this category. Demographic data on the group: "people with a migration background" demonstrates the extent to which this category is problematic: Of the 18 million people with a "migration background" living in Germany in 2012, 60 percent have German citizenship. People with a "migration background" are considerably younger than the rest of the population. People of African ancestry are the youngest group in Germany, followed by people with Turkish and Arab<sup>13</sup> ancestry. This data clearly indicates that there will be a growing number of people of the third-, fourth- or fifth-generation immigrants who can be deemed to be members of this group, but who will no longer be included in the category "migration background". Therefore, the category "migration background", based on an unacceptable summary analysis and leading to its arbitrary exclusion of various groups requiring specific protection under ICERD, is inadequate for ensuring conformity with the obligation to report under ICERD. A rigorous analysis of the deeply rooted structural and institutional racial discrimination is not possible using this approach.

The reality of racial discrimination in Germany is obscured by the government's refusal to gather disaggregated data. The use of this inadequate category is a failure of the state in its obligation to the groups requiring protection under

12 CERD "CERD/C/DEU/CO/18 – Concluding observations of the Committee on the Elimination of Racial Discrimination", last accessed 24 November 2014, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsv4qujPA8qSE3O3exJU3P3xxPG126Vm4ZRxoRSO-6zJuol9nsW75tNMgzanWe7DTlwUotv91AOcyEnM1OYJDFP%2fMTjhaQoqopG8rat41aB5%2fq>.

13 Franziska Woellert und Reiner Klingholz (2004) "Neue Potenziale: Zur Lage der Integration in Deutschland" (Berlin Institut f. Bevölkerung u. Entwicklung /Berlin Institute for Population and Development) on the state of integration in Germany.

ICERD by denying them the right to a comprehensive analysis of their lived experience, including structural and institutional racial discrimination.

The reasons for opposing group specific information mentioned in section 30 of the State Report are contrary to CERD recommendations. They refer to historic aspects, legal reservations and reservations expressed by national minorities. Reservations due to historical experiences cannot be put forward without extensive consultation with all the relevant groups. Moreover, reservations expressed by certain groups must not result in the withholding or ignoring of necessary information about other groups.

If categories are to be defined in order to gather data on racial discrimination, the participation of groups requiring protection is to be granted, as stated in ICERD, and it must have a significant impact. The core principles of an adequate and appropriate system of data collection in a context of informational self-determination must be on a voluntary basis and must include the possibility of self-assignment to a category<sup>14</sup> and / or the refusal to assign oneself to any category. An additional and important factor for the collection of data on discrimination is the differentiation between self-perception and the perception of others. The respondents must be given the opportunity to differentiate between their perception of their own experience of discrimination and the perception of others.

Among all the groups requiring protection under ICERD which are exposed to racial discrimination in Germany, only Sinti and Roma have the status of a national minority pursuant to international law, and only data on anti-Semitic attacks are collected separately in the statistical recording of hate crimes. Other groups requiring protection under Art. 1 of the Convention have not been given the status of national minorities on the basis of the relevant agreements, or do not benefit from a differentiated collection of data on the hate crimes committed against them. For this reason, Sinti and Roma as well as Black people demand a differentiated collection of data on discrimination offences that are committed against them [See: II. 5. a) Sinti and Roma in Germany and d) Black People in Germany].

In the police files, as well as in the police criminal statistics, data are routinely generated in Germany, through the means of which suspects or the accused are assigned to groups requiring protection under ICERD [See: II. 5. a) Sinti and Roma in Germany]. Given the fact that security bodies and criminal analysts already collect data on the basis of assignments decided upon by others, the collection of differentiated data on discrimination should be organised on the basis of consultation and cooperation with civil society organisations representing the interests of every single group that requires protection under ICERD, according to principles that conform with human rights. Disaggregated data collection also plays a pivotal role for use in court proceedings where, according to the EU Race Directive (2000/43/EC), the chance to prove that discrimination took place on account of the victim's affiliation to a specific group is possible. For this reason, the current data does not offer the same protection potential as differentiated data, neither for analytical purposes nor for court proceedings.

### Recommendations

The modalities for the collection of data on discrimination and equal treatment are to be defined in a consultative process with civil society organisations that can represent groups requiring protection under ICERD. To this aim, reservations expressed by certain groups must not be put forward as arguments against other groups' demands for differentiated data. The Federal Republic of Germany should shift away from the unsophisticated concept of "migration background" and adopt differentiated, group-specific solutions. In order for monitoring to conform with the recommendations of the Committee (Concluding Observations, Item 14) in connection with Art. 2 of the Convention, disaggregated data, i.e. group-specific demographic data, which are broken down by group, must be collected. Information on education, income and the lived experience of each of the groups requiring protection under ICERD must be collected on the basis of voluntary self-identification and with full respect for privacy rights and individual data. To this aim, it is necessary to collect disaggregated demographic data, as well as data on discrimination, and systematically determine their development over a particular period of time. The relevant bodies for the collection of data on discrimination, including the Federal Anti-Discrimination Agency and the Federal Government Commissioner for Migrants, Refugees and Integration, must be given an explicit mandate and adequate resources to gather disaggregated data broken down by group, derived from academic studies and surveys as well as the systematic assessment of court claims, judgements and complaints lodged with the Federal Anti-Discrimination Agency or the anti-discrimination agencies of the federal states ("Länder"). The categorisation, operationalisation, implementation, monitoring and analysis of this data must be conducted in consultation with, and with the participation of, relevant grass-roots organisations.

<sup>14</sup> This is concordant with the requirements as established by the case law of the German Constitutional Court as well as pursuant to the Federal Data Protection Act (BDSG).

Judicial statistics should be established in all cases where racial discrimination is mentioned, whether in police files or by the claimants themselves, and made public in order to assess the real impact of legal protection against racial discrimination.

## **1. Re Article 2 paragraphs a and b ICERD (Obligation of public authorities and institutions to not engage in any act or practice of racial discrimination)**

Regarding conformity with Article 2 para. 1a and b of the Convention, the State Report asserts that all public authorities and agencies are bound by Article 1 para. 1 of the German Basic Law (GG) and by Article 3 para. 3 of the German Basic Law; consequently, all public agencies are prohibited from engaging in any act or practice of racial discrimination. This is precisely where a fundamental issue is raised when considering protection against racial discrimination in Germany: constitutional prohibition of discrimination alone does not guarantee legal protection against discrimination from public authorities and institutions.

Effective protection against discrimination from public authorities and institutions requires additional specification. This is most especially and obviously the case for education [see: V. 4. b) Racial discrimination and segregation in the education system] and asylum law and practice [see: V. 4. a) Racial discrimination in the regulation and application of asylum and residence law]. Discrimination by public bodies is, according to the annual integration barometer survey conducted by the Expert Council of German Foundations on Integration and Migration (SVR), the most frequently mentioned source of discrimination; 31.8 percent of people with a Turkish “migration background” [see: II. – Obligation to provide information on groups requiring specific protection under ICERD] identified public services and institutions as the most frequent source of discrimination, whereas people with African/Asian/South American “migration background” ranked it third with 23.8 percent, after discrimination on the labour and housing markets.<sup>15</sup>

## **2. Re Article 2 paragraphs a and b ICERD (Mechanisms for the review of discriminatory effects of the acts and practices of public bodies and laws)<sup>16</sup>**

Although compliance with national laws designed to uphold human rights are monitored at federal and state levels, some regulations still do not provide adequate legal protection. [see: V. 2. The right to equal treatment in court and in all institutions for the administration of justice – Racial Profiling], or the General Equal Treatment Act (AGG) [see: V. 4. c), Involvement and participation in professional and economic life – there is insufficient legal protection, the General Equal Treatment Act (AGG) must be strengthened here]. There are no independent services mandated to monitor public institutions and, if necessary, to sanction the institutions that discriminate against people.

### **Recommendations**

The Federal Republic of Germany must institutionalise a mechanism through which legislation, regulations and official acts can be checked for unintended discriminatory effects. Where procedures for the checking of laws for discriminatory effects already exist, the federal government will be required to prove which methods and standards are applied when conducting this examination. It is particularly necessary to check for the relevant consequences and disparate racial impact with regard to Art. 1 of ICERD.

The competences of the Federal Anti-Discrimination Agency (ADS) must be expanded to more public institutions and the independence of ADS strengthened with regards to the implementation of the EU Anti-Discrimination Directive. The ADS must be able to conduct investigations, to be able to be effective in the administrative context (in a framework underpinned by sanctions) and bring cases of discrimination to court.

<sup>15</sup> Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR), Deutschlands Wandel zum modernen Einwanderungsland Jahresgutachten 2014 mit Integrationsbarometer, 2014, [http://www.svr-migration.de/wp-content/uploads/2014/11/SVR\\_JG\\_2014\\_WEB.pdf](http://www.svr-migration.de/wp-content/uploads/2014/11/SVR_JG_2014_WEB.pdf); Expert Council of German Foundations on Integration and Migration concerning Germany's path towards a country of destination for immigration.

<sup>16</sup> This section is based on background papers “Rassismus gegen Schwarze Menschen” by Damaris Uzoma, written on behalf of Initiative Schwarze Menschen in Deutschland, and “German policing at the intersection: race, gender, migrant status and mental health” by Dr. Eddie Bruce Jones. Both papers were submitted within the framework of the ICERD parallel report. The background paper by Damaris Uzoma is about racism against Black people and the full text can be accessed here: <http://rassismusbericht.de/hintergrundpapiere-2/> The full text of the paper by Eddie Bruce Jones can be accessed here: <http://rassismusbericht.de/wp-content/uploads/Bruce-Jones-German-Policing.pdf>

### **3. Re Article 2 paragraph 2 d ICERD (Prohibition and elimination of racial discrimination by private stakeholders)**

The provisions made in both criminal and civil law, including those of the General Equal Treatment Act (AGG), which aim to prohibit and eliminate racial discrimination by private actors, offer insufficient protection. An examination of these measures with a focus on a critical analysis of AGG can be found in Article 4 [see: V. 4. c) Involvement and participation in economic life – Inadequate legal protection: strengthening of AGG is essential].

### **4. Re Article 2 paragraph 1 e ICERD (Combating racism, in particular by supporting relevant organisations and movements)**

In the State Report, statements about protection against racism intertwine with discourse and policies aimed at the promotion of so-called “integration”. This is understood as the inclusion of people with so-called “migration background” into German society; this interpretation results in a narrowly construed representation of racial discrimination, as discrimination indisputably is an independent factor which is in no way determined by the “integration status” of the individuals or groups who are being discriminated against, especially given the fact that racial discrimination is increasingly experienced by people who have been living in Germany for generations.

Instead of severing the link between the two issues, the focus is turned towards the so-called “integration performance” (Integrationsleistungen) of people with a “migration background”. Though the promotion of “integration” through language and education support schemes has given people who experience racism in Germany access to important services, the lack of a human rights dimension in the integration policy has raised a fundamental issue. The starting point for anti-discrimination policy-making should be the guarantee of equal participation in society, supported by a comprehensive protection of human rights and not demands for integration, with the partial subtext, that equal treatment would need to be earned through an adequate display of “integration performance”. In this context, the statement made by Chancellor Merkel during the 2013 Integration Summit, according to which she intended to replace the integration concept with “inclusion, participation and respect”<sup>17</sup> welcome. However, until today, a paradigm shift towards inclusion – particularly through the enforcement of the rights and state duties enshrined in ICERD – is still not evident.

The obligation to encourage anti-racist initiatives under Art. 2, para. 1 e of the Convention cannot be efficiently fulfilled at present. One of the main areas of concern is the insufficient funding of projects, relevant grass-roots organisations and groups requiring protection under ICERD which focus on intersectional discrimination; e.g. sexual and gender-related issues in conjunction with affiliations to various social, religious and cultural groups. Due to the fact that an emphasis is placed on anti-discrimination projects that either represent the perspective of the majority of society in Germany or focus on a single factor, the inclusion and representation of lesbian, gay, bisexual, transgender and intersex people who experience racism is seldom ensured.<sup>1</sup>

#### **Recommendations**

The funding of organisations working in the field of racial discrimination should be separated from the funding of those organisations which promote “integration”.

Grass-roots organisations which actively counter racial discrimination in an intersectional way should benefit from targeted support, so as to develop a targeted approach to intersectional discrimination and disseminate information to people who are exposed to intersectional discrimination with the aim of safeguarding their right to protection under human rights and anti-discrimination laws.

### **5. Re Article 2 paragraph 2 ICERD (Protection of specific groups)**

The mention of Muslims and Black People in the State Report as groups of the population who require protection, alongside Jewish and Sinti and Roma people, is highly welcomed. Unfortunately, the information presented does not comply with the reporting guidelines on the form and content of the State reports, nor does it comply with Item

<sup>17</sup> “Merkel will sich bald mit Angehörigen der NSU-Opfer treffen” – Spiegel Online, on the issue of Chancellor Merkel’s meeting with the relatives of the NSU victims, last accessed 4 February 2015, <http://www.spiegel.de/politik/deutschland/merkel-will-sich-bald-mit-angehoerigen-der-nsu-opfer-treffen-a-902403.html>.

14 of the Concluding Observations of the Committee.<sup>18</sup> Against all expectations, the report falls short of giving an adequate account of the specific forms of discrimination the specified groups are exposed to. Furthermore, the report fails to take into consideration the intersectional aspects of racial discrimination, the importance of which the Committee explicitly underlined in the General Recommendation 32.

## a) Sinti and Roma in Germany<sup>19</sup>

### 1. Art. 2 Art. and 5 ICERD Structural racism and multiple layers of discrimination

Roma and Sinti are often depicted in the media as a problem.<sup>20</sup> Public discourse and heated campaigns against Roma have become common since the expansion of the EU to include Bulgaria and Romania and the liberalisation of travel requirements for Serbia. A survey conducted by the Federal Anti-Discrimination Agency,<sup>21</sup> which is consistent with the findings of the 2014 “Mitte-Studie” (survey of the mainstream) conducted at Leipzig University, reveals a widespread animosity against Roma and Sinti. The study shows, for instance, that 41.7 percent of the respondents agree with “Sintis and Roma” being banished from inner city areas and 55.9 percent of the respondents insinuate that “Sinti and Roma” have criminal tendencies.<sup>22</sup> These assumptions are part of a deep-rooted form of structural racism that gives inter-subjective and inter-organisational coherence and legitimacy to racial discrimination in practice, as the following examples clearly demonstrate.

Roma and Sinti have been subject to discriminatory and racist language. In the time of National Socialism, the perpetrators labelled Roma and Sinti with the discriminatory term “Zigeuner” and carried out genocide against people considered as such. Despite the racist connotation that it has, the word “Zigeuner” is still used in an openly careless way in supermarkets<sup>23</sup> the media<sup>24</sup> and official administrative communications. To ignore the self-determination of Roma and Sinti is a manifestation of structural racism.

Institutional racism: the aforementioned assumptions and attitudes stabilise institutional racial discrimination against Roma and Sinti and appear as an essential ingredient of Gadge<sup>25</sup> racism. Roma and Sinti have a multifaceted experience of institutional discrimination, including by public bodies such as schools, administrative services, the judiciary and the police. This can be illustrated using following examples:

**Law Enforcement:** In 2014, the Central Council of the German Sinti and Roma filed a suit against police officers of the State of Baden Württemberg, because in the police files, they referred to a wrongly suspected Rom, as a “typical representative of the minority”, the implication being that “lying is an essential component of his socialisation”<sup>26</sup> This is an issue of concern, especially considering the pivotal role of the police administration in the registration and persecution of Roma and Sinti during the time of National Socialism as well as the registration of Roma and Sinti by the police long after 1945<sup>27</sup> [see also: V.2. The right to equal treatment in court and in all institutions for the administration of justice].

Development programmes: the Berlin-based “Romano Bündnis”, a coalition of Roma and Sinti grass-roots organisations, is especially critical of the ethnicisation of social problems, the fact that grass-roots organisations are largely excluded and that combating racial discrimination against Roma and Sinti<sup>28</sup> is not considered to be a major issue of concern.

18 CERD, CERD/C/DEU/CO/18.

19 This section is based on a background paper “Rassismus gegen Sinti und Roma in Deutschland” (Racism against Sinti and Roma in Germany) by Elsa Moshitana on behalf of Ini Romnja, written in the framework of the parallel report process. Full text available online: <http://rassismus-bericht.de/hintergrundpapiere-2/>.

20 Romani Rose: Bürgerrechte für Sinti und Roma. Das Buch zum Rassismus in Deutschland., Auflage: 1. Auflage, 1. – 12. Tsd., (Heidelberg, Zentralrat Deutscher Sinti und Roma 1987., 1987). Citizen rights for Sinti und Roma. A book on racism in Germany. Central Council of the Sinti and Roma.

21 Zentrum für Antisemitismusforschung, Institut für Vorurteils- und Konfliktforschung e. V., Zwischen Gleichgültigkeit und Ablehnung Bevölkerungseinstellungen gegenüber Sinti und Roma, last accessed 18 August 2015, [http://www.antidiskriminierungsstelle.de/Shared-Docs/Downloads/DE/publikationen/Factsheets/factsheet\\_engl\\_Bevoelkerungseinstellun-gen\\_gegenueber\\_Sinti\\_und\\_Roma.pdf?\\_\\_blob=publication-File](http://www.antidiskriminierungsstelle.de/Shared-Docs/Downloads/DE/publikationen/Factsheets/factsheet_engl_Bevoelkerungseinstellun-gen_gegenueber_Sinti_und_Roma.pdf?__blob=publication-File). The Center for Anti-Semitic Studies, Research Institute on Prejudice and Conflict.

22 Ralf Melzer (2014), “Fragile Mitte-Feindselige Zustände – Rechtsextreme Einstellungen in Deutschland” 2014, last accessed 4 February 2015, [http://www.fes-gegen-rechtsextremismus.de/pdf\\_14/FragileMitte-FeindseligeZustaende.pdf](http://www.fes-gegen-rechtsextremismus.de/pdf_14/FragileMitte-FeindseligeZustaende.pdf) on the fragile centre, hostility and extremist right-wing views.

23 “Streit um Umbenennung: Zigeunersauce heißt trotz Protesten weiter Zigeunersauce – Deutschland – FOCUS Online – Nachrichten”, [http://www.focus.de/politik/deutschland/streit-um-umbenennung-zigeunersauce-heisst-trotz-protesten-weiter-zigeuner-sauce\\_aid\\_1124016.htm](http://www.focus.de/politik/deutschland/streit-um-umbenennung-zigeunersauce-heisst-trotz-protesten-weiter-zigeuner-sauce_aid_1124016.htm), argument over the renaming of a “gypsy sauce” that still kept its name despite protest. FOCUS online, news, last accessed 4 February 2015.

24 Rolf Bauerdick (2013) “Wer ist schuld am Elend der Zigeuner?” Welt Online (25. März), <http://www.welt.de/kultur/article114753394/Wer-ist-schuld-am-Elend-der-Zigeuner.html?> On the question: “who is responsible for the misery of the Gypsies?”

25 “Gadje” encompasses all people who are neither Roma and Sinti, nor Manusch or Kale. The term Gadje-racism defines a form of racism specific to these groups. This concept has been developed by the aforementioned communities in order to describe their specific experience.

26 Romano-Bündnis (2014), “Rassismus: Zentralrat der Sinti und Roma erstattet Anzeige gegen Polizei”, Die Zeit, 4 February, section “Zeitgeschehen”, <http://www.zeit.de/gesellschaft/zeitgeschehen/2014-02/nsu-prozess-sinti-roma-rassismus>.

27 Romano-Bündnis (2014) “Rassismus: Zentralrat der Sinti und Roma erstattet Anzeige gegen Polizei”, Die Zeit, 4 February, section “Zeitgeschehen”, <http://www.zeit.de/gesellschaft/zeitgeschehen/2014-02/nsu-prozess-sinti-roma-rassismus>

28 Romano-Bündnis (2013), discussion paper, last accessed 4 February 2015, [https://inirromnja.files.wordpress.com/2013/08/positionspapier\\_bu\\_ndnis\\_zum\\_senat1.pdf](https://inirromnja.files.wordpress.com/2013/08/positionspapier_bu_ndnis_zum_senat1.pdf)

## 2. Art. 3 ICERD Condemnation and prohibition of segregation

School: According to reports based on the experience of Roma and Sinti in the Berlin district of Neukölln, Roma children remain much longer in the so-called “welcome classes” (for children with limited knowledge of German) than other children. Whereas most children stay in the class up to three months, on average Roma children remain in the class for one year and sometimes even remain there for up to three years.

The trans-generational trauma experienced by Roma and Sinti, and its consequences, are realities that educational institutions, youth welfare offices, and family support schemes completely ignore or negate. In addition, German Sinti and Roma, who are exposed to massive discrimination at school, receive no support to deal with their experiences, as depicted in the “Survey on the Current Situation of Sinti and Roma in the Education System.”<sup>29</sup>

## 3. Art. 2 b ICERD State support schemes

Though Roma and Sinti have been recognised as a national minority in Germany, there is no support for the promotion of their languages and culture. The Romani language is not recognised as an independent, complex and historical language, it does not benefit from any promotion scheme, and it has not been integrated by the administrative bodies into the official interpretation services, even though national minority status in Germany covers legal rights in the fields of education and language promotion.

Administrative bodies make decisions and carry out policies that result in structural discrimination at national, state and community levels.<sup>30</sup> For example those organisations which are recognised as having expertise with Roma issues are usually those without Roma and Sinti members. In addition, Roma and Sinti grass-roots organisations typically have their demands for equal rights and dignified treatment reduced to a simple assessment of their social service needs.<sup>31</sup>

With a view to asserting human rights, Germany must fulfil its obligations pursuant to Art. 2 of ICERD as well as under the Framework Convention and the European Charter for Regional or Minority Languages, and adopt pro-active policies for the promotion of the Roma culture and language, which are detailed as follows:

### Recommendations

Actively promoting the use of family languages among children and young Roma and Sinti and establishing language education schemes for children in order to ensure that young people and adults can learn and master their first languages.

Establishing an institute managed by Roma and Sinti to aid knowledge transfer from other European states. Developing didactic and education material for Romanes dialects and for teaching about Roma history and cultural contributions: for Roma and Sinti by Roma and Sinti.

Ensure mainstreamed funding and hiring of Romanes interpreters to provide interpretation services in public administration offices.

Active promotion and funding of Roma and Sinti cultural and academic work.

### Education: The culture and education ministries of the federal states:

Abolition of segregated school classes and the creation of additional educational schemes for immigrant children within standard classroom settings.

Grass-roots organisations have spelled out their needs and recommendations for action aimed at achieving justice in the education system. These must be taken into consideration.

It is imperative that the Porajmos – i.e. the organised persecution and murdering of Roma and Sinti throughout Europe – is included in the school curricula, from the perspective of the survivors and their descendants.

29 Daniel Strauß; Alexander von Plato, Michael Klein, Uta Rüchel, Jane Schuch, 2011, last accessed 4 February 2015, [http://www.stiftung-evz.de/fileadmin/user\\_upload/EVZ\\_Uploads/Publikationen/Studien/2011\\_Marburg-strauss\\_studie\\_sinti\\_bildung.pdf](http://www.stiftung-evz.de/fileadmin/user_upload/EVZ_Uploads/Publikationen/Studien/2011_Marburg-strauss_studie_sinti_bildung.pdf)

30 Romano-Bündnis “Rassismus” (Racism).

31 Ini Rromnja (2013) “Position des Romano-Bündnis zum ‘Berliner Aktionsplan zur (gegen die) Einbeziehung von Roma’”, IniRromnja, last accessed 4 February 2015, <https://inirromnja.files.wordpress.com/2013/09/aktionsplankritikromanobc3bcndnis.pdf>Berlin-based Romano Alliance, position paper on the Berlin action plan for (against) the involvement of Roma.

**Monitoring discrimination:**

Establishing an independent investigation commission to investigate complaints against the police in connection to issues such as racial profiling and racist content in police files.

Creation of an anti-discrimination complaint body, which could be attached to the Berlin Office for Equal Treatment and Against Discrimination, but would have the obligation to employ multilingual and Rromani-speaking staff.

Promotion and further development of Roma and Sinti grass-roots organisations aimed at creating counselling centres to provide professional support to Roma and Sinti who experience discrimination, and to document cases of discrimination on a permanent basis.

Allow for collective action lawsuits.

**Monitoring and participatory promotion:**

Set up a commission comprised of Roma and Sinti grass-roots organisations that will be given the task of setting participatory and efficient quality standards aimed at developing, implementing and assessing promotional schemes for Roma and Sinti.

**b) Jewish communities in Germany<sup>32</sup>**

Due to the persecution and annihilation of the Jewish communities in Nazi Germany, the Federal Republic of Germany has committed itself to protecting and guaranteeing the security of the Jewish community and Jewish life in Germany. For this reason, the Jewish community is the only group in Germany that requires protection pursuant to Art. 1 of ICERD and whose data on discrimination in the field of hate crime is listed separately.<sup>33</sup>

Despite a wide range of measures to roll back anti-Semitism, Jewish people in Germany experience<sup>34</sup> crime and violence, attacks, hostility and hatred, discrimination and inequalities, all acts which are motivated by anti-Semitism. According to a wide range of studies, anti-Semitic attitudes are still a pervasive problem in German society.<sup>35</sup> According to the findings of a report submitted by the independent expert panel on anti-Semitism set up by the Federal Ministry of the Interior (BMI), there is a need for an overall strategy to combat anti-Semitism.<sup>36</sup>

**Article 2 and 4 ICERD – Racial discrimination and racially-motivated hatred**

The data collected under the specific category: “politically motivated crime” (PMC) show that over 90 percent of the anti-Semitic crimes and acts of violence can be attributed to the phenomenon of right-wing politically motivated crimes (PMC right-wing).<sup>37</sup>

According to the definition of PMC, the salient feature of anti-Semitic crimes is what is known in German law as “Volksverhetzung” (i.e. incitement of hatred against a segment of the population). The second most frequent offence is the dissemination of propaganda<sup>38</sup> through music or on internet platforms. The main source of hate speech in Germany is the NPD (National Democratic Party of Germany).<sup>39</sup> Following this, the AfD supporters (Alternative for Germany) rate second highest on xenophobia, chauvinism and trivialisation of National Socialism.<sup>40</sup> Under international<sup>41</sup> as well as German Law<sup>42</sup> the trivialisation and denial of the Holocaust are punishable as an incitement to hatred.

32 This section is based on a background paper on anti-Semitism in Germany written by Julia Alfandari within the framework of the parallel report process. The full text can be accessed here: <http://rassismusbericht.de/hintergrundpapiere-2/>.

33 BT Drucksache 17/14754, motion 17/14754 (to be) submitted to the Bundestag, the German parliament.

34 Bundesministerium des Innern, “Politisch motivierte Kriminalität im Jahr 2013”, Pressemitteilung 29.04.2014. Federal Ministry of the Interior, politically motivated crime in 2013, press statement, 29.04.2014 [“The German penal code (Strafgesetzbuch) establishes that someone is guilty of ‘Volksverhetzung’ if the person: [1] in a manner that is capable of disturbing the public peace: incites hatred against segments of the population or calls for violent or arbitrary measures against them; or assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population. There are also special provisions for Holocaust denial (added in the 1990s) and speech justifying or glorifying the Nazi government of 1933 – 1945 (recently added)”. Source: Wikipedia. <http://en.wikipedia.org/wiki/Volksverhetzung>, last accessed 16 February 2015.

35 BT Drucksache 17/14754, motion 17/14754 (to be) submitted to the Bundestag, the German parliament.

36 See Drucksache 17/1700, motion 17/1700, (to be) submitted to the Bundestag, the German parliament, or Friedrich Ebert Stiftung (FES), “Anti-Semitismus als Herausforderung für Politik und Gesellschaft”, 17.11.2009, on anti-Semitism as a challenge for politics and society.

37 19<sup>th</sup> – 22<sup>nd</sup> Report submitted by the Federal Republic of Germany to the UN Committee on the Elimination of Racial Discrimination under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, p. 9.

38 Federal Ministry of Interior, National Action Plan of the Federal Republic of Germany to Fight Racism, Xenophobia, Anti-Semitism and Related Intolerance, p. 76.

39 European Commission Against Racism And Intolerance (ECRI); Report on Germany, Neonazis and extreme right-wing groups, dated 5.1.2.2013.

40 Friedrich-Ebert-Stiftung (FES), “Mitte-Studie: Zentrale Ergebnisse”, main findings, dated 20.11.2014.

41 HRC, Communication No. 550/199, Faurisson v. France. dated, 8 November 1996, CCPR/C/58/D/550/199, Paragraphs 9.6. and 9.7.

42 §130 StGB Paragraphs 1 and 3.



The state parties have an obligation to ascertain whether anti-Semitic statements and propaganda activities qualify as racist incitement<sup>43</sup> against a segment of the population and prohibit any manifestation of racist hate speech by taking efficient measures to combat them.<sup>44</sup> Pursuant to CERD General Recommendation 35, various manifestations of racist hate speech in the form of spoken word, the written or the pictorial form have been recognised. Politicians and opinion leaders in particular are required not to make any racist or anti-Semitic statements.

The cases of Thilo Sarrazin and the AfD politician Jan-Ulrich Weiß provide a blatant demonstration of the considerable impact of these statements in the general public [See IV 1 a) CERD Communication No. 48/2010 (Termination of the investigation against Sarrazin) and Follow up]. Sarrazin claimed that all Jewish people have a gene in common and Jewish people from Eastern Europe are more intelligent than people of Turkish and Arab origin in Germany.<sup>45</sup> Weiß is currently under investigation for publishing an anti-Semitic caricature on his Facebook page.<sup>46</sup>

**The right to informational self-determination:** Pursuant to the right to informational self-determination, Jewish communities have opted against the collection of demographic and socio-economic data,<sup>47</sup> in order to protect themselves against anti-Semitic discrimination and offences. The request submitted by the right-wing party Die Rechte, which wanted to be given statistics about the Jewish population and housing situation,<sup>48</sup> should therefore be seen as a threat to the protection against organised discrimination of minorities<sup>49</sup> and consequently as a violation of the individual's general freedom of action (Art. 2 para. 2 in conjunction with Art. 1 para. 1 GG) and equality before the law (Art. 3 GG).

**Collection of data and multiple discrimination:** In the 2004 "Berlin Declaration", the OSCE participating states, including the Federal Republic of Germany, made a commitment themselves to "collect and maintain reliable information and statistics about anti-Semitic crimes, and other hate crimes, occurring within their territory, [and] report such information periodically."<sup>50</sup> Despite this obligation aimed at ensuring effective and comprehensive protection and prevention mechanisms, the process has only partially been implemented. Though the various manifestations of anti-Semitism are officially recognised<sup>51</sup>, offences on anti-Semitic grounds are not taken into consideration in the collection of data. Furthermore, cases of intersectional and/or multi-dimensional discrimination<sup>52</sup> are not considered. Jewish people with disabilities, members of the LGBTI community and other groups requiring protection under ICERD (i.e. Jewish people with Arab, Persian, or Turkish family background) are particularly exposed to discrimination and hate crimes.

**Article 7 ICERD – Education on human rights:** Lessons on the Holocaust are part and parcel of education curricula in Germany, but this emphasis is not sufficient to counter<sup>53</sup> anti-Semitic attitudes in a sustainable way. Priority should be given to education to combating anti-Semitism and to foster a culture of remembrance, as recommended in a study of the European Agency for Fundamental Rights (FRA) during the recent Berlin Conference on Anti-Semitism.<sup>54</sup> The foundation of a human rights dimension in schools, as well as in extra-curricular programmes and structures, is of paramount importance in order to create and enable a discrimination-free environment within which people of various origins can to live and exercise their human rights.

43 ICCPR (International Covenant on Civil Rights), Art. 19 para. 3 and Art. 20 para. 2, ICERD Art. 4.

44 CERD, General Recommendations No. 35, 26 September 2013, para. 7.

45 CERD/C/82/D/48/2010, para 12.6; Zeit Online, "Alle Juden teilen ein bestimmtes Gen", dated 28.08.2010, <http://www.zeit.de/gesellschaft/zeitgeschehen/2010-08/sarrazin-juden-gene-migration>, on all Jews share a particular gene.

46 Der Tagesspiegel, "Ermittlungen gegen AfD-Politiker Jan-Ulrich Weiß", on investigations against the AfD politician, dated 3.11.2014, <http://www.tagesspiegel.de/politik/antisemitische-karikatur-ermittlungen-gegen-afd-politiker-jan-ulrich-weiss/10926460.html>.

47 Jüdische Allgemeine, "Neonazis wollen wissen, wo Juden wohnen", dated 17.11.2014 <http://www.juedische-allgemeine.de/article/view/id/20749>, Jewish magazine, Neonazis want to know where Jewish people live.

48 Stadt Dortmund Drucksache Nr. 14315 – 14, City of Dortmund, motion (to be submitted).

49 Europarat, Artikel 3, "Rahmenübereinkommen zum Schutz nationaler Minderheiten" (Framework agreement for the protection of national minorities), Straßburg/Strasbourg, dated 1.11.1995.

50 Organisation for Security and Co-operation in Europe (OSCE), PC.DEL/347/04, Berlin Declaration, 29.04.2004 (Second OSCE Conference on Anti-Semitism, Berlin, 28<sup>th</sup> – 29<sup>th</sup> April 2004).

51 Federal Ministry of Interior, Office for the Protection of the Constitution, Report 2013, "Verfassungsschutzbericht 2013".

52 CERD, G.C. 32, 24.9.2009, CERD/C/GC/32.

53 FES, Mitte Studie; Drucksache 17/1700.

54 European Agency for Fundamental Rights (FRA) – Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of anti-Semitism, November 2013; Swiss OSCE Chairmanship conclusions, 10<sup>th</sup> Anniversary of the OSCE's Berlin Conference on Anti-Semitism, Berlin, 12 – 13.11.2014.

## Recommendations

Intensify measures being taken to create a legal foundation for the investigation and prosecution of anti-Semitic hate crimes and offences committed on the internet as well as by representatives of political parties and citizens' action committees.

Collect detailed and inclusive data on anti-Semitic hate crimes in order to improve legal and social protection and prevention work.

Commit to establishing a human rights approach in the education system as a foundation of a society which is distinguished by mutual respect, internal security and inclusion.

## c) Muslims in Germany<sup>55</sup>

Compared to other European countries, negative opinion<sup>56</sup> about Muslims in Germany are particularly widespread. According to a recent representative study, up to 60 percent of Germans are hostile to the notion of practising Islam. This negative attitude has also other implications, in terms of concrete political demands. 42 percent of people in Western Germany and 55 percent of people in Eastern Germany demand that the practice of Islam should be restricted.<sup>57</sup>

In the past year, populist movements have campaigned against "foreigners", "migrants" and first and foremost "Islam" and "Muslims" partly in a subtle manner, partly in a very clear way. In this context, the Pegida ("Patriot against the Islamisation of the Western world") in Dresden gathered up to 18,000 participants.<sup>58</sup>

Anti-Muslim hostility is therefore by no way a marginalised phenomenon; it is deeply rooted in the core of mainstream society and unifies a broad political spectrum. This was evident in the debate on circumcision in 2012. Due to strong reactions opposing the decision of the court in Cologne, which found that the ritual circumcision of boys were to be considered as a grave violation of their physical integrity and could not be justified, the Bundestag decided to adopt a law protecting the religious practice in the case of Jewish and Muslim circumcision rituals.

The Federal government decided to provide for legal clarity by ensuring that core traditions of the Jewish and Muslim communities could not be prosecuted, which is a highly welcomed step. The public debate and media coverage has nevertheless reflected anti-Semitic and anti-Muslim feelings and attitude. An analysis of the debate shows that even secular and atheist positions against Jewish and Muslim circumcision traditions are not free from anti-Muslim and anti-Semitic attitudes.<sup>59</sup> According to a subsequent representative survey, 70 percent of Germans oppose the circumcision law.<sup>60</sup>

Alarming increase of hate crime against Muslims: hate crime against Muslims has strongly increased in the past few years. A parliamentary inquiry concluded that an average of 21.9 "politically motivated offences targeting places of worship/mosques" had been officially registered. This figure increased from 12 cases per year in 2012 to 39 cases per year in 2014, amounting to up to three attacks a month. The Network Against Discrimination and Anti-Islamism led by the association Insaan e.V. in Berlin recorded a similar trend in Berlin. There is certainly a grey zone, taking into consideration that the majority of hate crimes are not reported to the police and political motivations often remain unmasked in the course of the investigation. Data on Anti-Muslim offences are not collected separately by the investigating authorities, so that there is a need for comprehensive and precise information about the real dimension of the phenomenon.

Muslims are first and foremost exposed to discrimination on the labour market and in the education system: In the European Union, every third Muslim has experienced racism in the past 12 months, the majority of Muslims do not

55 This section is based on the background paper "Antimuslimischer Rassismus", on anti-Muslim racism by Aliyeh Yegane on behalf of INSSAN e.V. and the Network against Discrimination and Anti-Muslim Racism against Islam as part of the parallel report process. The full text can be accessed here: <http://rassismusbericht.de/wp-content/uploads/Antimuslimischer-Rassismus.pdf>.

56 "Islamophobia" is a term commonly used in international human rights instruments but it is largely rejected in Germany. The most common terms used are "antimuslimischen Rassismus", which means "anti-Muslim racism" or "Muslimfeindlichkeit" which literally translates as "hostility to Islam". The rejection of the term "Islamophobia" is largely due to the suffix "phobia", – derived from Greek/Latin meaning "extreme or irrational fear or dislike of a specified thing or group", which usually refers to an illness, rather than an intended act. Muslim organizations in the English-speaking world put forward the same arguments. For this reason, it has not been used in this text in connection with discrimination.

57 Findings of the study "Wahrnehmung und Akzeptanz religiöser Vielfalt", Westfälische Wilhelms Universität Münster: [http://www.uni-muenster.de/Religion-und-Politik/aktuelles/2010/dez/Gastbeitrag\\_Pollack.html](http://www.uni-muenster.de/Religion-und-Politik/aktuelles/2010/dez/Gastbeitrag_Pollack.html), on the perception and acceptance of religious diversity.

58 Bernhard Honnigfort, "Pegida in Dresden: 15.000 Pegida-Anhänger demonstrieren", *fr-online.de*, 15. Dezember 2014, Abschn. Anhänger demonstrieren, <http://www.fr-online.de/pegida/pegida-in-dresden-15-000-pegida-anhaenger-demonstrieren,29337826,29344090.html>, on Pegida in Dresden, 15,000 Pegida supporters demonstrate.

59 Çetin, Z.; Voß, H.J.; Wolter, S.A., „Interventionen gegen die deutsche Beschneidungsdebatte“, edition assemblage, Münster, 2012, on interventions against the debate on circumcision in Germany.

60 "Studie: Mehrheit der Deutschen gegen Beschneidungsgesetz", *Spiegel Online*, 22. Dezember 2012, <http://www.spiegel.de/politik/deutschland/studie-mehrheit-der-deutschen-gegen-beschneidungsgesetz-a-874473.html>. A study on the majority of Germans being against the circumcision law.

report cases of racism to institutions or the authorities.<sup>61</sup> Discrimination against Muslims is an area which lacks concluding research data because structures for the collection, analysis, and documentation of cases of discrimination are hardly available.

The Network Against Discrimination and Anti-Islamism led by the association Inssan e. V. in Berlin is to date the only non-governmentally maintained project which systematically records anti-Muslim crime and discrimination in Germany. Data collected by the network show that the areas in which Muslims are most affected by discrimination are in the education sector (29 percent) and on the labour market (20 percent).

Women who wear head-scarves are particularly exposed to prejudice and have very limited opportunities to access mainstream education and the labour market.<sup>62</sup> In the education system, they are confronted with prejudice, which contributes to the fact that the majority of Muslims attend schools where it is not possible to gain a general qualification for university education. Many Muslims are often experience discouragement in their efforts to strive for higher levels of education.<sup>63</sup>

A dynamic and contemporary understanding of racism includes anti-Muslim racism and anti-Muslim hostility. ICERD covers protection against Anti-Muslim racism and Anti-Islam hostility as they constitute a form of racism which is connected to religious characteristics, from which difference and inferiority are construed using racist lines of argumentation. Though ICERD only mentions "race, colour, descent, or national or ethnic origin", the racist marginalisation of Muslims falls within its scope: the construed category of the alleged "races" is derived from a supposed "difference" and "inferiority" of the Muslim religion and culture.

Documented cases of anti-Muslim racist discrimination and hate crime are associated with real or assigned religious practices or symbols of Islam. This is the reason why people who are members of other religious communities, such as the Sikhs or whose appearance is considered to be "oriental", "Arab" or having a "Muslim" character, can also be victims of anti-Muslim discrimination.<sup>64</sup>

In addition, there is a need for a dynamic, contemporary and targeted approach that takes into consideration the comprehensive framework and guidance provided by ICERD and the intersectional dimension indicated in the General Recommendation 32. This means that various aspects of discrimination are often interconnected and must be considered as such. This also applies to "discrimination on the grounds of gender or religion."<sup>65</sup>

It is evident that as a specific group of people, Muslims are exposed to marginalisation, discrimination and violence. Despite Germany's historical responsibility to act preventively against racism in connection with inhuman attitudes and practices which show contempt for human values, anti-Muslim racism and hate crimes have not been given adequate attention. In the context of the racist murders perpetrated by the National Socialist Underground (NSU), insufficient attention has been paid to the fact that the majority of the victims were Muslims, which reflects the mounting anti-Muslim direction taken by extreme right-wing groups. Furthermore, despite the revelation that there had been administrative shortcomings during the investigations [see: IV 1. b), The NSU serial murders and the role of the State], the NSU Commission's demand that racist motivation should be considered by police authorities in cases such as the burning of the Mevlana Mosque in 2012 in Berlin was once again ignored.

## Recommendations

Provide funding for the research and study of anti-Muslim racism and hostility against Islam.

Implement of ICERD's General Recommendation 15 with the objective of taking racist hate speech into consideration when interpreting and implementing the offence of incitement to hatred (Sec. 130 StGB).

Collect and document separate data on explicitly anti-Muslim criminal incidents and discrimination in the criminal justice system.

61 FRA (2009), Data in Focus Report – Muslims, [http://fra.europa.eu/sites/default/files/fra\\_uploads/448-EU-MIDIS\\_MUSLIMS\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/448-EU-MIDIS_MUSLIMS_EN.pdf).

62 Netzwerk gegen Diskriminierung von Muslimen: 2011; Interkultureller Rat in Deutschland: 2010; IDA: 2007; Senatsverwaltung für Integration, Arbeit und Soziales 2009, OSI 2010. Network against anti-Muslim discrimination, 2011, Intercultural Council in Germany, Senate administration for integration, labour and social affairs in Berlin.

63 ADS 2013, p. 109, TIES 2009; Yegane Arani 2010. Among other sources: Federal Anti-Discrimination Agency.

64 Author's note: There are some documented cases in which for example an Indian, non-Muslim father accompanied his headscarf-wearing daughter to open a bank account. Despite the obvious age difference, it was assumed that he was his daughter's husband. This could be related to the image of the "oppressed Muslim wife". Though the father is not of the Muslim faith, he did in this case experience anti-Islam discrimination.

65 CERD, General Recommendation Nr.32: "(...) the Committee addresses situations of double or multiple discrimination – such as discrimination on grounds of gender or religion – when discrimination on such a basis appears to exist in combination with one reason or reasons listed in Article 1 of the Convention."

Establish a consistent and systematic nationwide framework to collect and document anti-Muslim crime and discrimination in the criminal justice system.

Establishment of accessible anti-discrimination facilities where Muslims can receive legal information and guidance.

Provide targeted diversity training schemes as part of further education programmes and organisational development (school development) in the education system focussing on diversity with respect to religion and beliefs, with special emphasis on anti-Muslim racism.

Include the dimension of religion and ideology as an aspect of diversity in all measures and policies aimed at fostering diversity in the workplace and in administrative bodies, with special emphasis on anti-Muslim racism.

#### d) Black<sup>66</sup> People<sup>67</sup> in Germany<sup>68</sup>

In Germany, Black People are exposed to everyday racism as well as structural racism. The federal government states in its report that Black People in Germany are members of a visible minority, and that Black people in Germany are particularly vulnerable to experiencing everyday racism as well as violence. However the report falls short of addressing structural and institutional racism (item 47 of the State Report). This indicates that only a very narrowly construed understanding of racism has been applied, one in which the focus is on intentional racism only.

Black People are not officially recognised as a group which is specifically exposed to racism. As a result, there is a lack of academic research about discrimination against Black People, for example on the labour market, in the education system, in the health system and on the housing market, which shows the reality of Black life in Germany. Some surveys, for example Europe-wide EU-MIDIS (European Union minorities and discrimination survey) conducted by the FRA (European Union Agency for Fundamental Rights) or research in the field of education show that, Black People, as well as Roma and Sinti, belong to groups that are particularly exposed to experiencing discrimination, physical attacks and unfair treatment in public offices, on the labour market and in the education sector.

**Demographic data:** CERD has repeatedly stressed the need to gather data on the population structure in order to ensure effective protection against racism.<sup>69</sup> [see: II. Obligation to collate data on the groups which need specific protection according to ICERD]. There is no official demographic data on the number of Black people living in Germany. More precisely, the characteristic used, "African migration background"<sup>70</sup> is not sufficient for collecting data on all Black people living in Germany. First, this concept does not include the third generation<sup>71</sup> of people who migrated from Africa. Secondly, there are many ways which lead to the migration of Africans in the Diaspora to Germany.<sup>72</sup>

**Institutional racism:** According to the Federal government, racism is expressed through "prejudice" and "discriminatory attitudes" in the population.<sup>73</sup> The denial of structural racism results in a limited level of protection against discrimination.

- a) According to § 2 AGG, the scope of the General Equal Treatment Act (AGG) is restricted to interaction between private actors and actions of the State covered by private law. Legal acts of State institutions, e.g. in the education sector, are not subjected to the prohibition of discrimination under the AGG. Therefore Germany does not meet the requirements laid out in the "EU Anti-Racism directive" (2000/43/EG), which does not stipulate such a restricted application.<sup>74</sup>

66 "B" of "Black" is written in capital letters in order to make clear that it refers to a construct and not to an actual "characteristic" that can be derived from skin colour. In this context, it is not related to what could be considered to be an "ethnic group". The identity "white" does not form a political counterpart to the tradition and practice of anti-racist resistance that is expressed by using a capital "B" for "Black" in capital letter. Therefore this term is written in lower case. "White" is also a construct but it is not derived from a tradition of political resistance (taken from: Eggers, Maureen Maisha/Kilomba, Grada/Piesche, Peggy/Arndt, Susan (eds.) 2005: *Mythen, Masken und Subjekte*. Münster: Unrast Verlag, S. 13).

67 According to the General Recommendation 34, the Expert committee suggests that the self-definition of People of African Descent should be the determining criteria.

68 This section is based on content included in the background paper: "Rassismus gegen Schwarze Menschen", submitted by Damaris Uzoma on behalf of the Initiative Schwarze Menschen in Deutschland, within the framework of the parallel report process. The topic is racism against Black People in Germany. The full text can be accessed here: <http://rassismusbericht.de/hintergrundpapiere-2/>.

69 For example General Recommendation IV, General Recommendation XXIV para. 1, Compilation of Guidelines On The Form and Content of Reports To Be Submitted By The Parties To The International Human Rights Treaties, para. 8.

70 See: Microcensus 2013, [https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/MigrationIntegration/Migrationshintergrund2010220137004.pdf;jsessionid=3EA1AC5452E60A5A880D6654A663A7B7.cae3?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/MigrationIntegration/Migrationshintergrund2010220137004.pdf;jsessionid=3EA1AC5452E60A5A880D6654A663A7B7.cae3?__blob=publicationFile), on population, migration, "migration background"

71 According to a common definition, those who are deemed to have a "migration background" are "all persons who have immigrated into the territory of today's Federal Republic of Germany after 1949, and of all foreigners born in Germany and all persons born in Germany who have at least one parent who immigrated into the country or was born as a foreigner in Germany."

72 For example, Black people migrate to Germany from the USA, France, the UK, the Caribbean and South-America, but also from Scandinavia or Eastern Europe, for example. These people are not captured in the category of "African migrant background."

73 With reference to structural racism in the police service, this is particularly denied: Bundestagsdrucksache 18/1629.

74 To see communication between the European Commission and the Federal government, see for example under: <http://www.bug-ev.org/themen/recht/agg-vertragsverletzungsverfahren/antirassismusrichtlinie.html>.

- b) Racial Profiling and racially motivated police violence: Black People are exposed to police checks in the absence of reasonable suspicion. Racially motivated police violence often follows on from racial profiling. Aside from racist insults and particularly brutal procedures, there are many cases in which Black People are the actual victims or witnesses, but are criminalised and arrested<sup>75</sup> by the police officers who have been called to the scene [See: V. 2. The right to equal treatment in court and in all institutions for the administration of justice.]

**Insufficient protection against institutional racism:** The Federal government asserts that institutional racism does not exist.<sup>76</sup> It only recognises “prejudice” and “discriminatory attitudes” within the population.<sup>77</sup> The denial of structural racism results in a limited level of protection against discrimination, and this remains below the standard as laid out in ICERD, particularly Art. 1, 2, 4 and 5.

A major cause of institutional discrimination for groups requiring protection under ICERD, including Black People and People of Color in Germany is the police force. In this context, a distinction has to be made between police violence on racist grounds and structural forms of institutional racism.

#### **Article 4 a ICERD Accounting for Racial Discrimination in Criminal Law (Article 4)**

Being members of a visible minority, Black People are particularly exposed to hate crime. In German criminal law there has been to date no specific provision to explicitly record racist motivation.<sup>78</sup> Victims of racially-motivated offences are often wounded in the core of their identity, as the attack is typically founded on unalterable characteristics. It can therefore be assumed that this results in a deep psychological and emotional and a negative signal for the wider community.<sup>79</sup>

In the current statistics of the criminal police, there is no indication of the number of Black People who have been the “victims” of racially motivated offences. Therefore, it is not possible to identify the places where Black People are particularly at risk from becoming the targets of racially-motivated attacks.

#### **Effective legal protection (Article 6)**

In order for the AGG to be able to provide effective protection against discrimination, those people directly affected need to be able to report racially-motivated incidents and bring cases before a court of law. Usually this does not happen because the people affected are not aware of their rights. Additionally, according to the AGG, only individuals are allowed to lodge a case – collective action lawsuits are not possible. Therefore the individual is liable for all legal costs should the case be lost. This financial risk is usually far too high for the victim (who is usually financially less stable than the perpetrator), and therefore they do not take on the risk of initiating legal proceedings against the perpetrator.

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<sup>75</sup> See p. 2 of the timeline.

<sup>76</sup> With reference to structural racism in the police service, this is particularly denied: Bundestagsdrucksache 18/1629.

<sup>77</sup> With reference to structural racism in the police service, this is particularly denied: Bundestagsdrucksache 18/1629.

<sup>78</sup> Even if in the legal practice pursuant to § 46 para. 2 StGB, the motives and objectives of the perpetrators as well as their disposition so far as it can be derived from the act, have to be taken into consideration when fixing a penalty.

<sup>79</sup> Sotiriadis. Kritische Justiz, Heft 3/2014, p. 266, on the Criminal Justice System from a critical perspective.

## e) Intersectional discrimination: the example of racism against lesbian, gay, bisexual and intersex people who belong to groups requiring protection under ICERD80

Although the Committee has already insisted in the General Recommendation 32 of 24 September 2009 that intersectionality should be taken into consideration when discrimination based on the characteristics connected to reasons listed in art. 1 ICERD occurs, Germany is far from fulfilling its obligation to ensure the resulting level of protection. Existing gaps in the protection against discrimination is highlighted by the racist, heterosexist as well as cissexist<sup>81</sup> discrimination against people who require protection under art. 1 ICERD and belong to one or several LGBTI communities.

Law enforcement: (Art. 2a and Art. 5b ICERD): Cases of discrimination reported to NGOs which offer counselling and anti-discrimination support demonstrate that no effective protection of the constitutionally entrenched rights of the most vulnerable members of society is possible without regulating police laws at federal and state levels. In this way, not only external appearance, but also the visibility of genders and gender identities, which are identified as not being “normal”, is used to justify suspicion and police controls, establishing a direct connection between deviation from the norm and delinquency. In this context, it becomes very apparent that individuals and groups who do or can experience multiple levels of discrimination are confronted with particularly severe conditions: Black and Trans\* people<sup>82</sup> in particular are often stopped by the police, asked to produce their identity documents and searched for no discernible reason or founded suspicion. This racial and sexual profiling can lead to further instances of discrimination. Attempted and enforced genital checks of Trans\* are performed in the context of such selective police checks and searches. Police officers justify this by citing the necessity to ascertain a person’s gender identity. This pretext highlights the specific vulnerability of people who belong to groups requiring protection under ICERD as well as one or more LGBTIQ communities.

This situation is not without consequence for the recruitment practice within the police service. The interwoven effects of hetero- and cissexism as well as racism are overwhelming. Applications submitted by Trans\* and Inter\* who also experience racism are usually unsuccessful. This is due to the fact that candidates are confronted with multiple layers of discrimination: the examination of breast and testicles form part of tests that candidates have to undergo pursuant to police regulation (Polizeidienstvorschrift PVD) 300. Based on the same regulation, Trans\* and Inter\* are deemed unfit for service for allegedly unstable hormone levels. These specific obstacles to joining the police force have to be added to the barriers preventing candidates who belong to groups requiring protection under ICERD. As a consequence, Trans\* and Inter\* who experience racism face particular forms of exclusion.

**Multiple discrimination and asylum laws in practice:** The current practice of providing accommodation to LGBTI asylum seekers constitutes a violation of article 3 of the European Human Rights Convention (prohibition of torture), article 5 b CERD, and article 18 of the EU guidelines on the reception conditions of asylum seekers. This is because Germany does not take the necessary measures to protect asylum seekers from (sexual) harassment assault, or rape.

Outreach Counselling services report that an increasing number of refugees in the last few years have been seeking advice after having been confronted with violence and discrimination in their refugee accommodation. They explain that the people often find themselves in a difficult situation: “Those who have not been outed fear being identified as LGBTIQ and facing discrimination.”

Those who have already been outed constantly experience “physical and psychological violence [and] sexual harassment from other inhabitants of asylum homes”. Many asylum seekers report being subjected to marginalisation, violence and discrimination by other inhabitants or/and staff in the accommodation centres and fear of being outed due to the subsequent discriminatory and violent reactions which are likely to occur.

As a state which has committed itself to adhering to international conventions and agreements on the adequate accommodation, treatment and protection of asylum seekers, Germany should take the necessary steps to protect asylum seekers from (sexual) harassment, assault and rape during their stay in accommodation centres. This particularly applies when asylum seekers have been placed under the care and custody of the State.

80 This section is based on a background paper written by Beatrice Cobbinah on behalf of LesMigraS e. V. on “Lesbian, Gay- Trans-, Bi- and Intersex People of Colour who are exposed to Racism”. The full text is available here: <http://rassismusbericht.de/wp-content/uploads/Rassismus-gegen-LSBTQI-of-Color.pdf>.

81 Cissexism refers to the rejection, marginalisation and discrimination of trans\*people by people whose sexual identity harmonises with the gender they were assigned at birth and/or has never been questioned.

82 Trans\* encompasses a large variety of people, including Trans\*People and a wide range of self-definitions and ways of life of people who cannot or only partly identified with the the gender they were assigned at birth, e.g. Transgender, Transsexual People, Transidente, Polygender.

This issue is of a crucial importance for LGBTI who are exposed to specific forms of violence and sexual abuse. If asylum seekers are also Lesbian, Gay, Bisexual, Trans\* and Inter\*, this means that they face multiple layers of discrimination on account of their status as asylum seekers on the one hand, and due to their sexual or/and gender identity on the other. Trans\* asylum seekers are confronted with the additional difficulty of reduced access to trans\*specific health services. Because they have limited access to health care, they are at risk of suffering the consequences of an interruption to hormonal treatment. Trans\* asylum seekers must have access to trans\*specific medical care at all times, especially during a transition phase, in order to avoid negative impacts on their mental and physical health.

**Multiple levels of discrimination in the education system:** In the Concluding Observations of 31 January 2014 the UN-Committee expressed their concern for the rights of children: "Children with a migration background living in the signatory state are still confronted with discrimination, especially in the education system. [22]" Experiences of racist discrimination are aggravated by additional factors, such as gender identity. Lesbian, Gay, Bisexual and Trans\* youth are deeply affected by the effects of intersectional and multi-dimensional discrimination. This is clearly demonstrated in a survey conducted by LesMigraS. While 27.9 percent of all interviewees indicated that they often experienced discrimination in the education sector, 33 percent of them reported that they are also confronted with racial discrimination, and have experienced multiple layers of discrimination in the education system. Questioned about their experiences in the education sector, 45 percent of the interviewees stated that they have been bullied at least once or several times by fellow students. 72.6 percent of the Lesbian, Gay, Bisexual and Trans\* interviewees pointed out that on at least one occasion they have received lower grades on account of their lesbian or bisexual way of life.<sup>83</sup>

Most interviewees agreed that awareness-raising about sexual diversity and ways of life is required in the education sector. These findings coincide with the conclusions of a survey conducted by the European Agency for Fundamental Rights (FRA) on discrimination against LGBT\* people: homo- and transphobia is an extremely serious source of concern in German schools.<sup>84</sup> This situation can be best exemplified by the following figures: 68 percent of the interviewees have concealed their sexual orientation during school time. Around 77 percent of the interviewees have had personal experience of negative comments or treatment at school because of their sexual orientation. Over 70 percent of all interviewees in each of the LGBT groups had witnessed negative comments or treatment imposed on a fellow student because the person concerned had been identified as a member of the LGBT community. Only 4 percent of the LGBT\* interviewees had disclosed their sexual orientation at school.

### Recommendations

The very specific form of intersectional vulnerability experienced by LGBTIQI, who also belong to groups requiring protection under ICERD, needs to be addressed. Data on discrimination must be collected, particularly with a view to obtaining a comprehensive picture about the amount of hate crime being perpetrated against these groups.

Research conducted by state and federal anti-discrimination agencies on experiences with, and complaints about, discrimination should incorporate a greater emphasis on intersectional racial discrimination.

Racial and sexual profiling, as well as discriminatory hiring practices, are human rights violations, breaching in particular: article 14 of the European Convention on Human Rights Convention (ECHR), article 2 paragraph 1 and article 26 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). As a result, all laws that legitimate discriminatory recruitment practices and the so-called spot checks by the police (checks which take place independent of any concrete suspicion or wrongdoing) should be abolished or amended. This review process should target police regulations and laws at state as well as regional levels.

<sup>83</sup> LesMigras-Studie, research paper, 2012

<sup>84</sup> EU LGBT survey – European Union lesbian, gay, bisexual and transgender survey – Results at a glance, 2013.

### III. Re Article 3 ICERD (Prohibition of segregation and apartheid)

Access to housing and education are two areas of blatant segregation in Germany. In both cases, legal protection is inadequate and article 3 of ICERD does not offer effective protection within the national legal system.

#### **Housing:**

In the General Recommendation XIX, the committee explained the meaning of segregation under article 3 which does not assume any intended action by the State. It was observed that, specifically with regard to housing, segregation can be a by-product of private actions.

Sociological research and informal “rental” tests regularly demonstrate that members of groups identified as needing specific protection under ICERD experience discrimination under article 1 and 2 of the Convention and that is almost impossible for them to find accommodation in specific residential areas. This particularly applies to people who are perceived to be members of the Muslims community.<sup>85</sup>

Many are reluctant to bring the matter to court despite experiencing blatant discrimination. This is exemplified by the case of a Black couple who was denied the right to visit a flat with the reason that the flat could not be rented out to Black people.<sup>86</sup>

The AGG offers no protection here. As the European Commission has already observed<sup>87</sup> § 19, para. 3 violates European law. The guidance enables landlords and landladies to discriminate when choosing tenants if their action by the need to “create and maintain stable housing structures and balanced economic, social and cultural conditions.”

In a communication with the federal government, the commission had stated that it is not certain that this guidance conforms with the anti-racism guidelines (2000/43/EG). Moreover, § 19 IV of the AGG does not offer adequate protection against discrimination as it applies to landlords and land who rent out than 50 properties [see: V. 4. c) Involvement and Participation in Economic Life – Inadequate legal protection: strengthening of the AGG is essential.]

#### **Recommendations**

The standard underpinning prohibition of segregation pursuant to article 3 of ICERD must be anchored and implemented in German law. To this aim, § 19 IV AGG must be removed without substitution.

#### **Education:**

One of the prominent features of the German education system is segregation and racial discrimination. Compared to other European countries, people who require protection under ICERD are disproportionately discriminated against [See V. 4. b) Racial discrimination and segregation in the education system].

85 For example: “Erfahrungen von türkischen und türkeistämmigen Migranten bei der Wohnungssuche in Berlin” (2008) by the sociologist Emsal Kiliç on the experiences of Turks and People with a Turkish “migration background” on the housing market.

86 On the court decision: [http://www.justiz.nrw.de/nrwe/olgs/koeln/j2010/24\\_U\\_51\\_09urteil20100119.html](http://www.justiz.nrw.de/nrwe/olgs/koeln/j2010/24_U_51_09urteil20100119.html)

87 European Commission communication to the Federal Government, 23.10.2007 and 29.10.2009 pursuant to Art. I 266 EG-Vertrag, because of incomplete implementation of the guidelines.



## IV. Re Article 4 ICERD (Combating racist propaganda and organisations)

### 1. Re Article 4 a ICERD (Effectiveness of criminal laws)

The failure to implement Art. 4 of ICERD with specific regard to legislation and application in criminal law and regulations in court proceedings can be analysed in light of the efforts that have been made to take into consideration the communication of 26 February 2013 (48/2010) by the Committee. The problematic issue is the concrete implementation of the regulation and investigation procedures. This is exemplified by the role of the state in connection with the racist serial murders committed by the so-called "National Socialist Underground".

#### a) Implementation of regulations in the investigation process

##### Data collected by the Federal criminal police

[For the problematic issue of data collection see V.1. Criminal provisions and their effectiveness.]

##### CERD Communication 48/2010 (Termination of the investigation against Sarrazin) and Follow-Up<sup>88</sup>

The German legal practice suffers from a double deficit: an insufficient understanding of racism and a lack of knowledge regarding the implementation of the Convention.<sup>89</sup> The Sarrazin case epitomises the issues raised before and after the communication by the Committee of 26 February 2013 (48/2010). For the first time, the Committee criticised Germany for failing to conduct an efficient investigation of the matter due to violations against Art. 2 paragraph 1 (d), 4 and 5 of ICERD.

Even after the Committee sent its communication, the Berlin prosecutor failed to investigate Sarrazin for insults pursuant to Sec. 185 or incitement pursuant to Sec. 130 StGB (German Criminal Code). This amounts to admitting that the German courts had not checked Sarrazin's statements for violations of ICERD and the established case law<sup>90</sup> of the European Court of Human Rights.

Furthermore, there seems to be no reason why the German Federal Republic did not inform the general public about this communication, although it had been requested to do so. On the contrary, the most influential media only mentioned the communication casually, if at all. The Committee had called upon Germany to submit a report within 90 days reporting on the measures taken to implement the communication.

Regrettably, the federal government only answered with a verbal note<sup>91</sup> on 1 July 2013. In this document, the federal government reported that it had passed on the communication to the relevant ministries for Justice of the Länder (federal states). To date, no information has been disclosed about the response given by the ministries of the Länder and whether they reacted at all. The federal government also considered whether it should check on the criminal liability (Strafbewehrung) of Sarrazin's statements in light of the communication by the Committee. Once again, it clearly appears that no information has been given on the state of the examination, whether the procedure has already been terminated or which conclusions have been drawn.

A major cause of concern is the book written by Sarrazin "Deutschland schafft sich ab" (translated as "Germany Is Doing Away With Itself", "Germany Makes Itself Redundant" or "Germany Is Abolishing Itself") in which he develops similar theories<sup>92</sup> and which has become the bestselling non-fiction book of the post-1945 era.<sup>93</sup> The prosecutor's office saw no reason to initiate a criminal investigation<sup>94</sup> against Sarrazin for defamation or incitement. The reprimand by the Committee required an examination which also applied to Sarrazin's book. Reference to the right to freedom of speech is not sufficient grounds for justifying why the investigation was terminated. The course of action taken by the prosecutor's office was therefore definitely below the level of protection required both under ICERD as well as European Court for Human Rights case law. In this respect, the European Court for Human Rights had given

88 This section is based on the background paper "Der Fall Sarrazin und das Follow-up" by Cengiz Barskanmaz which was written within the framework of the parallel reporting process.

89 For a critical analysis see Payandeh, Mehrdad "Die Entscheidung des UN-Ausschusses gegen Rassendiskriminierung im Fall Sarrazin", in *Juristische Zeitung* 2013, 980 ff on the decision of the Committee on the Elimination of Racial Discrimination over the Sarrazin case.

90 ECtHR, dec. 15948/03, 10.7.2008, – *Soulas v. Frankreich*; ECtHR, dec. 15615/07, 16.7.2009, 15615/07 – *Féret v. Belgien*; ECtHR, dec.18788/09, 20.4.2010, Nr. – *Le Pen v. Frankreich*; ECtHR, dec. 23131/03, *Norwood v. United Kingdom*. 16.11.2004.

91 Permanent Mission of the Federal Republic of Germany, "CERD-TBB\_Antwort.pdf", last accessed 4 February 2015, [http://mediendienst-integration.de/fileadmin/Dateien/CERD-TBB\\_Antwort.pdf](http://mediendienst-integration.de/fileadmin/Dateien/CERD-TBB_Antwort.pdf).

92 See Foroutan, Naika (ed.) (2010): "Sarrazins Thesen auf dem Prüfstand. Ein empirischer Gegenentwurf zu Thilo Sarrazins Thesen zu Muslimen in Deutschland", Humboldt-Universität of Berlin, <http://www.heyemat.hu-berlin.de/sarrazin2010>, A critical analysis of Sarrazin's thesis. Empirical study, as an alternative approach to Sarrazin's thesis on Muslims in Germany (last accessed 9.9.2014).

93 1.2 million copies had already been sold by mid-2012.

94 Compare with the pending case *Azize Tank and Gabriele Gün Tank v. Germany* before the Committee.

clear guidance: a differentiation between offences with a racial motivation and offences without a racial motivation was necessary.<sup>95</sup> It is therefore necessary to investigate racist offences pursuant to Art. 14 ECHR with increased care and extreme vigilance.

In addition, there are some doubts as to whether the prosecutor's office has taken the decision of the Federal Constitutional Court<sup>96</sup> into due consideration. Regarding the so-called "Rudolph Heß Remembrance Day" in connection with Sec. 130 StGB, the court found that protection of public order should be interpreted as "protection of a peaceful environment". "Disturbing the peace" does not constitute an offence according to the Federal Constitutional Court. Rather an assessment of the "value of an incident so as to determine whether it should be subject to prosecution" is needed. Indisputably, the prosecutor has allowed for a scope of discretion making it possible for Sarrazin to be prosecuted.

Unfortunately, the trivialisation of racist hate speech is a hindrance to prosecution, the prosecutor's office being an obstacle for its own investigation. Racist hate speech directly affects human dignity and therefore prevails over the right to freedom of speech, as the Committee specified in its Recommendation 35. This interpretation is also included in the jurisdiction of the European Court for Human Rights as well as the German Federal Constitutional Court.<sup>97</sup> The prosecutor has so far not paid due attention to this aspect.

Finally, it should be mentioned that with a view to Sec. 130 StGB and the necessary reviewing process, one could also consider introducing an interpretation that would conform with the framework decision<sup>98</sup> on combating discrimination. The European Union (EU) Framework Decision takes a very direct approach and demands effective protection; sanctions must be adequate and should be a deterrent to crime. For this reason, the prosecutor's statement about the importance of public debate is not convincing.

In addition, the prosecutor's office failed to take into consideration the conclusion drawn by the Committee: that Sarrazin's statements were racist. It is clear that there is a wide gap between the way the prosecutor's office understands racism and the views of the Committee.

The Sarrazin case epitomises how important it is to bear the goal of ICERD in mind: to confront all forms of racism. This means that not only blatantly racist views are to be investigated but also any act of constructing hierarchical differences between cultures and religions or stigmatising "other cultures or religions" in a racist way and labelling them as inferior. The Committee has underlined the importance of this in its General Observation 32 (Rz. 7).<sup>99</sup>

German prosecution institutions would be well advised to no longer let these forms of cultural racism go unchecked. This applies especially where the general public believes that Sarrazin's theories are protected under freedom of speech. Ultimately the obligation to protect vulnerable groups against discrimination under Art. 1 para. 4 is ICERD's core aim.<sup>100</sup>

### Recommendations

The German Federal Government should report on the progress made in the implementation of the measures listed in the verbal note. The ministries for justice of the federal states and the government must provide information about the answers they have given regarding the future possibility for actions aimed at prosecuting the perpetrators of racist hate crimes. In addition, following the communication of the Committee, the government must be asked whether an examination of Sarrazin's statements has led to any conclusion.

The German Federal Government, or the corresponding Ministry of Justice, should be asked whether the prosecutor's office has been required to explain why it departs from the conclusion of the Committee, which found that Sarrazin's utterances to be racist and why it has failed to prosecute Sarrazin.

The German Federal Government should be asked to provide information on the concrete measures it has taken to delete "disturbing the public peace" from Sec. 130 of the German Criminal Code.

The German Federal Government should be asked whether the judgement of the European Court for Human Rights concerning the identification of a distinction between racially-motivated crime and crime without racial motivation has been taken into consideration by the prosecution authorities.

95 See ECtHR, 55523/00, dec. 26.7.2007, – Angelova and Iliev vs. Bulgarien; ECtHR, 43606/04, dec. 23.10.2012, – Yotova/Bulgaria, including Rn. 104 – 111.

96 BVerfG, dec. 1 BvR 2150/08, 4.11.2009, = BVerfGE 124, 300, 334 f., especially 341.

97 As an example among many other sources: ECtHR, dec. 23131/03, 16.11.2004 – Norwood/United Kingdom; see BVerfG, n° 2179/09, 24.9.2009, 2 BvR – "Polen-Invasion" = Neue Juristische Wochenschrift (NJW) 2009, 3503; BVerfG, dec. 1 BvR 2150/08, 4.11.2009, = BVerfGE 124, 300.

98 Following the revision of Sec. 130 StGB, the framework decision 2008/913/JI was implemented. The framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law was adopted by the Council of the European Union on 28 November 2008, ABl. L 328/5.

99 See also: CERD, Communication 36/2006, 8.8.2007, Nr. – P.S.N. v. Denmark on "interface of race and religion".

100 Relevant: General Recommendations 8, 11, 22, 23, 24, 27, 30, 32 and 34.

## **b) The NSU serial murders and the role of the State<sup>101</sup>**

For the first time in the history of the Federal Republic of Germany, the German Bundestag and the parliaments (Landtage) of three federal states simultaneously established four parliamentary investigation commissions in order to investigate the role of the security forces in connection with a series of racially-motivated murders. Three more investigative commissions were established in North-Rhine-Westphalia, Baden-Württemberg and Hessen in December 2014. This shows the scope of the scandal caused by revelations concerning the extreme right-wing terror group called the "NSU" (National Socialist Underground) – despite massive obstructions to the work of the commission and its investigative process.

In November 2011 it was revealed that for a period of over ten years, the NSU had been able to commit serious crimes throughout the whole country without being caught. The group, which allegedly consisted of only three members, had been able to murder at least nine men, small business owners with a Turkish or Greek "migration background" in various cities, by shooting them in targeted attacks at their own business premises. These murders were committed during the time following the NSU decision to go underground in 1998.

The final murder the group committed was the shooting of a female police officer in 2007. She came from the same region as her alleged murderers. The motivation for the murder remains unclear. This final murder revealed links between police officers in Baden-Württemberg and the German Ku-Klux-Klan because the squad leader of the murdered policewoman was an active member of the Klan.

### **The NSU serial murders exposed deep-rooted and widespread institutional racism in Germany**

The police, media and prosecutors paid particular attention to the NSU serial murders. However, what really became apparent was the fact that racist attitudes are deep-rooted in the institutions involved. Though family members repeatedly pointed out that the crimes could be racially-motivated, neither the police, nor the prosecutor's office, nor the media took this seriously. On the contrary, the family members themselves were subject to suspicion and accusations. The media failed to take a critical stand and did not take the perspective of the victims into consideration – which can be seen by the use of the term "Döner murders" in the press. This is a sad confirmation of the deep-rooted institutional racism that NGOs, migrant organisations and victims of racist violence have decried for years. And even worse, this deep-rooted institutional racism continues to be denied. Since the beginning of the investigation in 2011, two of the inquiry commissions have submitted their reports. Both are damning accounts of the work of the security bodies.<sup>102</sup>

During the investigation of the murders of nine immigrants, the authorities only suspected that immigrants could have possibly perpetrated the crimes. They targeted the victims' families, criminal groups involved in the drug trade, or political organisations from Turkey. During the review of the investigation racist assumptions concerning the perpetrator were made. Migrants were also under general suspicion in the eyes of the security bodies. Various methods were used to relate the murders to organised crime. However racial motivation was systematically ruled out from the beginning despite testimonies of relatives. Despite the revelations of the investigative committees and the media concerning the investigation procedure, the federal government refuses to officially recognise that institutional racism is a source of concern and refuses to take appropriate measures to combat it.

### **Failure to fulfil the obligation to protect: The police do not proactively investigate racially-motivated violent crime**

In 2006, two demonstrations were organised by migrant organisations in Dortmund and Kassel following the murder of Halil Yozgat. Over 2,000 participants, mostly people of Turkish descent, gathered and chanted "we don't want a 10<sup>th</sup> victim!" The victim's family clearly voiced their suspicion of racial motivation. However, even at this point, the authorities and the media ignored the victim's family. The NSU's murder series showed that the German state does not, and cannot, protect people who are exposed to racism and need protection under the ICERD. This is because the authorities systematically exclude racism as a possible motivation for violent crime. There are a number of cases of racially-motivated criminal acts which demonstrate that civil servants do not proactively detect racism in their investigations. But this is the first time that it has been possible to provide a detailed documentation of this fact in the wake of a series of murders. What becomes apparent is the very real vulnerability of migrants. However this is constantly denied, with the result that migrants are denied protection. Therefore racist perpetrators are able to

<sup>101</sup> This section is based on a background paper "Die rassistische Mordserie der NSU und die Rolle des Staates" (on the NSU's racially-motivated crime series in Germany), by Dr. Bilgin Ayata, written within the framework of the parallel report process. Full text available here: <http://rassismusbericht.de/hintergrundpapiere-2/>

<sup>102</sup> The final report of the Investigation Committee of the Bundestag is available online and can be accessed here: <http://dipbt.bundestag.de/dip21/btd/17/146/1714600.pdf>, and the final report of the NSU investigation committee, set up by the federal state of Thüringia, is available here: <http://www.thueringer-landtag.de/imperia/md/content/landtag/aktuell/2014/drs58080.pdf>

commit murders against groups requiring protection without fear of prosecution. Indeed, they are able to rely on the fact that racism in the state's administrative bodies is widely tolerated and accepted.

### **Inadequate investigation and measures to combat racism**

Chancellor Merkel condemned the NSU's violent murders and promised a rapid and speedy investigation. To date, this promise has not been honoured by the German government. This has been repeatedly criticised by the families of the victims and their lawyers. The federal inquiry committee concluded in its final report that the murders could have been prevented and described the work of the security authorities as a failure of the state. The investigative committee set up by the Thuringian State Parliament argued that mistakes or errors were not words which could be used to describe the behaviour of the authorities and expressed their suspicion that Thuringian security authorities had deliberately sabotaged the investigation. Both reports indicated that state authorities bear part of the responsibility for the crimes of the NSU. This responsibility reaches beyond the scope of the inquiry into the NSU murder series. Criminal investigations within the state authorities themselves are required. However, to date, no member of staff belonging to one of the security authorities involved has had to account for his or her actions or for failing to act. In addition, no legal action has been taken against those officers who destroyed records or withheld information from the investigative commissions. On 4 November, over 300 files were destroyed in various ministries by the intelligence agencies in charge of protecting the country against any violation against the constitution. Instead, the government gave additional powers to the very institution that played such a pivotal role in the failure to detect and investigate the murders: this institution is called the "Verfassungsschutz", i.e. the intelligence agency in charge of protecting the country against any violation of the German Basic Law.

By choosing such a course of action, the state fails to assume – active or passive – responsibility for the murder series and sends out a clear signal to all state bodies: racism in their midst is tolerated and should not be subject to prosecution. The government has used the NSU as an argument to introduce more stringent security and police laws to combat terrorism. Instead of taking concrete measures to confront institutional racism within the security authorities, the issue was reduced to a lack of cooperation between the relevant security bodies and new coordination centres aimed at combating extreme right-wing movements were opened.

### **Failure to conduct an adequate investigation and the Munich trial**

Since May 2013, a court case has been conducted in Munich against a member and four alleged supporters of the NSU organisation. No state body employee has been prosecuted. Although the investigations into the murders have started afresh and are still running, only five people have been charged. So long as the motivation of the perpetrators and the role of the authorities is not fully clarified, there is no prospect of achieving transparency.

The core issues remain: how large is the NSU network? Did its main leaders, Mundlos and Böhnhardt, really commit suicide? Why was police officer Kiesewetter murdered? What is the role of the civil servant Andreas Temme in the murder of the internet cafe owner Halil Yozgat? Temme was at the crime scene at the time of the murder and did not reveal this fact to the police. The inquiry commissions had a mandate that was so limited, that a thorough investigation of the NSU version of events was not possible.

The process has revealed a full range of details but there remains no answer to questions as to why and how each of the victims had been targeted. The families of the victims have been left with feelings of insecurity and distrust of state authorities. The lawyers of the victims' families, who are joint plaintiffs in the Munich trial, demand the establishment of an inquiry at national level, seated in the Bundestag. Further inquiry commissions are required at federal and state levels. However this time the government must take action against intimidation and threats against witnesses. Relevant cases have been well documented by the Thuringian inquiry commission. The government must also ensure that ministries do cooperate with the inquiry commissions. An international monitoring mechanism would support this process.

#### **Recommendations**

The role that state authorities played in the NSU scandal must be thoroughly investigated with legal consequences applied. In order to find answers to the pending questions and shed light on the whole issue, it is necessary to set up additional inquiry commissions at federal and state level. They must explicitly be given the mandate to investigate claims that institutional racism exists in the security bodies. In order to combat racism in the police, the justice system and in other state administrative bodies, the measures recommended by the inquiry commissions and the NGOs must be implemented.

A commissioner for racism, discrimination and right-wing extremism must be appointed.

A permanent anti-racism commission must be established at the Bundestag (federal parliament) with a duty to make the reports accessible to wider public.

## V. Re: Article 5 ICERD (Comprehensive protection)

### 1. Criminal provisions and their effectiveness<sup>103</sup>

#### a) Massive deficits in the prosecution of racially-motivated crime

The federal government states in item 56 of the State Report that “Comprehensive criminal provisions (a) are available for the fight against racially-motivated crime which are implemented in court proceedings (b) and investigation proceedings (c).”<sup>104</sup> To put it mildly, this statement represents a limited view of reality.

In Germany, there are major deficits at the legislative as well as executive levels with respect to the detection and prosecution of racially-motivated offences. There are an impressive number of criminal regulations (§§ 86, 86a, 130 StGB) applying to so-called hate speech. However, there is no specific standard for the prosecution of racially-motivated offences, such as material destruction, physical attack, theft, etc.

For a long time, this imbalance has been justified by the government with the argument that “as a matter of principle, this concern has been adequately taken into consideration by means of the general provision contained in section 46 subs. 2 of the Criminal Code, in accordance with which the court, when sentencing, is to consider the motives and aims of the offender and the attitude reflected in the offence by the court.”<sup>105</sup> Moreover, the federal government relies on the recognition of this regulation in German legal practice. For this reason it is believed that the prosecution of racially-motivated crimes will be intensified in the future.

#### b) Inadequate laws against crimes motivated by prejudice

Empirical studies tend to prove the contrary.<sup>106</sup> An assessment of all the right-wing violent crimes for which the police in Saxony (2006/07)<sup>107</sup>, conducted successful investigations revealed that the existence of prejudice as motivation was not mentioned in practically half of the charges brought by the public prosecutor and in the court decisions (41 percent each). The shortcomings of the criminal justice system were blatant in almost half of the cases. Moreover, even in the 59 percent of the court decisions taken where prejudice was mentioned as a motive, this resulted in a higher sentence in less than every fifth case.

Another issue of concern is the frequency according to which the prosecution of violent crimes with a right-wing orientation is discontinued; in 28 percent of the cases prosecution proceedings were terminated although the investigation had successfully identified suspects. If all the court cases – including the terminated procedures – are taken into consideration, it appears that of all the cases in which it was possible to reach a conclusion, and pursuant to ICERD § 46 Abs. 2 StGB, prejudice as a motivating factor was only taken into consideration in 12 percent of them.

These examples do not only apply to the criminal justice system in Saxony, as the survey conducted in Baden-Württemberg during the period 2004 – 2008 by Alke Glet<sup>108</sup> clearly demonstrates. The prejudice behind the crime was only mentioned in the final report of the prosecutor in every fifth case (19 percent). In 74 percent of the decisions examined, there was no mention of motive at all. In the end, just as the results of the Saxonian study show, the prejudicial motivation of crimes was only explicitly mentioned in 13 percent of the closed cases.

As the empirical evidence shows, it is obvious that neither the prosecutor’s office nor the courts are in a position to record the motives and motivation in an adequate manner. They are equally unable to take these findings into account during the final sentencing. Therefore the claim made by the federal government in its State Report, that racial motivation is a factor in the criminal justice system, is simply wrong.

<sup>103</sup> This section is based on a background paper “Defizite in der Verfolgung rassistischer Straftaten”, by Dr. Kati Lang that was written as part of the parallel reporting process. The full text can be assessed here: <http://rassismusbericht.de/wp-content/uploads/Hintergrundpapier-Dr-Kati-Lang.pdf>.

<sup>104</sup> 19<sup>th</sup> – 22<sup>nd</sup> State Report submitted to ICERD, p.13.

<sup>105</sup> 19<sup>th</sup> – 22<sup>nd</sup> State Report submitted to ICERD, p.13.

<sup>106</sup> Lang, Kati “Vorurteils kriminalität”, on crimes based on prejudice, Baden-Baden 2014; and Glet, Alke: “Sozialkonstruktion und strafrechtliche Verfolgung von Hasskriminalität in Deutschland”, on the social construction and prosecution of hate crime, Freiburg 2011.

<sup>107</sup> Lang, Kati “Vorurteils kriminalität”, on crimes based on prejudice, Baden-Baden 2014.

<sup>108</sup> Glet, Alke: “Sozialkonstruktion und strafrechtliche Verfolgung von Hasskriminalität in Deutschland”, on the social construction and prosecution of hate crime, Freiburg 2011.

### **c) Shortcomings in data collection on racially-motivated crime**

The State Report also provides information regarding the collection of data by the investigation authorities (Items 66–70). It omits the fact that data collection on politically motivated crime (PMC) with a racial motivation only takes place at the police investigation level. Neither the prosecutor's office nor the courts collate relevant data on the conclusion of court trials, sentencing, perpetrators, or offences. For this reason, it is only possible to analyse politically motivated crime as recorded by the police.

Despite the inclusion of "hate crime" in the definition of politically motivated crime in 2001, there is a wide discrepancy between the figures collated by independent counselling services for people concerned with right-wing, racist and anti-Semitic violence and the data used in official publications. By way of example, monitoring projects recorded 737 violent acts motivated by prejudices in Eastern Germany alone<sup>109</sup> whereas the authorities had only recorded 837 crimes motivated by right-wing violence<sup>110</sup> for the same period of time and across the whole of Germany.

This discrepancy is partly due to the fact that not all incidents and crimes known to NGOs are reported to the police. Furthermore, a substantial number of offences motivated by prejudices are not considered as such by the police. Institutionalised prejudice contributes considerably to this situation. Furthermore, people concerned, the media and human rights organisation repeatedly report that the police do not rush to the scene of a crime when they are called but allow for delay. Victims are viewed as perpetrators and perpetrators are allowed to leave the site, claims are not recorded or investigated, and/or the police do not take any further measures.

The data collection system for politically motivated crime remains the foundation of the state's concept of protection. It is based on the extremist theory. Converse to this approach, the orientation toward hate crime and crime motivated by prejudices has been inspired by a policy aimed at the emancipation of minorities. Regarding politically motivated crime, this mixture between two different concepts means that crime motivated by prejudices are mostly acknowledged as such when they have ties to perpetrators with an extreme (right-)wing background. This wide gap is entirely due to the non-recognition of victims of right-wing violence by state authorities. According to detailed investigations led by journalists, the number of victims of right-wing violence amounted to 152 from 1990 up to today.<sup>111</sup> Out of 152 investigated deaths, only 63 were so far officially recognised by the government.

### **d) Legal standards are necessary for crime motivated by prejudice**

The previous chapter has pinpointed the shortcomings in the area of the police regarding the collection of data on crime motivated by prejudices. In addition, it demonstrated that the prosecutor's offices and court do not sufficiently make use of the standard pursuant to § 46 Abs. 2 StGB. As opposed to the views expressed by the federal government in the State Report, the statistics and legal systems are blemished by numerous flaws. These defects impair the functioning of the prosecuting authorities and courts. These critical points are part of an ongoing review and should lead to a revision of politically motivated crime.

The seventh draft of the law was submitted to the Bundestag in 2000. It aimed at introducing a new standard in criminal law, pursuant to which regulations for sentencing under § 46 Abs. 2 StGB would be strengthened: "Particularly racist, xenophobic and other inhuman motives and goals" would be added. The language used has been criticised from two angles: to begin with, the language is too vague. Secondly, the implementation process has been postponed to a later stage of the procedure.

One of the pitfalls that must be avoided is an excessively broad definition of characteristics. For instance, the idea that motives and goals that violate human dignity could be included in the characteristics does not pertain to the global approach. One should not lose sight of the real objective: the aim is not to protect any identifiable group in society, but to protect minorities who are exposed to marginalisation and discrimination according to a specific analysis of the conditions in society that have led to this situation. This is the reason why the motives for targeting a minority should not be covered up by introducing the umbrella concept of "motives and goals that violate human dignity". In addition, the wording "motives and goals that violate human dignity" trivialises violence against minorities by involving all the groups of society who can be clearly identified with no regard for specific characteristics.

As a principle, sentencing is the right place for such a regulation. This is the legal area with the greatest impact on all delicts. However, a single knot does not bring changes in the course of a whole vessels and the anchorage of the reg-

<sup>109</sup> Statistik Beratungsstellen 2013, Statistical data, counselling services.

<sup>110</sup> Press statement on politically motivated crime, 2013.

<sup>111</sup> Dokumentation: 156 Schicksale. Zeit Online, documentation of 156 tragic cases, can be accessed online: <http://www.zeit.de/gesellschaft/zeitgeschehen/2010-09/todesopfer-rechte-gewalt>.

ulation at the closing of a criminal procedure – in connection with the judge’s decision making process on the sentence – does not allow for a positive evolution throughout the procedure. Real changes could be brought already at the onset, starting with police investigations, followed by prosecution, with the recognition by the court as the crowning point. This is the only way to ensure that a racist motive can be identified and does not “lose its way” in the course of the procedure. To this aim, changes in the criminal code and relevant measures in the field of criminal procedure and regulations for sentencing and fines (RiStBV) are necessary. As a considerable amount of offenses are perpetrated by youth and young adults, it is advisable to keep a closer look on possible amendments to the juvenile criminal law (Juvenile Court Act, JGG, as well as the relevant regulations).

### Recommendations

Taking into consideration the constantly high number of crime motivated by prejudice, there is a need for specific standards for the justice system and a reform of the data collection system for the police.

In statistics, there should be a distinction between the concept of the state’s security authority and crime motivated by prejudice. The collection of data should not be limited to the police but encompass the whole process up to a legally binding decision.

The implementation of a specific legal standard is a welcome step. However, unspecific concepts that leave room for interpretation, such as “contempt for humanity” or “inhuman character” should be rejected. An exhaustive list would be a better option. It has to be established with due consideration to the historical framework and current societal issues. Such a definition should become the foundation of the suggested flow statistics mechanism.

Laws and regulations embracing the entire legal procedure are needed, starting with the beginning of police investigations, followed by prosecution, up to the binding court decision. To this aim, changes in the criminal code, the code criminal procedure and the fine and sanctioning proceedings are to be considered.

Considering the fact that a substantial number of perpetrators are likely to be tried by a juvenile court, it is advisable to consider possible amendments to the juvenile criminal law (Juvenile Court Act, JGG, as well as the relevant regulations).

Racist crime has a particular impact on the victims, which should be recognised. Concerned people who have been exposed to violence motivated by prejudices must receive support.

The case-law of the European Court for Human Rights, pursuant to which prosecution authorities have to make a distinction between offences perpetrated with or without a racial motivation.

## 2. The right to equal treatment in court and in all institutions for the administration of justice<sup>112</sup>

**Racial profiling by the police:** Pursuant to § 22 paragraph 1a of the police law, the police can check someone’s identity without founded suspicion as preventive measure against unauthorised immigration. In this context, the police use racist criteria to select the individuals they are going to check. Although the federal government still denies the existence of such a practice<sup>113</sup>, voices from the police<sup>114</sup> have confirmed it to be true. For Black People and other People of Color in Germany, this practice has become part of their daily life. In spite of what could be tagged as an almost non-existent success quote (0.07 percent)<sup>115</sup> in 2012, the number of police checks carried out with no reason given increased<sup>116</sup> in 2013. Hence, the arguments put forward in the State report under Item 100 are unfounded and the claim that no ethnic profiling is taking place in Germany is therefore to be dismissed.<sup>117</sup> This line of reasoning demonstrates once again the unwillingness of the state party to acknowledge the reality of state-made racist discrimination.

112 This section is based on contents included in the background paper by Damaris Uzoma on behalf of the Initiative Schwarze Menschen in Deutschland, “Rassismus gegen Schwarze Menschen” on Black People in Germany and Dr. des. Eddie Bruce Jones, “German policing at the intersection: race, gender, migrant status and mental health”. Both papers can be accessed online. Damaris Uzoma’s full text can be accessed here <http://rassismusbericht.de/hintergrundpapiere-2/> and Eddie Bruce Jones’ full text can be accessed here: <http://rassismusbericht.de/wp-content/uploads/Bruce-Jones-German-Policing.pdf>.

113 Bundestagsdrucksache 18/1629, motion (to be) submitted to the Bundestag (German federal government). See also Bundestagsdrucksachen 17/11971 and 18/453.

114 As did the Head of the Police Trade Union Rainer Wendt to the daily newspaper “Die Tageszeitung” (TAZ) published on 27.10.2013 online: <http://www.taz.de/!126295/>.

115 Bundestagsdrucksache 17/14569, motion submitted to the Bundestag (German federal government) 17/14569.

116 Bundestagsdrucksache 18/453, motion (to be) submitted to the Bundestag, (German federal government).

117 See VG Koblenz, 5 K 1026/11.KO, 28.2.2012, did not object to police checks on the basis of skin colour. This judgement was reversed by the Oberverwaltungsgericht Rheinland-Palatinat, (higher administrative court), in the decision 7 A 10 532/12.OVG, dated 29.10.2012. The court ruled that police checks made solely on the basis of skin colour and in the absence of reasonable suspicion are unconstitutional.

### Recommendations

It is imperative that § 22 paragraph 1a of police law is deleted without substitution.

The police must keep a record of the checking process and hand in to the person subject to the check a reference number on the basis of which it will be possible for the civil society to carry out an analysis of random sample of such checks. In this way, a monitoring of racist discrimination against each of the groups who require protection under ICERD could take place.

Finally, the government should be asked to which extent the standards for racial profiling in the police practice developed by the European Court for Human Rights have been implemented.

**Police violence motivated by racism:** Police violence on racist grounds often follows on from racial profiling. In the absence of a complaints office, there is no official body to keep record of racist attacks by the police. The only sources<sup>118</sup> available for analysis are the various documentations compiled by NGOs.

Beside racist insults and particularly brutal procedures, there are many cases in which Black People who actually are victims or witnesses end up being criminalised and arrested by the police officers who have been called to the scene.<sup>119</sup> In addition to an uncertain residential status, the interwoven effects of intersectional forms of discrimination – hetero- and/or cissexist as well as racist forms of discrimination are experienced as a threat by the people concerned.

### Recommendations

There is a necessity for an independent complaints office against racism to record cases of discrimination by the police. This body should be adequately equipped and funded and have the power to take sanctions. In this way, cases of discrimination by the police experienced by the specific groups who require protection under ICERD, such as Sinti and Roma, Black People and LGTI could be recorded and followed-up.

The federal government should be requested to give evidence of the extent to which the stringent requirements spelled out by the European Court for Human Rights for police administrative practice, including for police misconduct with a racist background, have received due consideration.

## 3. Right of a person to security and protection by the state against violence or bodily harm

[see also: Racial Profiling and police violence with a racist motivation.]

## 4. Racial discrimination and exclusion

### a) Racial discrimination in the regulation and application of asylum and residence law<sup>120</sup>

For decades, asylum has been a topic that has caused waves of blatant racial discrimination and populist and racist mobilisation among the population. Asylum and residence laws, including § 1 AufenthaltG, aim at containing migration to Germany. Such provisions are a hindrance to the full exercising of constitutional rights. As a result, it can be said that such provisions pave the way for racial discrimination. Certainly, the Convention does allow different treatment for citizens and non-citizens (Art. 1 para. 2 CERD). However, the General Recommendation 30 (2004) clearly states that this difference should never result in human rights being rendered void. The state must provide concrete measures to ensure that legislation and regulations do not have any discriminatory impact on non-citizens.

Many special rules and regulations add to this heavy load, such as the so-called “Residenzpflicht”, (the obligation of residence for asylum seekers), insufficient access to health care, stigmatisation through police checks with a racist motivation. Furthermore, given the uncertain legal status of asylum seekers and the so-called “Geduldete”, (i.e. the people under temporary suspension of deportation), it is no wonder that they find it difficult to avail themselves of legal protection. As a result, those among them who belong to at least one of the groups requiring protection under ICERD, are particularly vulnerable. [Particularly see thereof the situation of LGBTI refugees and asylum seekers: II 5 e]

118 For instance the timeline of a campaign to support victims of police racist violence, Chronik der Kampagne für Opfer rassistischer Polizeigewalt: <https://www.kop-berlin.de/files/documents/chronik.pdf>.

119 See p. 2 of the timeline (previous footnote).

120 This section is based on analyses by Katharina Stamm, Officer for Migration Law at Diakonie Deutschland, and Dr. Dorothee Hasskamp.



Intersectional discrimination exemplified by racism against LGBTI people who belong to a group requiring protection under ICERD].

The uncertain situation of asylum seekers led to the suicide of a refugee in an accommodation centre. This in turn prompted refugees to take up a protest march to Berlin. Up until now, nothing has abated the self-organised protest movement of refugees and asylum seekers. It is still directed at the “Residenzpflicht”, which restricts mobility to the boundaries of a district (“Kreis”), the “Lagerpflicht”, (i.e. the obligation to stay in an accommodation centre), restricted access to social services and health care, and lengthy asylum procedures.<sup>121</sup>

Populist statements by the government coalition have given unequivocal support to a more stringent legislation, which coincide with an increased number of attacks on refugees in accommodation centres and in residential areas with a strong presence of migrants from the European Union.<sup>122</sup> Racism against Roma is on the increase, fired up by the political campaign of the National Democratic Party of Germany (NPD) which posted posters with the slogan, “More money for Grandma instead of Sinti and Roma”. Several administrative courts have legitimised<sup>123</sup> this poster, despite the fact that it marginalises a whole ethnic group in a statement that is clearly racist.

It is recommended that the Committee should address the issue of racial discrimination in asylum and residence law, including the few aforementioned examples, especially with regard to the signal this legislation gives to society. Particular attention should be paid to the social allowances and services available to groups of people such as asylum seekers, “temporarily tolerated people” (“Geduldete”), and people without residential status, under the Asylum Seekers Act (Asylbewerberleistungsgesetz).

The Asylum Seekers Act is a cause of major human rights discrimination. The Federal Constitutional Court has made some improvement, upgrading the volume of services and allowances<sup>124</sup> However, a considerable potential for discrimination remains. For this reason, many NGOs advocate that the issue the benefits and services available to foreigners shall be dealt with on the basis of the Social Act (Sozialgesetzbuch).

In 2014, Germany received 173,072 first applications for asylum.<sup>125</sup> Since the 1990s, the number of refugees who first set foot in Germany has amounted to 400,000. Now, makeshift tent towns and container villages emerge and standards for the accommodation of refugees have become a high source of concern. The German Institute for Human Rights has raised the alarm, filing complaints about the disastrous living conditions in the refugee accommodation centres and urging that human rights factors should be taken into consideration when choosing a place of accommodation.<sup>126</sup>

There are reported cases of racist demonstrations taking place in front of the accommodation centres and before the very eyes of the refugees. Residence in accommodation centres is compulsory and the decision to allocate refugees to a particular location is made from above. The failure of the authorities to fulfil their obligation to protect has serious consequences, especially considering that the location of asylum residence centres are known to the public, which make them a target of hostility and attacks. The number of attacks on asylum refugee centres rose to 150 in 2014. The number of demonstrations against accommodation centres also increased. Data on attacks and demonstration are fragmented. [See V. 1. Criminal provisions and their effectiveness]. Given the preliminary nature of the figures published by the German home office, many more unaccounted-for attacks are likely to have taken place.

**Restriction to the choice of residence for asylum seekers and “tolerated” people (“Residenzpflicht” or mandatory residence):** The “Residenzpflicht” is a rule that has deprived the refugee movements of any legitimation and criminalises them as soon as they leave the boundaries of the places they have been allocated to. Asylum seekers and “tolerated” people cannot choose freely their place of leaving and residence: they are allocated to a compulsory place or residence and accommodation.

This means that only the Federal Office for Migration and Refugees (BAMF – Bundesamt für Migration und Flüchtlinge) and the Immigration Office have the power to decide on the area where they can stay and live. This most strin-

121 “Flüchtlingsbewegung in Deutschland: Radikaler, lauter, aber kaum gehört”, on the refugee movement in Germany, more radical, louder, yet hardly heard. In weekly magazine Die Zeit, 9 September 2013, section: Zeitgeschehen. <http://www.zeit.de/politik/deutschland/2013-09/emanzipations-fluechtlingsbewegung> as well as an overview of the issue [http://de.wikipedia.org/wiki/Fl%C3%BChtlingsproteste\\_in\\_Deutschland\\_ab\\_2012](http://de.wikipedia.org/wiki/Fl%C3%BChtlingsproteste_in_Deutschland_ab_2012).

122 Article 23.08.2013, daily newspaper die tageszeitung. “Rechte Hetze gegen Roma – Die Angst vor Lichtenhagen” on right-wing hate campaign against Roma – a fear of a new upsurge of xenophobic violence as in Rostock-Lichtenhagen 1992, <http://www.taz.de/!122337/>.

123 The Central Council of Sinti and Roma documented the campaign and the legal dispute. For further details see <http://zentralrat.sintiundroma.de/content/downloads/presseschau/303.pdf>.

124 See previous footnote in Article 1 paragraphs 2 and 3 ICERD.

125 BAMF – Bundesamt für Migration und Flüchtlinge “Aktuelle Meldungen – 202.834 Asylanträge – 128.911 Entscheidungen”, Office for Migration and Refugees, information update, 202.834 applications for asylum – 128.911 decisions, last accessed on 10 February 2015, [http://www.bamf.de/SharedDocs/Meldungen/DE/2015/20150114-asylgeschaefsstatik-dezember.html?nn=1367522](http://www.bamf.de/SharedDocs/Meldungen/DE/2015/20150114-asylgeschaefsstistik-dezember.html?nn=1367522).

126 Henrik Cremer, “Menschenrechtliche Verpflichtungen bei der Unterbringung von Flüchtlingen”, on human rights obligations regarding the accommodation of refugees, last accessed 4 February 2015, [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Policy\\_Paper\\_26\\_Menschenrechtliche\\_Verpflichtungen\\_bei\\_der\\_Unterbringung\\_von\\_Fluechtligen\\_01.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Policy_Paper_26_Menschenrechtliche_Verpflichtungen_bei_der_Unterbringung_von_Fluechtligen_01.pdf).

gent requirement is unique to Germany (§§ 56, 71 para. 7n of the Asylum procedure law and § 61 para. 1 of the Residence Act, Aufenthaltsgesetz, AufenthG). No other country in Europe has adopted a similar regulation.

In districts (Landkreisen) with a vast territory, this regulation is an even greater obstacle to social participation. In order to obtain an authorisation to leave the district, a fee has often to be paid at the discretion of the authorities. Whether a visit to relatives, friends or the attendance to an event is at stake, most of these everyday activities do not qualify for a leave permit. Violations of the "Residenzpflicht" are punished with a fine that rapidly exceeds the monthly benefit payment of a refugee. In case of delayed payment, jail or coercive detention may follow. As a result, refugees and tolerated people are criminalised and they are largely denied the possibility to engage in social activities. Beside the negative impact on social participation, this regulation contributes to higher criminal statistics and paves the way for a more forceful stigmatisation.

According to the newest legislation, asylum seekers will not be subject to restrictions to the choice of residence for asylum seekers after a period of four months. However, restrictive measures may still be enforced in the case of people who have committed offences or crimes in connection with the Narcotic Drugs Act (Betäubungsmittelgesetz), or who are exposed to imminent measures aimed at terminating their stay in Germany, which mostly apply to people under "Duldung."<sup>127</sup> These restrictions to freedom of movement are not only disproportionate to the offences they have committed; they also have a discriminatory character, given the fact that they contribute to exclude asylum seekers from possibilities of social participation and give incentives for police checks to be carried out with no reason (see Item 4).

**Access to health care:** According to the revised version of the Asylum-Seekers' Benefits Act (AsylbLG), asylum seekers and "tolerated" people have only access to limited health care services during the first 15 months of their stay in Germany. Medical or psychotherapeutic treatments can only be provided to patients who suffer from an acute illness or pain. It goes without saying that, in the absence of proper treatment and care, the pain or illness can persist and become chronic. In addition, medical aids and equipment, such as glasses or walking devices, are often not included. Teeth that would have been preserved<sup>128</sup> have to be extracted for lack of treatment. In practice, those who oversee the issuing of health insurance vouchers (Krankenschein) as a prerequisite to access to medical care, are likely to be members of staff of the social services with no expert knowledge of medicine.

In refugee accommodation centres, guards and members of staff often decide when to call an ambulance. This delays emergency treatment. Patients are often directed to the emergency squad, medical doctors being often reluctant to attend to them on account of the high bureaucratic hurdles they will have to face, and uncertainty about the types of treatment they are entitled to. This in turn tends to reinforce prejudices among members of the medical staff [see: V. 4. d) Racial discrimination in the health sector].

Black asylum seekers are particularly vulnerable, as the following case best exemplifies: In Hanover, a Ghanaian asylum seeker with a baby born four-weeks premature was refused admission to hospital. The situation was not identified as an emergency. The mother rushed to a resident physician, who called an ambulance. Despite her prompt reaction, the baby died shortly after. The baby could have been immediately admitted to hospital and saved if only his mother had had insurance.

**Distinctions are made between the country of origin of asylum seekers:** many politicians claim that the reason for overburdening is the high number of unfounded applications for asylum from the Western Balkan region. They oppose refugees who "flee poverty", while supporting "legitimate" refugees who flee war or political persecution. From January to November 2014, Germany received 15,000 applications for asylum from Serbia.<sup>129</sup>

Serbia, Macedonia and Bosnia-Herzegovina have been declared safe third countries pursuant to a law that came into force in November 2014.<sup>130</sup> Very often, applicants from these countries are Roma or members of other minorities in Germany. Whilst the other applicants are formally entitled to have their case examined without preconceived beliefs, asylum seekers from these countries are automatically deemed not to be subject to any persecution. As a consequence, they have to bear a much heavier burden of proof and produce more convincing evidence than other asylum seekers for whom those assumptions are not made. Their applications are more rapidly turned down with the argument that they are manifestly "unfounded". This leads to significant limitations on the legal protection of applicants.

The European Commission and several other Human Rights organisations have reported on Roma in Serbia, Bosnia and other countries having to face serious racist discrimination. Yet, the percentage of applications from these coun-

127 Deutscher Bundestag, "Erleichterungen für Asylbewerber", on improvements in connection to asylum laws and procedure, last accessed 4 February 2015, [http://www.bundestag.de/presse/hib/2014\\_12/-/343932](http://www.bundestag.de/presse/hib/2014_12/-/343932)

128 Additional case studies that have been documented can be accessed on the campaign website "Stop AsylbLG", which is supported by a broad alliance of refugee organisations <http://stopasylblg.de/faelle-berichte/>

129 Current statistics on asylum, Federal Office for Migration and Refugees (BAMF) November 2014, January – November 2014: 15.282 first applications for asylum from Serbia, p. 5.

130 Law on classification of further states as safe countries of origin and on the facilitation of access to the labour market for asylum seekers and tolerated foreigners, "Gesetz zur Einstufung weiterer Staaten als sichere Herkunftsstaaten und zur Erleichterung des Arbeitsmarktzugangs für Asylbewerber und geduldete Ausländer", Bundesgesetzblatt (Official Gazette), No. 49, 5 November 2014 BGBl. I 2014, p. 1649.

tries that have been approved is lower than 1 percent.<sup>131</sup> There could not be a sharper contrast to the level of protection granted in other countries of the European Union. If this percentage is lower in Germany than in other countries there is reason to suspect that elements that denote cumulative discrimination due to racial or ethnic discrimination have been systematically pushed aside.

To add to the difficulties, interpreters generally do not master the Romani languages, more likely speaking the languages of the majority of the population of the country from which asylum seekers have migrated. The decision-making process must be improved in practice. Secondly, suspicion of racial discrimination and the possible impact on social rights must be given due consideration. Thirdly, the root cause of what leads refugees to flee their country has to be addressed. The low percentage of successful applications was unfortunately used as a counter argument to declare that these countries are safe.

This legislation distils the idea in the mind of the population that asylum seekers from these states are not persecuted. The administrative court in Münster ruled on 27 November 2014, four weeks after the law came into force, that there were some doubt as to whether the upgrading of the Serb Republic as safe country of origin was constitutional.<sup>132</sup>

The Federal government is planning strict sanctions against asylum seekers who submit applications considered as being “manifestly unfounded”. This draft law will be even underpinned with several years of ban.<sup>133</sup> The most affected group is likely to be Roma, given the fact that they have least opportunity to give evidence of the cumulative racial discrimination that they face. As a result, their applications are rejected. Asylum seekers subject to the Dublin rule made out 80 to 90 percent of all the detainees awaiting deportation in Germany, most of whom after being arrested by the police, in the first half of 2014.<sup>134</sup>

### Recommendations

Abolition of the asylum seekers benefit act, which is per se a source of discrimination. The benefits and services that refugees are entitled to, including equal access to medical care, should be regulated on the basis of the social law.

Abolition of the “Residenzpflicht” and granting of the full right to mobility within the German territory, including to those people who have the obligation to leave the German territory. Facilitate access to the housing market, providing accommodation compatible with human dignity, taking into consideration the infrastructure, and the right to have opportunities of participation in the choice of a location for accommodation.

Thorough examination of the reasons for asylum including in the case of asylum seekers from Serbia, Macedonia and Bosnia-Herzegovina, with due consideration to cumulative discrimination on racist grounds. Interpreters and translators in the asylum process who have knowledge of the languages of ethnic minorities. No ban on asylum seekers whose application has been rejected.

No detention of asylum seekers awaiting transfer in the course of a Dublin procedure.

Targeted studies on discrimination as it is experienced by refugees who belong to one or several groups requiring protection under ICERD. These surveys must be used to collect data on intersectional discrimination as it is experienced by these groups pursuant to the General Recommendation 38.

## b) Racial discrimination and segregation in the education system<sup>135</sup>

Racism and structural discrimination in the German education is prohibited pursuant to Art. 1 para. 1, 2 and 3 of ICERD, Art. 13 of the International Covenant on economic, social and cultural rights, Art. 1 of the Convention against Discrimination in Education as well as Art. 2, 3 and 29 of the Convention on the Rights of the Child. Consequently, Germany has the obligation to combat racial discrimination under four international human rights covenants at least. In addition, the

131 Statistics about BAMF (Federal Office for Migration and Refugees): “Das Bundesamt in Zahlen 2013”, Tab. I-14, p. 47.

132 Administrative court VG Münster 4 L 867/14.A [http://www.vg-muenster.nrw.de/behoerde/presse/10\\_pressemitteilungen/01\\_archiv/2014/08\\_141128/index.php](http://www.vg-muenster.nrw.de/behoerde/presse/10_pressemitteilungen/01_archiv/2014/08_141128/index.php)

133 Pro Asyl, “Verschärfung des Aufenthaltsrechts droht: Pro Asyl, [http://www.proasyl.de/en/press/press/news/gesetz\\_zu\\_bleiberecht\\_und\\_aufenthaltsbeendigung\\_massive\\_verschaerfung\\_des\\_aufenthaltsrechts\\_droht/](http://www.proasyl.de/en/press/press/news/gesetz_zu_bleiberecht_und_aufenthaltsbeendigung_massive_verschaerfung_des_aufenthaltsrechts_droht/) On further restrictions to the right to chose one’s place of residence.

134 NGO estimate of number of detainees awaiting deportation. <http://www.jesuiten-fluechtlingsdienst.de/images/pdf/140717%20pro%20asyl%2B-jrs%20eugh%20abschiebungshaft.pdf>.

135 This section is based on a background paper on racial discrimination in the German education system “Rassistische Diskriminierung im deutschen Schulsystem”, written by Daniel Gyamerah as part of the parallel reporting process. The full text can be accessed here: <http://rassismusbericht.de/wp-content/uploads/Der-schulische-Erfolg-Schwarzer-Sch%3BClerinnen-und-Sch%3BCler-in-Deutschland.pdf>. In addition to this, Dr Elina Marmer kindly made available analysis and data from her research project IMAFREDU. See also: Marmer and Sow (eds.) “Wie Rassismus aus Schulbüchern spricht. Kritische Auseinandersetzung mit “Afrika“-Bildern und Schwarz-Weiß-Konstruktionen in der Schule – Ursachen, Auswirkungen und Handlungsansätze für die pädagogische Praxis”, published in 2015 by Beltz Juventa. It deals with racism in school books. This is a critical analysis of the stereotyped image of Africa and racialised constructions in the school system. It also deals with the causes, impact and tips for effective pedagogical practice.

European Court for human rights has ruled in the case D.H. versus Czech Republic in a highly differentiated way so that the education system has to fulfil stringent requirements against unequal treatment, including segregation.<sup>136</sup>

The reading of the State report reveals among others in the sections on education that emphasis has been placed on racist discrimination against immigrants or people with a “migration background” (Items 199–123). This presumption is highly problematic. The two groups of people mentioned in the state report are school children and high school students from families with a lower rate of education achievement immigrant children, i.e. children with a “migration background”. In reality, this list should have included the growing number of children and young people who belong to at least one of the groups requiring protection as defined by ICERD, yet do not have a “migration background” according to the definition of the micro-census.

This listing makes apparent the fact that the state fails to take resolute action against discrimination in the education system. In fact, school children and high school student with a “migration background” are not targeted because of their “migration background” as it is not a characteristic on the basis of which they can be identified in everyday life. They are rather discriminated against as a result of a process of external assignation to a particular group defined according to racist criteria, which can be regarded as pertaining to a “racialisation”<sup>137</sup> process. “Migration background” is a volatile feature that has mostly vanished after the third generation [see: II. Prohibition of racial discrimination and protection of specific groups]. In one word, the state report fails to pay due consideration to effects and therefore fails to prove that it has an understanding of racial discrimination that would be conform with the definition outlined in ICERD.<sup>138</sup>

Regarding the unequal treatment of people with a “migration background” who belong to groups requiring protection as defined by ICERD, an analysis of micro-census shows that additional factors converge, independently from socio-economic status, education background and professional status of the parents. This has a particular impact on Black children:<sup>139</sup> for example, they are on average up to eight percent (+/- less likely confidence interval) (+/- 6 percent confidence interval) less likely to obtain a certificate higher than the lower secondary school qualification “Hauptschulabschluss” (which does not qualify the holder for entrance to higher education institutions).

The positive effect of the higher education or socio-economic status of parents on the education attainment of their children is cancelled out by the impact of this negative factor. This is by no means specific to Black children alone. It applies to further groups requiring protection as defined by ICERD. Furthermore, this clearly demonstrates the necessity to define specific categories for the collection of data so as to reveal racial discrimination in the German education system.

After comparing the educational performance of students with and without “migration background” the Organisation for Economic Cooperation and Development (OECD) concluded that these two groups show the largest discrepancies in test scores in PISA achievement tests. The achievement gap between students with a “migration background” on the one hand and their fellow students without a “migration background” could be as wide as two years (Programme for International Student Assessment 2006:79).<sup>140</sup>

Diefenbach (2011)<sup>141</sup> notes that 8 years later, no study has been able to disprove the causal relationship between “migration background” and educational achievement, even where socio-economic variables have been taken into consideration (ibid: 463).

**Segregation in the German education system:** horizontal and vertical mechanisms of segregation have been identified in the Germany education system and all of them have discriminatory effects. Depending on the federal state in which they are enrolled, children are subject to a hierarchical system on the basis of which they are sent to one

136 European Court of Human Rights (EctHR), decision 57325/00 of 7.2.2006 – D.H. et al vs. Czech Republic, see also the EctHR’s most recent decision 11146/11 of 29.1.2013 – Horváth and Kiss vs. Hungary.

137 The term “racialisation” is based on Terkessidis (2004), in which he outlines the process in which “a group of people are reduced to a naturally fixed group on the basis of certain features. At the same time the nature of this group is defined in relation to one’s own group” (Terkessidis, 2004). In the context of this analysis of racial discrimination and segregation in the German education system (see the background paper “Rassistische Diskriminierung im deutschen Schulsystem” written by Daniel Gyamerah), the term “migration background” is used as a euphemism to suggest the defining features of this group arise from this supposed migration experience. In his literature review, Terkessidis highlights the various features which form the basis of a naturally fixed group definition. These include for example physiological but also sociological markers like language. This implies that individuals can be racialised as soon as their voice is heard (for example on the telephone), without the other person knowing what the individual looks like. At the same time, the same individual could probably “pass” as white in other contexts, if they have a name that “sounds white.”

138 Human Rights Council, untitled report, last accessed 4 February 2015, [http://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/PDF-Dateien/UN-Dokumente/Sonderberichterstattung/report\\_Muigai\\_mission\\_Germany\\_\\_2009.pdf](http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/UN-Dokumente/Sonderberichterstattung/report_Muigai_mission_Germany__2009.pdf).

139 These children were identified as having a Sub-Saharan “migration background” – an indirect method for collection data, which certainly does not enable the identification of all People of African Descent, but in the absence of a comprehensive set of data broken down by group, is the only way to be able to conduct any analysis at all.

140 OECD Programme for International Student Assessment, Where Immigrant Students Succeed A COMPARATIVE REVIEW OF PERFORMANCE AND ENGAGEMENT IN PISA 2003, last accessed 4 February 2015, [http://www.phil-fak.uni-duesseldorf.de/ew/bf/bf\\_veranstaltungen/ss06/HS\\_Bildungssoziologie/9806021E.pdf](http://www.phil-fak.uni-duesseldorf.de/ew/bf/bf_veranstaltungen/ss06/HS_Bildungssoziologie/9806021E.pdf).

141 Diefenbach, H. (2011) “Der Bildungserfolg von Schülern mit Migrationshintergrund im Vergleich zu Schülern ohne Migrationshintergrund” (pp 449–473) in “Lehrbuch der Bildungssoziologie” edited by R. Becker (Wiesbaden: Springer). A comparative study of the education achievements of children with a “migration background” versus children without a “migration background”.

type of school between the 4<sup>th</sup> and 6<sup>th</sup> form. Only one of these types of ordinary schools can lead to the Germany Abitur (A-Level), giving direct access to university. In the lower, under-privileged school types<sup>142</sup> have no access to higher education and are confronted to a learning environment which is demotivating.<sup>143</sup>

Due to "...differential learning and development milieus..." (Baumert, Stanat and Watermann 2006:99)<sup>144</sup> <sup>145</sup> children in the under-privileged types of schools have a slower learning rhythm. This discrepancy is exacerbated by different "theoretical approaches to education, curricula-related and didactic traditions [as well as] different approaches to teachers' education" (Baumert, Stanat and Watermann 2006:177). Taking the national education panel as an example it clearly appears that students with a "migration background" with a lower socio-economic status are overrepresented in these schools (Autorengruppe Bildungsberichterstattung – a group of authors report on the state of education 2014:76 and 257).<sup>146</sup> Moreover, surveys on residential environments demonstrate that residential segregation is the basis on which segregation at school can grow.<sup>147</sup>

Given the fact that German as a second language is not taught in schools with a higher educational status, insufficient knowledge of the German language has an extremely strong prejudicial effect. The consequence is extreme segregation based on assigned social, national and ethnic origin in connection with the vertical distribution of students according in the various types of schools.

A study published in 2012<sup>148</sup> highlighted an additional aspect of horizontal segregation in the education system: a considerable level of horizontal segregation was identified among the same types or schools. Following an analysis of 108 primary schools in Berlin, it was possible to show that some schools had a share of foreign students three times higher than the share of foreign children in their constituency whereas in other schools this number was five times lower. In some schools, the share of students with a non-German language of origin even reached 98 percent (Sachverständigenrat deutscher Stiftungen für Integration und Migration 2012:9).

A survey conducted across the whole country (Lange, Wendt and Wohlfahrth 2013)<sup>149</sup> demonstrated that in major cities, 38.2 percent of fourth form students with a "migration background" had attended schools with a majority of students who had poorer education performances as compared to 5.7 percent of the students without a "migration background" (Lange, Wendt and Wohlfahrth 2013: 22). This figure was even higher in the major cities, where 69.7 percent of the students with a "migration background" attended a segregated school (share of the students with a "migration background" over 50 percent) compared to only 17.1 percent of children without a "migration background" attending similar schools (Lange, Wendt and Wohlfahrth 2013:9). This trend is just as strong in rural areas.

All in all it appears that vertical and horizontal segregation mechanisms cause schools to be labelled as "problem schools" which have an extremely high rate of students with a "migration background", and students who are exempted from paying fees for their learning materials.<sup>150</sup> In Berlin, there are 66 schools with a rate of exemption

142 In Germany, the education system formerly had a three tiered system: the Gymnasium (grammar school) was the only one which granted its pupils the chance to qualify for higher education. The Realschule could lead to higher qualifications in technical professions and the Hauptschule prepared its pupils for lower levels of qualification. Various educational reforms were implemented in several states throughout Germany. According to the specific of each of these states, this resulted in a more diversified system. However, equal opportunity in the German educational system (which would lead to equal access to higher education and professional training) has still not been achieved – not even in the new types of school.

143 Maaz, K., U. Trautwein, O. Lüdtke and J. Baumert (2008) "Access to higher education and professional training is still reserved Educational Transitions and Differential Learning Environments: How Explicit between-School Tracking Contributes to Social Inequality in Educational Outcomes." *Child Development Perspectives* 2(2): pp 99–106.

144 Baumert, J., P. Stanat and R. Watermann (2006) "Schulstruktur und die Entstehung Differenzieller Lern- und Entwicklungsmilieus." *Herkunftsbedingte Disparitäten im Bildungswesen: Vertiefende Analysen im Rahmen von PISA 2000:95–188*. On school structures and how differential learning and development milieus are generated. Disparities based on origin in the education system: comprehensive analysis within the framework of PISA 2000:95–188.

145 van Ophuysen, Stefanie and Heike Wendt (2010) "Zur Veränderung der Mathematikleistung von Klasse 4 bis 6. Welchen Einfluss haben Kompositionsumd Unterrichtsmerkmale?" in *Bildungsentscheidungen*, edited by J. Baumert, K. Maaz and U. Trautwein (Berlin: Springer). On changing the performance in mathematics of pupils in grades 4 to 6 (German education system). What is the influence of class-composition and teaching methods?

146 Autorengruppe Bildungsberichterstattung (2014) "Bildung in Deutschland 2014. Ein indikatorengestützter Bericht mit einer Analyse zur Bildung von Menschen mit Behinderungen." (Bielefeld: Bertelsmann Verlag) can be accessed online here: [http://www.bildungsbericht.de/daten2014/bb\\_2014.pdf](http://www.bildungsbericht.de/daten2014/bb_2014.pdf). A collective study on education in Germany, 2014. A report based on indicators combined with an analysis of education in relation with differently abled people. According to this study, the probability for students with a "migration background" to attend a Hauptschule – the type of school leading to part-time enrolment in a vocational school in conjunction with apprenticeship training – is twice as high as it is the case for students without a "migration background".

147 Terpoorten, Tobias (2014) "Räumliche Konfiguration der Bildungschancen: Segregation und Bildungsdisparitäten am Übergang in die weiterführenden Schulen im Agglomerationsraum Ruhrgebiet." Vol. Band 3: ZEFIR ([http://www.zefir.rub.de/mam/content/zefir\\_materialien\\_3\\_r%C3%A4umliche\\_konfiguration\\_der\\_bildungschancen\\_2014.pdf](http://www.zefir.rub.de/mam/content/zefir_materialien_3_r%C3%A4umliche_konfiguration_der_bildungschancen_2014.pdf)). On spatial configuration, educational opportunities, segregation and educational disparities: On the transition from primary to secondary schools in an urban agglomeration in the Ruhr district.

148 Sachverständigenrat deutscher Stiftungen für Integration und Migration (2012) "Segregation an Grundschulen: Der Einfluss der elterlichen Schulwahl", by the Expert Council of German Foundations on Integration and Migration (SVR) concerning segregation in German primary schools: the influence of parental choice, [http://www.svr-migration.de/wp-content/uploads/2014/11/Segregation\\_an\\_Grundschulen\\_SVR-FB\\_WEB.pdf](http://www.svr-migration.de/wp-content/uploads/2014/11/Segregation_an_Grundschulen_SVR-FB_WEB.pdf), last accessed 4 February 2015.

149 Sachverständigenrat deutscher Stiftungen für Integration und Migration (2013) "Segregation an deutschen Schulen: Ausmaß, Folgen und Handlungsempfehlungen für bessere Bildungschancen" by the Expert Council of German Foundations on Integration and Migration (SVR) concerning segregation in German schools: the extent, the consequences and recommendations to improve equality of opportunity in education, [http://www.bagkjs.de/media/raw/SVRFB\\_StudieBildungssegregation\\_Web.pdf](http://www.bagkjs.de/media/raw/SVRFB_StudieBildungssegregation_Web.pdf), last accessed 4 February 2015.

150 Arbeitskreis Stadtentwicklung, Bau und Wohnen, Friedrich Ebert Stiftung, "Das Programm Soziale Stadt: kluge Städtebauförderung für die Zukunft der Städte" Publikation der Abteilung Wirtschafts- und Sozialpolitik der Friedrich-Ebert-Stiftung, on the programme "Social city: clever funding schemes for city planning for the future of cities, published by the department of Economic- and Social Politics in the Friedrich-Ebert-Foundation, <http://library.fes.de/pdf-files/wiso/07498.pdf>, last accessed 4 February 2015.

from learning material fees exceeding 75 percent. In this context, provisions of the General Equal Treatment Act (§ 19 para. 3 of AGG) that dovetail with a segregated form of urban development have become redundant.

Racism in school books, curricula and at school: IMAFREDU (The Image of Africa in Education) is a project which dealt with the issue of racist contents in the Hamburger school books and their impact on everyday life at schools. The project run for several years and was able to give evidence of the relation between racist and discriminatory contents in school books and racist and discriminatory incidents.

German curricula, school books and didactic content reproduce the colonial and racist messages of mainstream discourse in society. Teachers impart this information to the pupils without critical reflection of the content. As a result, children acquire knowledge that reproduces racism. The IMAFREDU survey provides empirical evidence to demonstrate that this knowledge supports those individuals privileged by racism to exercise racist practice in schools. In addition, racist knowledge has a negative impact on the self-image of students who experience racial discrimination.

White teachers who were interviewed by the IMAFREDU project team were unequivocally opposed to racial discrimination. Yet, they had an understanding of racial discrimination that was limited to intentional racism, and therefore not conform with the definition spelled out in ICERD. Narrowly-construed racism has prevented them from adopting a critical attitude and checking the learning material available against racist contents. For the same reason, they were unable to acknowledge that their students' experience in relation with racism.

**Insufficient human rights education:** In Germany, students and teachers are not fully conscious of the fact that discrimination is a violation of human rights. This also explains why they have a limited knowledge of the rights and actions that one has and can avail oneself of in case of discrimination. Discrimination is seen by students and teachers as resulting from individual misconduct. There is a lack of understanding for institutional forms of racist discrimination.

The CERD has issued numerous recommendations pointing out the necessity for human rights education to have a firm anchorage and space in curricula and education laws at state levels and in the teachers' schools curricula. Yet, only specific human rights are dealt with at random and explained. There is a lack of comprehensive curricula on democracy and citizen education in Germany school covering the whole range of human rights listed in the Universal Declaration on Human Rights.

Indisputably, Germany does not fulfil its obligation pursuant to Art. 5 and 7 of ICERD. In addition, Germany's must be considered as a violation of Art. 14 of the European Union Charter of Fundamental Rights, in relation with the right of every person to education an Art. 26 para. 2 of the Universal Declaration of Human Rights. Germany's policy also contravenes Art. 13 of the Convention on the Rights of Children, in connection with Art. 2 para. 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

### Recommendations

In 2010, the Special Rapporteur on Racism underlined the necessity to adopt and use a comprehensive definition of racism. He added that such an approach is a precondition for combating racism. Consequently, it is imperative that all structural changes and policies resolutely aimed at curbing down racism in the education system have a human rights dimension pursuant to Art. 1 of ICERD. In other words racism has to be assessed considering the effect it has actually has beyond the intended effect. This approach has to be made known in all relevant bodies and accounted for in the planning process of any reform.

Curricula and school books must be revised from a critical perspective and checked for racist content in the light of the General Recommendation 32 of ICERD. All stakeholders must be involved, including the Standing Conference of the Ministers for Education and the Arts (Kultusministerkonferenz), during which the education ministers of the federal states co-ordinate educational policy guidelines. Binding guidelines should be developed from the relevant recommendations. Human-rights based education may entail interactional forms of discrimination. It can also be tainted by non-intentional, institutional and structural forms of racial discrimination, which are defined in Art. 1 of ICERD as human rights violations. With this aspect in mind, it is imperative that human based education should be included in the curricula as a compulsory content. This applies to school curricula as well as teachers' training. Given the lack of an anti-discrimination infrastructure in the education system, including schools, there is a necessity for the creation of an independent complaint office, which would offer counselling services, receive complaints and develop anti-discrimination interventions. The action of this independent office should be underpinned with sanctions. Furthermore, its power should not be limited to the aforementioned forms of discrimination but also enable it to provide information on mechanisms tending to reproduce discrimination, such as micro-attacks, stereotypes and threat.

There is also a need for research surveys on the extent of racial discrimination at school, university and in other educational institutions. The interviewees must be given the opportunity to choose a differentiated, self-assigned category, which is a clear requirement pursuant to Art. 1 of ICERD, including “race, colour, descent and national or ethnic origin” (GR No 24 & GR No 34/9). Due consideration must be paid to members of groups requiring protection as outlined in ICERD, who must have the opportunity to decide themselves between self-assigned categories or being assigned to categories by a third party.

The urban planning bodies must also assume responsibility for the discrimination-free access to education. To this aim, they must submit adequate concepts aimed at combating the negative effects of segregation (ICERD GR No 19/4).

The federal government and the government of the federal states should be requested to provide information on the state of implementation of case-law of the European Court of Human Rights and the obligation of the state and state to adopt and implement affirmative actions in the field of education. Pursuant to this, measures must imperatively be taken if a group that has a historical experience of discrimination still experience discrimination today.

### c) Involvement and participation in economic life

#### Racial discrimination on the labour market

In Germany, the labour market is segregated and segmented in a specific way. This form of discrimination affects people with a “migration background” as well as people who require protection pursuant to Art. 1 para. 1 of ICERD. Needless to mention, this form of discrimination is a violation of their right to be protected against discrimination under Art. 5. Lit.e I of ICERD. They are more often affected by unemployment, more frequently employed in the precarious work sector and discriminated against in the application process.<sup>151</sup> In addition, the form of discrimination as described in the following section is a violation of the right to work (Art. 23. 1 of the Universal Declaration of Human Rights, Art. 6 of of the International Covenant on Economic, Social and Cultural Rights) and an adequate standard of living (Art. 11 of ICESCR).

**Discrimination of people with a “migration background”:** Contrary to the recommendations and calls of the ECRI and CERD, the federal government persistently opposes the breaking down of demographic data by groups, which would illuminate the situation of groups requiring protection under ICERD. For this reason, the only way to comprehend the scope of discrimination on the labour market is to use research studies on discrimination against people with a “migration background”.

Incomplete as they may be, the data available [see: II. – Obligation to provide information on groups requiring specific protection under ICERD] shows that people with a “migration background” face blatant forms of discrimination: Of all the forms of discrimination, discrimination on the labour market ranks second. According to a representative survey conducted by the SVR in 2012, 22 percent of the respondents indicated that they often experience discrimination by public bodies and 19 percent report discrimination on the labour market.

Furthermore, employment is a precondition for acquiring German citizenship. Racial discrimination is a serious obstacle to accessing the labour market, and consequently racial discrimination is a serious obstacle to accessing the labour market and, since work is crucial accessing civil rights, racism in the workplace paves the way for racism in other spheres of life.

A close examination of the situation on the labour market shows that self-assessments of people with a “migration background” converge with demographic data in relation to the labour market. The overall picture is that structural discrimination can be clearly identified: In 2012, 10 percent of the respondents with a “migration background” stated that they face “serious discrimination” or “rather serious discrimination” on the labour market.<sup>152</sup> Whereas 6.5 percent indicated that they are exposed to “serious” or “rather serious discrimination” in the education sector. All in all, every fifth respondents with a “migration background” pointed out that they had faced discrimination in both sectors at least once (ADS on comparison between Western and Eastern regions and 2012, p. 9 – 10). 24.3 percent of the respondents with a “migration background” had the feeling that they were discriminated against on the labour market while 23.7 percent of them had the same feeling about discrimination in the education system, including in apprenticeships.

<sup>151</sup> This has been proven by numerous studies, which for example use comparative testing procedures involving pairs of identical job applications of candidates, where one person belongs to one of the groups which, according to ICERD, needs specific protection against discrimination. See for example the SVR report: “Diskriminierung am Ausbildungsmarkt – Ausmaß, Ursachen und Handlungsperspektiven” (Berlin 2014) concerning discrimination on the apprenticeship market – the extent, the consequences and recommendations for action.

<sup>152</sup> According to a study by the Expert Council of German Foundations on Integration and Migration (SVR) on behalf the Federal Anti-Discrimination Agency.

Besides, the relation between discrimination in the education system and discrimination on the labour market is even more apparent when a comparison is made between people without “migration background” and a relatively lower level of education and the population with a “migration background”. In this way, racial discrimination, segregation and lower education achievement [see V. 4. b) Racial discrimination and segregation in the education system] have a negative impact on the labour market.<sup>153</sup>

Discrimination in accessing the labour market: the number of people with a “migration background” who are in employment has increased, yet the percentage of people with a “migration background” remains lower than the percentage of those without a “migration background”. In 2010, 69.4 percent of the people with a “migration background” were employed. Yet this percentage is still lower than that of their German colleagues, 78.2 percent of whom are in work (Federal Commissioner for Migration, Integration and Refugees 2012a, table 25).

Only a limited proportion of people with a “migration background” belong to the core personnel of the businesses. Conversely, the percentage of people with a “migration background” working in low wage and precarious professions is much higher.

This gap is particularly wide in the public sector, in the age group encompassing people age 15 to 34: there are just half as many people with a “migration background” as without a “migration background”. According to data collected by the OECD, people with a “migration background” employed in the public sector made up 13 percent of the employees subject to social insurance contributions in the public sector in 2008 whereas 26 percent of the employees in the public sector were people without a “migration background” (OECD 2012c, p. 129237). As a result, the employment structure in the public sector does not reflect the demographic structure of the population in Germany. This gap explains to a certain extent why people with a “migration background” consider the public sector to be the most frequent cause of discrimination [see: II. 5. a) – e) on the situation of each of the groups requiring protection under ICERD].<sup>154</sup>

In addition, there is only a limited proportion of migrants or people with a “migration background” in the core personnel of companies. They are more often employed in sectors requiring a lower level of qualification and more precarious wage structure. As a result, employees with a “migration background” have an at-risk-of-poverty rate of 13.5 percent, which is more than double the rate of employees without a “migration background”, which is 6.2 percent (Federal Office for Statistics 2011, p. 245).

It is noticeable that people with a “migration background” who have a high level of education have a higher at-risk-of-poverty rate than people without a “migration background” who have a lower education level. This gap is an additional indicator for deep-rooted structural discrimination in the German labour market. The education level of people with a “migration background” has hardly any effect on the at-risk-of-poverty rate, which remains high despite a higher education level, assessed by qualifications such as the German school-leaving exams known as Abitur. The at-risk-of-poverty rate (20.1 percent) is double the rate of people without a “migration background” who do not have Abitur (8.9 percent).

### Recommendations

Data regarding the situation on the labour market situation for groups requiring protection under ICERD must be collated in a way that fulfils the strict requirements on the protection of individual data. This data must be collected on the basis of voluntary self-identification. [see: II. – Obligation to provide information on groups of people requiring specific protection under ICERD].

The available anti-discrimination infrastructure, which encompasses the various anti-discrimination offices, must be expanded in such a way as to make available a specialised service that has the capacity to deal with labour-related issues.

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<sup>153</sup> Ibid.

<sup>154</sup> Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR), Deutschlands Wandel zum modernen Einwanderungsland Jahrgutachten 2014 mit Integrationsbarometer, 2014, [http://www.svr-migration.de/wp-content/uploads/2014/11/SVR\\_JG\\_2014\\_WEB.pdf](http://www.svr-migration.de/wp-content/uploads/2014/11/SVR_JG_2014_WEB.pdf), on Germany's development towards becoming a modern immigration society.



It is imperative to support civil society organisations, including grassroots organisations of groups requiring protection under ICERD in order for them to be in a position to provide targeted information to their respective communities on the protection against discrimination in the field of labour rights.

Anti-discrimination offices at federal and state levels must be more resolute in their action to provide targeted information to people who belong to groups requiring protection under ICERD, with due consideration to the specific situation of each of the groups on the labour market. The latter must receive information on their rights and opportunities for counselling and receiving support. The human rights dimension of protection against discrimination has to be made explicit.

It is necessary that the public sector should implement affirmative action measures pursuant to Art. 2 Ans1 of ICERD, so as to put an end to blatant discrimination against people with a “migration background” who are employed in the public sector. To this aim, recommendations as derived from the National Integration Plan 2012/13 should be implemented. This measures and their implementation must also be binding for the state-funded social sector.

### **Disparate racial impact of church-based employment policy:<sup>155 156</sup>**

Given the structure of the personnel employed in church-related institutions in Germany, it is clear that specific groups of people who require specific protection are marginalised, which is a source of discrimination pursuant to under Art. 4 a – d and Art. 5 d of ICERD. The option to select and privilege employees with a Christian affiliation leads to the disproportionate exclusion of people with another religious faith and this fact constitutes a violation of Art. 1 of ICERD.<sup>157</sup>

Given the size of church-related institutions, racist exclusion in the German health and social systems can be deemed to have a structural dimension. All employees working for Germany’s second largest employer are affected, including those who are not involved in faith-based activities: Diakonie and Caritas employ altogether over 1.3 million people and have a structural position in the health and social sectors.

The loophole with the most crucial impact derives from Sec. 9 AGG, allowing Protestant and Catholic-affiliated institutions to require that their employees satisfy specific requirements of loyalty. Pursuant to Sec. 9. AGG “difference of treatment on the grounds of religion or belief [...] shall not constitute discrimination.” The consequence is a systematic marginalisation of applicants of another faith. This particularly applies to groups requiring protection under ICERD due to race, colour, descent, or national or ethnic origin, including people with a Turkish and Arab background from predominantly Muslim countries.

According to the estimation of the federal government, 2.1 to 2.3 million Muslims with foreign citizenship live in Germany, while 1.7 to 2.0 million Muslims with German citizenship live in Germany. The nationalities most affected are those for which labour recruitment agreements were signed by Germany. It has to be mentioned that at that time migrant workers were called “Gastarbeiter”, which means “guest workers” in Germany.

	<b>Muslims living in Germany with relevant citizenship*</b>	<b>German Muslims with a relevant “migration background”</b>
<b>Turkey</b>	<b>1,506,410</b>	<b>1,054,618</b>
<b>Former Yugoslavia</b>	<b>346,917</b>	<b>189,823</b>
<b>Morocco</b>	<b>32,609</b>	<b>131,057</b>

\*All figures: Average number according to the Federal Office for Migration and Refugees, Survey “Muslimisches Leben in Deutschland 2009”, on Muslim life in Germany in 2009.

155 This section is based on the background paper “Discriminatory effects of the church’s recruitment policy” by Corinna Gekeler on behalf of the Humanistic Union, which was written within the framework of parallel reporting process. The full text can be accessed here: <http://rassismusbericht.de/wp-content/uploads/Diskriminierende-Effekte-der-kirchlichen-Einstellungspolitik.pdf>.

156 Diakonie Deutschland supports the idea of an independent civil society Parallel Report in principle, has supported the process leading to its submission and is committed to upholding the reports’ independence. However, Diakonie Deutschland objects to the actual statements made in relation to Diakonie. They do not convey an accurate picture of actual circumstances. Therefore, Diakonie Deutschland opposes the legal assessments which have been made. Any claim of discrimination is to be refuted, both from a factual and a legal point of view. In addition, Diakonie Deutschland rejects the assessment made regarding paragraph 9 of the German equal treatment act (AGG). Paragraph 9 of the AGG expresses a distinction (based on practical considerations) between church employment practice in relation to Diakonie and non-church-affiliated employers. At the same time, it articulates the right to the self-determination of the church, in accordance with the German constitution, European law and international law – particularly human rights standards. Other church-based organisations that are members of Forum Menschenrechte, and that are subject to the same requirements in relation to labour law, share this view.

157 Frings, Dorothee (2010): “Diskriminierung aufgrund der islamischen Religionszugehörigkeit im Kontext Arbeitsleben – Erkenntnisse, Fragen und Handlungsempfehlungen. Diskriminierungen von Musliminnen und Muslimen im Arbeitsleben und das AGG”, on the discrimination experienced due to affiliation with Islam in the context of labour relations – Findings, questions, recommendations for action, discrimination of Muslim women and men at work and the General Equal Treatment Act (AGG). Research paper submitted to the Federal Anti-Discrimination Agency, p. 51.

Current praxis includes job offers, even if there is no religious-function directly related to the positions – for example assistants in kitchen and kindergartens –, where Christian membership is required for performing these tasks. Employees without religious affiliation cannot be elected into workers' representation committees and are thus, denied their rights to represent their own interests. In addition, their advancement opportunities are systematically thwarted.

This situation has serious consequences given the structural importance of Diakonie und Caritas as the second largest employers in Germany and their quasi-monopolistic position in some regions and fields of work.

The following examples illustrate the scope of marginalisation, as caused by the aforementioned framework and an environment that does not conform with the legal foundation of ICERD:

- The work contract of a Muslim nurse was terminated because she wore a headscarf which was deemed to be threatening the credibility of her institution and the church.
- A medical practitioner was asked at the beginning of the interview whether he was Muslim. He said he was and was told in the follow-up that he could not work in the institution concerned.
- For the five past years, a children and youth worker (pedagogical assistant) with additional training has been looking for employment in a city with a high percentage of migrants but so far his applications have been unsuccessful because the majority of the institutions are run by church organisations.

In the absence of statistic data, structural marginalisation can only be demonstrated using individual cases. This approach correlates with the definition given by the "Working Group Church and Right-Wing Extremism" (BAGKR) in 2013: Anti-Muslim racism is "a form of racism against Muslims and people who are perceived to be and identified as Muslims due to their external appearance."

Church institutions are very well-funded from income tax, which amounts to a state-maintained form of financing discriminatory practice, which is prohibited pursuant to Art. 2 (b) ICERD. Moreover, these practices are even financed by the people affected by such discrimination because they themselves also pay taxes.

Provisions in § 9 AGG allows for unequal treatment on the basis of religious affiliation are being arbitrarily implemented.

However, churches can only maintain their increasing number of institutions if they hire people who do not have any religious affiliation or who are of another faith. This is the reason why around 50 percent of non-Christians are employed in these institutions. The theological arguments put forward by both churches, based on the controversial concept of ministerial communion borders on the absurd in view of the numerous exceptions in the employment practice. This demonstrates that it is possible and will be necessary to depart from a restrictive interpretation of § 9 AGG. Though the churches claim that they are compelled to practice unequal treatment, employment practice demonstrates that there are alternative approaches.

### Recommendations

Germany can only fulfil its human rights obligation to provide protection against racial discrimination pursuant to Art. 2 ICERD if § 9 AGG is removed. In fact, § 8 AGG ("Permissible difference of treatment on grounds of occupational requirements") already covers exceptions in relation to employment where there is a religious function directly related to the positions concerned and they are dealt in adequate manner. In Germany, the implementation of the European Union Anti-discrimination Guideline is subject to criticism, in relation to § 9 AGG especially. The reason is that, contrary to the EU requirements, unequal treatment is not limited to positions with a religious function; it encompasses all activities. Even the guidelines for labour relations in the churches establish a clear distinction between positions with a religious function and those that are not faith-based activities in relation to religious faith.

A legal expertise submitted to the Federal Anti-Discrimination Agency also criticised the implementation of the European Union anti-discrimination guidelines, stating that § 9 AGG is a loophole that leads to a wide protection gap. It added that the state must take corrective measures pursuant to Art. IV a, b, c, d, Art. V d among other articles of ICERD.

### Inadequate legal protection: strengthening of AGG is essential<sup>158</sup>

In the state report, AGG is described as the core instrument of anti-discrimination protection. Undoubtedly, AGG provides protection against discrimination on the labour market and in the field of civil law. Yet, improvements are nec-

<sup>158</sup> The following section is based on the background paper "Rechtlicher Diskriminierungsschutz gegen Rassismus in Deutschland muss gestärkt werden" submitted by the Büro zur Umsetzung von Gleichbehandlung e.V. working in favour of the implementation of AGG. This paper was developed as part of the parallel reporting process. The full text can be accessed here: <http://rassismusbericht.de/wp-content/uploads/Rechtlicher-Diskriminierungsschutz-gegen-Rassismus-in-Deutschland-muss-gestaerkt-werden.pdf>.

essary in many aspects. The European Commission drew attention to this issue in its injunction of 17 October 2007 (K(2007)4872).<sup>159</sup> Protection under AGG remains below the provisions outlined in the Racial Equality Directive (RL 2000/43/EG) as well as in ICERD. The UN Committee has already pointed out that § 19 Abs. 3 AGG contradicts the principles laid out in Art. 3 on the prohibition of segregation.

Moreover, due to the federal structure of the German State, the Racial Equality Directive cannot be implemented adequately by the various federal states, especially in the criminal justice and education systems. It should be stressed at this point, that the AGG exclusively applies to discriminatory behaviour of individuals or individuals acting on behalf of the state. It however does not cover state activity. This is best exemplified by racial profiling, which cannot be punished on the basis of AGG. The mandate of the Federal Anti-Discrimination Agency has been criticised for being too narrowly defined: it has no powers to represent any party in court nor can it provide support during a legal process. Finally, it has often been remarked that sanctions based on the Racial Equality Directive (2000/43/EC) do not constitute an effective deterrent to discrimination.<sup>160</sup>

### Recommendations

The anti-discrimination (AGG) law should be further developed, and corresponding legislating should be adopted at state levels.

The scope of AGG should be extended to also cover state activity.

Affirmative action measures should be legally compulsory for public administration and companies. Beyond the affirmative action measures enumerated in Sec. 5. AGG, legally binding measures are necessary in order to enforce equal treatment in the administration and the private sector.

Exemptions in pursuant to Sec. 9 AGG should be deleted.

The mandate of the Federal Antidiscrimination agency (ADS) should be strengthened. It should be given power to support the individuals who are affected by discrimination, including in court. Additional anti-discrimination agencies should be set up at the state level.

Exemptions in relation to the housing market pursuant to § 19 AGG should be removed.

Adequate sanctions should be implemented.

Associated discrimination should be included in the law: Until now, only people whose relatives are affected by discrimination can bring a claim. For example, when a flat is not be rented to a couple of which one spouse belongs to groups requiring protection under ICERD. For example, when a lesser refuses to rent a flat to such a couple, relatives do not have the possibility to receive remedy. Only people directly affected by discrimination have this right. It is necessary to provide the opportunity to bring to court cases of associated discrimination.

## d) Racial discrimination in the health sector – physical health<sup>161</sup>

People who require protection according to the provisions outlined in ICERD, especially Black People and People of Color, are exposed to racist practice and ascriptions in the German health sector. A negative impact relationship between medical doctors/nurses and patients arises already before any contact with a patient has taken place due to racist medical assumptions.

Simply the sound of a patient's name often leads to rash conclusions about the patient's behaviour, the reason for the complaint and the root-cause of the issue. A small selection of the numerous examples of acts of discrimination, are outlined below: The presumption of aggravation or the exaggerated and unprofessional self-diagnosis undertaken by People of Color, and the assumption that women of Muslim faith are victims of violence inflicted by a male relative. Although there are reports which prove that during the job application process, individuals experience discrimination due to the sound of their name, to date no similar, systematic research has been undertaken which focusses on the experience of "name-based" discrimination in the health sector.

Moreover, very often the assumption is made that symptoms are being exaggerated. Where there are linguistic problems, patients are not asked what their first language is, or – as is often the case with Black people of African

<sup>159</sup> See also: Nickel, Rainer (2009) Drei Jahre Allgemeines Gleichbehandlungsgesetz (AGG): eine Zwischenbilanz, [http://heimatkunde.boell.de/sites/default/files/pics/Rainer\\_Nickel\\_Drei\\_Jahre\\_AGG\\_PDF.pdf](http://heimatkunde.boell.de/sites/default/files/pics/Rainer_Nickel_Drei_Jahre_AGG_PDF.pdf).

<sup>160</sup> CERD closing statements concerning the last State report, remark 17.

<sup>161</sup> This section is based on a background paper "Rassistische Diskriminierung und physische Gesundheit" written by Fortuna Ghebremeksel on racial discrimination and physical health. This paper was developed as part of the parallel reporting process and is available online here: <http://rassismusbericht.de/hintergrundpapiere-2/>.

Heritage – medical staff resort to a European language. Due to these connotations, patients repeatedly feel that treatment is refused or that they have not been adequately examined.<sup>162</sup>

Although interpretation services are usually available in the larger clinics, they can be limited and are rarely used. It is necessary for health service professionals to gain awareness regarding these problems. Moreover the use of interpreting services should be extended.<sup>163</sup>

The attributed aggravation is usually codified in allegedly medical languages, as it is the custom in the medical profession. One example is the term “Morbus M” (actually an abbreviation for morbus mediterraneus, the description used for aggravated patients from the Mediterranean region, but it is exclusively used to describe People of Color.) Surveys have repeatedly demonstrated medical doctors view Black patients as having a lesser “Western” understanding of illnesses, which leads to a problematic relationship between medical doctors and their patients.<sup>164</sup>

There is a misconceived and preconceived image of a Black patient in the mind of medical doctors as the aforementioned survey demonstrated. However, the issue is not dealt with as such in the survey. These images and opinions do not have negative consequences on the relationships between medical doctors and patients. They create an environment in which there are “us versus them”. This aggravates the lack of empathy, as surveys conducted in the Anglo-American region demonstrate.<sup>165</sup> Assumptions as described below can entail opinion about sensitivity to pain and result in the practice of inadequate treatments.

An important aspect in health care is the knowledge and acceptance of different cultural aspects regarding sickness, and also regarding death. Far too often medical staff lack of empathy when passing on information terminal diagnoses or where a patient is passing away.

The situation is more acute in the case of people who require protection under ICERD when confronted with other ways of dealing with grief. There is a lack of knowledge about different funeral rituals. Muslims bury their deceased relatives immediately after death with the eyes and mouth closed and among other things in a piece of cotton cloth, which is not widely known and sometimes even refused.

Reference to Anglo-American surveys is a clear sign that research work on this issue is urgently needed in Germany. It is imperative that qualitative and quantitative research studies should be conducted. In that way, the data that they entail could be used as a base for drawing up guidelines for everyday medical practice.

It is particularly important that acquired know-how and competence should be shared by personnel who received specific training and passed so as to be included in training schemes for medical staff. Training, acquiring these competences and passing them are crucial aspects that should be highly valued.

### Recommendations

In this context, research work on group-specific experience of racial discrimination in the German health system is urgently needed. The aim is to be able to assess the scope, the form and the impact of racist discrimination, as no systematic research into this issue has ever been carried out before.

Besides, personnel working in the health-care sector must take part in comprehensive training schemes so as to be able to adequately attend an increasingly diverse population of patients.

Thirdly, linguistic barriers must be to a greater extent overcome. To this aim, interpreters must be made available. Pilot projects with multilingual medical students could inspire further measures with a similar approach.

As for the state-funded health and outdoor patient care sector, the focus should lie on taking affirmative action measures pursuant to Art. 2 ICERD with the aim of increasing the representation of groups requiring protection under ICERD.

162 See also BVerfG decision 1 BvR 274/12 dated 28.01.2013. A 61 year old Kurdish man (who had been living in Germany since 2000) was refused a place on the waiting list to receive a heart transplant. His application to receive legal aid to bring a case of discrimination before a court was also turned down. The reason given was that due to his inadequate German language skills, his co-operation before and after the operation could not be counted on. The German Federal Constitutional Court found the decision to refuse legal aid to be unconstitutional. See also: Barskanmaz, Cengiz (2013) “Mehr Rechtsstaat für Migrant/innen: BVerfG stärkt Diskriminierungsschutz für Migrant/innen”, VerBlog, 2013/3/07.

163 Documentation of a conference “Migration und Gesundheit – Kulturelle Vielfalt als Herausforderung für die medizinische Versorgung” (2010), <http://www.ethikrat.org/dateien/pdf/tagungsdokumentation-migration-und-gesundheit.pdf> on migration and health – cultural diversity as a challenge for health-care systems.

164 H. Gerlach et. al. (2008) “Diskriminierung von Schwarzen aufgrund ihrer Hautfarbe? Ergebnisse von Focusgruppendifkussionen mit Betroffenen im deutschen Gesundheitswesen”, on the discrimination of Black people because of their skin colour, results of focus group discussions with victims in the German health system.

165 Jennifer N. Gutsell and Michael Inzlicht (2012) “Intergroup differences in the sharing of emotive states: neural evidence of an empathy gap.” *Social Cognitive and Affective Neuroscience* 7, Nr. 5 (June): pp 596 – 603.

### e) **Racial discrimination in the health sector – mental health**<sup>166</sup>

The findings of many studies demonstrate that the groups requiring protection under ICERD and experience discrimination in Germany have lower psychiatric health quality and suffer from inadequate group-specific health services in Germany.

Nonetheless, no studies have been conducted in Germany which explicitly examine the correlation between exposure to racism and mental health. The results of Igel and Anderen (2010)<sup>167</sup>, who researched a sample taken from a representative group of households of 1,844 migrants, indicate that migrants who have experienced racism also experience significantly poorer mental health.

Several studies on the impact of migration processes and the experience of difference offer the following information on the psychiatric morbidity of migrants in Germany compared to the majority of the population: higher prevalence of psychotic disturbances, higher prevalence of affective and psychosomatic disturbances among women, a higher incidence of treatment in locked psychiatric units, lower day-care attendance, less frequent use of out-patient treatment and very low rates of psychotherapy treatment.<sup>168</sup> Löhr et. al. (2006)<sup>169</sup> report a higher prevalence of suicide among people with a Turkish “migration background”.

These findings provide only indirect information about the higher prevalence of mental stress among patients who do not benefit from a medical treatment of the same quality as people who are not affected by racism. However, the non-thematisation of racism is a hindrance to a further going interpretation of these studies. Another obstacle is the use of the imprecise variable of “migration background”. [see: II. – Obligation to provide information on groups requiring specific protection under ICERD]. As an example, it was not possible to establish a relationship<sup>170</sup>, between a “migration background” and mental health problems. The survey was based on a representative sample comprised of 2,510 respondents. However, this rather tends to prove that a distinction had not been made in the sample between racial discrimination and other migration-related reasons.

As a comparison, research outcomes in the USA, the United Kingdom and Australia have proved beyond doubt the correlation between the two factors: racism was clearly mentioned as one of the most important, independent indicator for the health of members of minorities<sup>171</sup>, independent from any “migration background”, as per Paradies and Cunningham<sup>172</sup> in their research study on Australia’s indigenous population.

Medical care for people with mental problems in Germany is characterised by the absence of any diagnostic tools aimed at apprehending pain, stress reactions due to racist discrimination and other consequence of racist experience and racism. Racist practices by members of the medical teams are not thematised. Furthermore, racist structures on account of which the person concerned is denied access to adequate care, are not questioned. The current practice of culturalisation of mental health care (transcultural psychiatry, intercultural psychotherapy) strengthens the racist system, by presenting the structure of medical care as neutral, whereas the pain induced by racism and experienced by the persons concerned are considered “alien”.

166 This section is based on the background paper on “Rassismus und psychische Gesundheit in Deutschland”, submitted by Dr. Amma Yeboah as part of the parallel reporting process. The full text can be accessed here: <http://rassismusbericht.de/wp-content/uploads/Rassismus-und-psychische-Gesundheit.pdf>

167 Ulrike Igel, Elmar Brähler und Gesine Grande “Der Einfluss von Diskriminierungserfahrungen auf die Gesundheit von MigrantInnen”, *Psychiat Prax* 37 (2010): 183-90, on the influence of experiences of discrimination on the health of migrants.

168 E. Koch et. al. (2008) “Patienten mit Migrationshintergrund in stationär-psychiatrischen Einrichtungen”, *Der Nervenarzt* 79, Nr. 3: pp. 328 – 39; Meryam Schouler-Ocak et. al. (2009) “Patienten mit Migrationshintergrund in stationär-psychiatrischen Einrichtungen-Vergleich zwischen Patienten aus Ost-europa und der Türkei”, on patients with migration background in inpatient psychiatric clinics – a comparison of patients from Eastern Europe and Turkey – “National survey on patients with a “migratory background” in in-patient psychiatric clinics of the working group, ‘Psychiatry and Migration’ of the Federal Board of Directors”, *Zeitschrift für Medizinische Psychologie* 18, Nr. 3: pp. 117 – 23; Isaac Bermejo et. al. (2010) “Psychische Störungen bei Menschen mit Migrationshintergrund im Vergleich zur deutschen Allgemeinbevölkerung”, *Psychiatrische Praxis* 37, Nr. 05 (Juli): pp. 225 – 32.

169 C. Löhr et al. (2006) “Epidemiologie suizidalen Verhaltens von Migranten in Deutschland”, *Suizidprophylaxe* 33, Nr. 4: 171, on the suicidal behaviour of migrants in Germany.

170 Heidi Glaesmer et. al. (2009) “Sind Migranten häufiger von psychischen Störungen betroffen? Eine Untersuchung an einer repräsentativen Stichprobe der deutschen Allgemeinbevölkerung”, *Psychiat Prax* 36: pp. 16 – 22.

171 Hope, Landrine and Elizabeth A. Klonoff (1996), “The schedule of racist events: A measure of racial discrimination and a study of its negative physical and mental health consequences”, *Journal of Black Psychology* 22, Nr. 2: pp. 144 – 68; Don Elligan und Shawn Utsey (1999), “Utility of an African-centered support group for African American men confronting societal racism and oppression”, *Cultural Diversity and Ethnic Minority Psychology* 5, Nr. 2: p. 156; Shawn O. Utsey und Yasser Payne (2000) “Psychological impacts of racism in a clinical versus normal sample of African American men”, *Journal of African American Studies* 5, Nr. 3: pp 57 – 72.

172 Yin C. Paradies and Joan Cunningham (2012) “The DRUID study: racism and self-assessed health status in an indigenous population”, *BMC public health* 12, Nr. 1: pp. 131.

### **Recommendations**

There is an urgent need in Germany to conduct qualitative and quantitative studies which examine the impact of racism on the mental health of patients suffering from psychiatric disorders broken down by groups of people who require protection under ICERD. In addition, comparative studies should investigate discrepancies in relation to the medical services and care provided to patients in Germany.

Racism is a topic to be included in all curricula for future medical staff. The quality of medical care for people who experience racism and suffer from mental disorders or illnesses should be assessed and monitored. It is necessary to establish standards and overcome discrepancies in the quality of medical services and care provided to people who are exposed to racism in contrast to the majority of the population.

In the long run, studies on racism and mental health should help define criteria for diagnoses in relation to psychological disturbances and illnesses arising from exposure to racism, with the aim of including these in the official classification of psychological disturbances and illnesses.

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