Executive Summary

of the publication


Society and the state have the duty to provide health care services to the whole population. Further on is it the state's obligation to guarantee that unhindered access to proper medical services also applies to socially marginalized groups. In Germany the state's obligation derives directly from the constitution, which declares human rights to be inviolable and inalienable. It follows that the state must also take active measures to ensure that people are able to make effective use of their fundamental rights.

“Undocumented migrants” refers to people living in a state of illegality in terms of their residence permit status. The report thus deals with migrants without any kind of (official residence status or) stay permit and who are not recorded by any authority. It excludes persons with discretionary leave to stay or who are accorded humanitarian protection as well as migrants awaiting deportation.

In Germany undocumented migrants are in practice denied unhindered access to medical services. Current field reports as well as documentary and empirical studies of recent years reveal the structural deficits in medical services for this group.

Against this background the German Institute for Human Rights and the Catholic Forum on “Living in Illegality” joined forces in March 2006 to found the National Working Group on Health and Illegality (in the following simply referred to as “the National Working Group”), which brought together researchers, local government officials, medical staff, the churches, charities and various NGOs. The National Working Group set itself the goal of drawing up concrete concepts for ways to improve access to health care for people with no health insurance or residence permit status. It focuses on finding practicable solutions that promise structural improvements in health provision for the affected persons and adequate funding of those services.

The present report summarises the main results of the discussion process within the National Working Group. It concentrates on recording, describing and analysing different
approaches to providing medical care for undocumented migrants, which have often already been addressed in other contexts and introduced as proposals by various actors. In order to develop and test the different approaches, the National Working Group invited experts from various fields to attend a workshop in January 2007, the results of which form part of this report.

Despite the fact that the human right to health has long been recognised by the Federal Republic of Germany, the idea of tackling elementary social problems and humanitarian issues as human rights questions is not yet terribly well established in the country. This is why such an approach still sometimes meets with uncertainty, scepticism or reservations. In order to avoid any possible misunderstandings, we would like to stress that by identifying deficits in implementing this right and places where action is needed we are not automatically accusing the state of human rights violations.

Recently the public discussion about how to deal with undocumented migrants has gained a political edge in Germany, and the decision – in the coalition agreement of November 11, 2005 – to investigate the issue of “Illegality” has contributed to this.

The National Working Group views its report as an independent constructive contribution to the debate within society as a whole. We hope that the report will provide an additional incentive for politicians and society to respond quickly to the urgent question of making structural changes in order to ensure that proper health care is provided to undocumented migrants. The report is addressed equally to politicians and society at large.

On the Content of the Report

Health care for undocumented migrants in Germany is substandard. That is the clear finding of field reports and scientific studies. Doctors, in particular, report that undocumented migrants seek medical assistance too late or not at all and that in many cases the chance of early diagnosis and treatment is missed. Illnesses become unnecessarily serious and possible consequences include avoidable hospital stays and the risk of conditions becoming chronic. Particular difficulties are associated with pregnancy and childbirth for undocumented migrants.

The central legal right to medical treatment under the Asylum Seekers Benefits Act – which is considerably below the standard of the statutory health insurance system – is rarely taken up by undocumented migrants. The fear of discovery of their status leads them to make little or no use at all of their right to medical treatment. As a consequence, alternative non-state structures for assistance and support have arisen. These parallel structures are inadequately equipped and qualified and insufficiently funded, and consequently are unable to guarantee adequate and sustainable health care for undocumented migrants.

The key reason for the structural underprovision of health care for undocumented migrants is the official duty to report contained in the Residence Act, under which official bodies (such as welfare offices) are obliged to inform the immigration authorities if they learn of a foreigner living without legal residence status.
No other European state has a reporting obligation of this kind in the elementary field of health care provision. From the perspective of undocumented migrants, the duty to report represents the central obstacle to obtaining health care. For this reason they use their legal right to medical treatment only in emergencies. A second factor that adds to the problem is the overwhelming poverty of this group. Paying for treatment themselves is generally beyond their financial means, so undocumented migrants almost always depend on support to receive medical care.

The state's responsibility for dealing with people without documents is founded in human rights, and human rights must be guaranteed irrespective of residence status, because they take priority over a state's legal instruments for controlling migration. Thus the task of finding a structural solution to the problem of deficits in health care provision for undocumented migrants goes back to the state in its function as a guarantor of human rights.

The question also arises of whether an official duty to report is a suitable instrument at all for controlling migration. Numerous empirical studies have shown that migration decisions are driven by factors such as language, social networks, and employment opportunities. Questions of social security law (for example health care) play a very marginal role here. It is then very doubtful whether abandoning the official duty to report would have any pull effect.

Experience also shows that the official duty to report fails to achieve its goal. It is based on the expectation that when they fall ill, undocumented migrants will turn to the authorities and reveal their identity and status. This expectation ignores the realities. It is shown that in the vast majority of cases fear of discovery prevents sick people from contacting state authorities. Consequently the duty to report fails as a control instrument. The de facto outcome – that undocumented migrants fail to use their social right to medical care – cannot be the purpose of the duty to report. In this context it becomes clear why churches, charities and human rights organisations place such emphasis on the issue of the duty to report.

The National Working Group discussed ways to achieve structural improvements in medical care for undocumented migrants and to provide a lasting guarantee of appropriate funding for health services provided. The report outlines the different proposals: set up of a national fund, access to private health insurance, anonymous supply of medical treatment certificates, expansion of local health offices and the role of local initiatives and round tables.

Owing to various constraints – for example financial – the improvements offered by the approaches presented will admittedly at best be local or otherwise restricted and to that extent provisional and partial. They do not represent alternatives to the broadly supported call for restrictions on the official duty to report undocumented migrants to the authorities under the Residence Act. In practice, the success of the provisional models presented in the report will depend largely on the duty to report being curtailed. For that reason alone it would be wrong to regard one or more of the models as a real alternative to a reform of the duty to report.
Recommendations

Recommendation 1: Develop a solution compatible with human rights

The National Working Group recommends that society and politicians develop a solution for undocumented migrants in compliance with human rights.

There is a large (and indefinable) number of undocumented migrants living in Germany. Some of these women, men and children live for long periods in Germany and work here. This phenomenon needs to be dealt with adequately and solutions need to be found. There is no question that the Federal Republic of Germany as a state is entitled to regulate entry, residence and departure of persons without German citizenship. Nonetheless, special solutions conforming with human rights are needed for undocumented migrants in Germany, especially in relation to their right to health, which enjoys priority as a human right.

Recommendation 2: Restrict the duty to report

The National Working Group recommends restricting the legal duty to report contained in the Residence Act (through changes in the law and in judicial practice) as to allow those affected to make use of their social rights in the field of health care provision.

Practical experience shows that in many cases undocumented migrants fail to take up the services legally guaranteed to them under the Asylum Seekers Benefits Act. For public bodies the official duty to report plays a central role here. From the perspective of the affected persons, it represents the decisive obstacle preventing access to health care services.

Recommendation 3: Clarify freedom from prosecution

The National Working Group recommends clarifying that those professionally assisting undocumented migrants in the assertion of their social rights ("humanitarian assistance") will not be regarded as aiding and abetting under criminal law.

Social workers and others, who interact with undocumented migrants as part of their work and provide them with assistance in the realization of their social rights are often uncertain whether such acts are subject to prosecution. Activities such as providing emergency accommodation or giving away warm clothing in the winter cannot constitute the crime of aiding and abetting a person to stay in the country illegally. The National Working Group believes it is necessary – in addition to the clarification already provided for doctors and medical personnel – to provide legal assurance to the social professions that helping undocumented migrants to exercise their social rights will not expose them to prosecution. Such clarification can be provided by changing the law or issuing an ordinance.