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الدورة الثلاثون

البند ٣ من جدول الأعمال

تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

تقرير الفريق العامل المعني بالاحتجاز التعسفي

إضافة

بعثة متابعة إلى ألمانيا*

موجز

قام الفريق العامل المعني بالاحتجاز التعسفي بزيارة متابعة إلى ألمانيا في الفترة من ١٢ إلى ١٤ تشرين الثاني/نوفمبر ٢٠١٤ بناءً على دعوة من الحكومة. وطوال الزيارة، حصل الفريق العامل على تعاون تام من الحكومة.

وفي هذا التقرير، يلاحظ الفريق العامل أن خفض عدد نزلاء السجون هو إنجاز ملحوظ لألمانيا، في وقت تواجه فيه بلدان أخرى تبعات الإفراط في السَّجن. وقد تواصلت الاتجاهات التي لاحظها الفريق العامل خلال زيارته عام ٢٠١١. والخطاب الدستوري، الداعي إلى تنفيذ التزامات القانون الدولي بشأن تناسبية التدابير التي تحد من حرية الأفراد، حاضر بنشاط في النظام السياسي والقانوني الألماني.

ويرى الفريق العامل أن نظام العقوبات الألماني وإعادة النظر في الاحتجاز السابق للمحاكمة يشكلان ممارسة جيدة دولية.

* يُعمَّم موجز هذا التقرير بجميع اللغات الرسمية. أما التقرير نفسه الوارد في مرفق الموجز، فيعمَّم باللغة التي قُدّم بها فقط.

وبموجب القانون الدولي، تقتضي الضرورة والتناسبية إيجاد بدائل لاحتجاز المهاجرين الذين لا يحصلون على الحق في البقاء في البلد. ويقضي القانون الدولي، الذي أُعيد تأكيده في الاجتهادات القانونية للفريق العامل، بألا يُستخدم الاحتجاز المتعلق بالهجرة إلا كحل أخير ولأقصر فترة زمنية ممكنة فقط. ويطلب الفريق العامل إلى الحكومة تقصير فترة الاحتجاز بحيث لا تتجاوز الفترة اللازمة لتحديد الهوية. ولضمان حقوق ملتمسي اللجوء واللاجئين، يُطلب إلى الحكومة حظر أوامر الاحتجاز السابق للترحيل بحق الأشخاص المنتمين إلى مجموعات ضعيفة للغاية، كالقصَّر غير المصحوبين. ويُطلب إلى الحكومة أيضاً اتخاذ خطوات لمنع انتهاكات حقوق الإنسان خلال عمليات الترحيل.

ويشير التقرير إلى عملية تطبيق مقتضيات القانون الدولي على نظام الحبس الاحتياطي بعد صدور الحكم بالعقوبة وهي عملية يتواصل الحوار بشأنها مع المحكمة الأوروبية لحقوق الإنسان. ويلاحظ الفريق العامل أن انتهاكات اتفاقية حماية حقوق الإنسان والحريات الأساسية تشكل أيضاً انتهاكاً للقانون الدولي. فالعهد الدولي الخاص بالحقوق المدنية والسياسية والقانون الدولي العرفي يقضيان بأن يكون الاحتجاز الإضافي مبرَّراً بأسباب قاهرة ناجمة عن خطورة الجرائم المرتكبة واحتمال ارتكاب جرائم مماثلة في المستقبل. ويجب أن يكون هذا النوع من الاحتجاز حلاً أخيراً، كما يجب أن تضمن هيئة مستقلة إجراء مراجعات دورية منتظمة للبت في ما إذا كان استمرار الاحتجاز مبرَّراً.

ووفقاً للتقرير، لا ينظر القانون الألماني إلى بعض أنظمة الاحتجاز والقيود على الحرية الشخصية كعقوبة رغم أن القانون الدولي يعتبرها كذلك، وبالتالي توجد ضمانات مختلفة تحمي من الأثر الرجعي للقوانين ومن ضمنها سبل انتصاف أقل فعالية.

ويكرر الفريق العامل توصيته بإتاحة التعرف فعلياً على هوية أفراد الشرطة في جميع المقاطعات للتمكن من مساءلتهم. ويتابع الفريق العامل تطور الممارسات الفضلى التي تمتثل للقانون الدولي، بما فيها الإلزام بإبراز شارات التعريف بالهوية في برلين والمقاطعات الأخرى. ويرحب الفريق العامل باستمرار الحوار بشأن هذه المسألة وبشأن آليات التظلم المستقلة المفتوحة لجميع الأفراد.

ويطلب الفريق العامل إلى الحكومة، في توصياته، ألا تحد من مراجعة المحاكم لأوامر الترحيل، وأن تبني على ما تحقق من إنجازات لخفض عدد الأجانب المحتجزين قيد الترحيل. ويقضي القانون الدولي ومبدأ سيادة القانون بأن يحتفظ الأفراد بحقهم في أن يطلبوا من المحكمة مراجعة قرارات ترحيلهم.

فالاحتجاز هو الحل الأخير ولا يُسمح به إلا عندما يكون ضرورياً ومتناسباً، وعندما لا توجد بدائل أيسر.

Annex

[English only]

Report of the Working Group on Arbitrary Detention on its visit to Germany (12–14 November 2014)

I. Introduction

1. The Working Group on Arbitrary Detention, established pursuant to former Commission on Human Rights resolution 1991/42, whose mandate was clarified by Commission resolution 1997/50, and extended for a further three-year period by Human Rights Council resolution 24/7 of 26 September 2013, conducted a follow-up country visit to Germany from 12 to 14 November 2014 at the invitation of its Government. The Working Group was represented by its Chair-Rapporteur, Mads Andenas (Norway). He was accompanied by the Secretary of the Working Group and two interpreters.

2. Throughout the follow-up visit and in all respects, the Working Group enjoyed the fullest cooperation of the Government of Germany and all authorities with which it dealt. The Working Group would like to extend its gratitude and appreciation to the Government for its quick and prompt response to the Working Group's request to carry out its follow-up visit. This should indeed be highlighted, as it displays the willingness of this Government to cooperate with the Working Group and, in general, the special procedure mandate holders.

3. The Federal Government observes that it had been agreed between the Working Group and the Government that the official discussions during the visit should, due to the short notice of the visit, focus on the question of preventive detention and the reforms in this area since 2011. All information about other areas of law contained in the report are therefore based on information received by the Working Group from other sources and do not represent the outcome of any substantive discussions with the Federal Government.

4. The Working Group was able to meet with and interview detainees confidentially as required by its mandate.

5. The Working Group would also like to thank the representatives of German civil society for their support during the visit, particularly representatives of the national human rights institution and non-governmental organizations, human rights defenders, lawyers, academics and jurists, who met with the delegation and provided the Working Group with important information and assistance. Additionally, the Working Group wishes to thank colleagues at the Office of the United Nations High Commissioner for Refugees for their valuable assistance.

II. Programme of the follow-up visit

6. The Working Group met with senior authorities from the executive, legislative and judicial branches of the State, including representatives of the Ministries of Foreign Affairs, Interior and Justice; members of the Committee on Legal Affairs and Consumer Protection of the Deutscher Bundestag (Parliament); magistrates; judges; prosecutors; and public defenders and representatives of the Berlin Senate Department for Justice. The delegation also visited the Tegel Penal Institution in Berlin.

III. Status of the implementation of recommendations contained in the report on the 2011 Working Group's visit to Germany

7. The following is the analysis of the implementation of the recommendations made by the Working Group at the end of its 2011 visit (see A/HRC/19/57/Add.3, para. 68).

(a) Recommendation: All appropriate measures should be taken to ensure that deprivation of liberty is only used as a measure of last resort and for the shortest possible time

8. The Working Group considers that detention is the last resort and only allowed when necessary and proportionate, and when there are no less burdensome alternatives.

9. At the time of the Working Group's follow-up visit, the prison population was 64,379, including 11,119 pretrial detainees and 348 juvenile under the age of 18. The prison system has a capacity of 77,243 inmates.

10. The Working Group notes that the reduction in prison population is a remarkable achievement for Germany, as many countries struggle with the consequences of over-incarceration. The trends noted by the Working Group during its 2011 visit have continued. The constitutional discourse, giving effect to international law obligations on the proportionality of measures limiting the liberty of individuals, is active in the German political and legal system. The German sentencing regime and the review of pretrial detention constitute international best practice.

11. The Working Group notes with satisfaction the legislative amendment prohibiting children in detention from being placed with persons up to the age of 24.

12. The Working Group is continuing discussions with the Government on several issues related to detention. For example, there is a need to monitor and remedy the disproportionate application of pretrial detention in the case of foreign nationals and Roma, including minors.

13. According to the Federal Government, there are no figures to support the Working Group's presumption that there is a disproportionate application of pretrial detention with regard to foreign nationals and Roma. Nor has there been any systematic evaluation of this question by the Working Group. The Federal Government therefore does not share the conclusion made in paragraph 12.

(b) Recommendation: States (Länder) should consider the model of independent special commissions for the investigation of police officers in cases of alleged misconduct or alleged ill-treatment, such as that established in Hamburg

14. The Working Group is concerned that cases of alleged ill-treatment or excessive use of force by the police were not always investigated promptly, independently, impartially or effectively.

15. According to the German Institute for Human Rights, data on police violence have long shown a discrepancy between the number of criminal proceedings and the number of convictions, which it attributed to an increased reluctance on the part of officers to incriminate their colleagues, as well as to the difficulty of proving such offences.

16. The Working Group is also concerned that, with the exception of the police forces in Berlin and Brandenburg, police officers are not obliged to wear identification badges showing their name or number during the exercise of their functions. Even in those two Länder, the obligation to wear a badge might be withdrawn in order to protect the safety and security of the police officers. According to a study commissioned by the Berlin Police, some 10 per cent of

cases of alleged ill-treatment by police officers could not be investigated or prosecuted because the officers involved were not wearing identification.

17. The Working Group repeats its recommendation that members of the police in all Länder should be effectively identifiable so that they can be held accountable. The Working Group is following the development of best practices that comply with international law, including obligatory identification badges in Berlin and other Länder. The Working Group welcomes continued dialogue on this issue and on independent complaints mechanisms open to all individuals.

(c) Recommendation: Concerning the post-sentence preventive detention regime, the Working Group recommends that the Government give full effect to the mechanism set out by the Federal Constitutional Court in its May 2011 judgement for the compliance with the decision of the European Court of Human Rights

18. The Working Group is concerned about the number of persons who are still detained in post-conviction preventive detention in Germany (252 persons at time of the follow-up visit; 38 persons in Berlin), and the duration and conditions of such detention.

19. The system of preventive detention in Germany is undergoing a major reform, in the light of recent judgments of the European Court of Human Rights and the Federal Constitutional Court. The Working Group is following how the process of giving effect to international law requirements for the post-sentence preventive detention (*Sicherungsverwahrung*) regime continues in a dialogue with the European Court of Human Rights, which has further cases on the issue under consideration. In 2014, Germany graduated from the enhanced supervision regime of the Council of Europe Committee of Ministers to standard supervision, in recognition of its implementation of the Court's judgments.

20. The Implementation Act under the Federal Law of the Distance Requirement in the Law Governing Preventive Detention of 5 December 2012 entered into force on 1 June 2013. The Act implements the requirements that the Federal Constitutional Court set forth in its leading judgment of 4 May 2011. The distance requirement is the difference in treatment between preventive detainees and prisoners serving sentences. According to the Government, the Act represents the federal-law element of a new freedom-oriented and therapy-based overall concept of preventive detention for implementing the distance requirement. The goal is to enable those in preventive detention to be released as early as possible by reducing the risk they pose.

21. Such detainees should be offered adequate treatment options during the execution of their prison sentences. Otherwise, their placement in preventive detention would be disproportionate; in this case, the execution of preventive detention must be suspended on probation. Adequate treatment options should also be offered as part of regular judicial reviews to determine whether preventive detention should continue. These judicial reviews are to be conducted annually and, after 10 years of preventive detention, every nine months.

22. The responsibility for the execution of preventive detention is with the Länder. Länder should establish specific rules governing the detainees' everyday activities, which should differ significantly from those serving prison sentences.

23. At time of the Working Group's follow-up visit, 252 persons were in preventive detention in Germany, 86 of whom have been in preventive detention for more than 10 years. During 2009 and 2010, there were more than 500 persons in preventive detention.

24. Responsibility for preventive detention lies with the Länder. They are drafting guidelines for employing preventive detention. Problems have arisen concerning the allocation of resources to preventive detention, given the high cost of the facilities and the social/therapeutic and psychological programmes.

25. The Working Group notes that violations of the European Convention also constitute violations of international law. The International Covenant on Civil and Political Rights and

customary international law require that additional detention be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of similar crimes being committed in the future. Such detention is a last resort, and regular periodic reviews by an independent body must be ensured to decide whether continued detention is justified.

26. States must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society.

27. If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 of the International Covenant on Civil and Political Rights and customary international law prohibit a retroactive increase in sentence. States may not circumvent this prohibition by imposing a detention that is equivalent to penal imprisonment under any other label. Articles 9 and 15 of the Covenant and customary international law, as restated by the Human Rights Committee in its general comment No. 35 (2014) on article 9 (liberty and security of person) and in the practice of the Working Group, clearly prohibit the imposition of the new preventive detention regime of 1998, including the provisions which would allow the extension of detention after the completion of penalties (and other restrictions under domestic law).

28. The Working Group notes that it is still unsatisfactory that certain detention regimes and restrictions on personal liberty that, under international law, are considered punishment are not so considered under German law, and that consequently there are different guarantees against retroactivity, including less effective remedies.

29. The Federal Government considers the statements made in paragraphs 25 and 26 as, at least, incomplete since they are based on the former legislation and do not take the amendments made sufficiently into account. Normative and practical changes have been made to address the concerns with regard to international law. Following these changes, there remain — limited — possibilities to extend detention on preventive grounds after the completion of penalties which have been considered as compatible with the European Convention on Human Rights by the European Court of Human Rights, including preventive detention as regulated by the judgement of the Federal Constitutional Court or reserved preventive detention (see *Müller v. Germany*, decision of 10 February 2015, application No. 264/13). These concerns have been addressed in legislation and the corresponding changes in the detention regime.

Visit to Tegel Penal Institution

30. The delegation was able to visit the new compound destined to hold preventive detainees in Tegel, which has a multistorey building with large living areas and a big courtyard. However, this building is located at the end of the detention's compound and access to it is through the prison entrance. New therapeutic activities and motivation programmes are being developed. Facilities are very good but upkeep is very expensive. At time of the Working Group's follow-up visit, there were 38 persons in preventive detention in Tegel. This special compound can hold up to 60 persons.

31. The Working Group was informed that the programmes in Tegel are therapy-oriented, rather than release-oriented. All preventive detainees are undergoing a treatment assessment and a treatment plan.

(d) Recommendation: The use of restraints, such as handcuffs and shackling, in remand hearings should be monitored; guidelines would provide assistance in the application of the relevant proportionality test

32. The Government reported that shackling detainees is a permissible practice in all of the Länder. The practice of "Fixierung", i.e. using restraints to deprive detainees of the ability to move, is tied to stringent prerequisites and is used only in some Länder and in rare and

exceptional cases. Such means of restraint are used only in situations in which the parties affected pose a hazard to themselves or others.

33. The Working Group notes that the use of restraints, such as handcuffs and shackling, in remand hearings is applied by the court hearing the case, applying the proportionality requirement of the criminal procedure statute. The general proportionality test applied seems to be in conformity with fair trial and other relevant international standards. The issue of concern continues to be the inconsistent application of restraints, without any justification offered for the clear differences between the local courts that the Working Group visited in 2011. The Working Group repeats its recommendation that the use of restraints be monitored. Statistical information and guidelines may provide assistance at different levels, including for the judges who must apply the relevant proportionality test.

(e) Recommendation: The use of alternatives to detention for foreigners who are not in possession of a valid visa or whose visa is expired should always be considered

34. In 2012, Germany became the second largest recipient of migrants in the world, second only to the United States of America. In 2013, 127,000 persons sought protection in Germany. Some 4,812 persons were placed in immigration detention. Germany continues to make wide use of its prison system to hold foreigners in administrative detention. Of the 16 Länder, 10 use prisons for detaining migrants.

35. The Federal Government finds no basis in fact for the allegation in paragraph 34 that Germany made "wide use of prisons" for pre-removal detainees.

36. In July 2014, the Court of Justice of the European Union found that the practice of Germany of using prisons for immigrants was incompatible with Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (cases of *Bero and Bouzalmate*;[1] case of *Pham*[2]).

37. The Working Group notes that necessity and proportionality under international law require alternatives to detention of migrants who do not obtain the right to remain in the country. International law, restated in the jurisprudence of the Working Group, requires that migration-related detention is a last resort and only for the shortest period of time.

38. The Government finds no basis in fact for the allegation that offences under section 95 (1) of the Residence Act were subject to "harsh sentencing". As far as the Government is aware, proceedings for such offences are in practice either discontinued or end with only mild sentences being handed down.

(f) Recommendation: The issue of proportionality in the detention of foreigners for illegal entry to the country or for illegal border crossing, coupled with harsh sentencing, should be carefully addressed

39. In June 2014, the Federal Ministry of the Interior presented draft legislation addressing, inter alia, certain aspects of the detention of foreign nationals, including detention under Regulation No. 343/2003 of the Council of the European Union of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (the Dublin II Regulation). The draft legislation was commented upon by international agencies[3]

[1] Judgement of 17 July 2014, joined cases C-473/13 and C-514/13.

[2] Judgement of 17 July 2014, case C-474/13.

[3] Available in German at www.unhcr.de/fileadmin/rechtsinfos/fluechtlingsrecht/3_deutschland/3_2_unhcr_stellungnahmen/FR_GER-HCR_Referentenentwurf_062014.pdf.

and several non-governmental organizations. With regard to immigration detention, the breadth of criteria in the draft was sharply criticized. However, as the different ministries responsible are still in the process of coordinating work on the law, the final draft version is not available.

40. The Working Group urges the Government to reduce the length of the detention to the period of time strictly necessary for identification.

41. The Government pointed out that, under German law, detention prior to deportation may only be ordered to secure the actual execution of the deportation order. This is only possible if the identity and nationality of the person to be deported have been established. German law does therefore not provide for detention in order to establish the identity of a foreign national.

(g) Recommendation: An individual risk assessment should be requested to process forcible returns of foreigners, particularly in the cases of foreigners requesting political asylum. The risk of persecution and discrimination in countries of origin should be evaluated, and essential economic and social rights should be considered

42. The Government stated that foreigners undergoing asylum proceedings in Germany are under no circumstances forced to return to their country of origin, i.e. the potential country of persecution. The Working Group, in many instances, uses the term "asylum seekers" in the meaning of *rejected* asylum seekers, i.e. persons required to leave the country.

43. To safeguard the rights of asylum seekers and refugees, the Government is requested to prohibit pre-deportation custody orders against persons belonging to particularly vulnerable groups, such as unaccompanied minors. The Government is asked to adopt law and practice so that traumatized and psychologically ill persons are not detained, but instead receive the treatment necessary.

44. The Government noted that the situation of particularly vulnerable groups is already taken into account when pre-deportation detention is decided upon. Minors are detained extremely rarely in practice and, as with any detention under German law, by order of a judge only.

45. The Government is also requested take steps to prevent human rights violations during deportations. International law and the principle of the rule of law require that individuals retain the right to court review when faced with deportation.

46. According to the Government, this seems to imply that there is no right to court review with regard to deportation orders. This is not the case; German law does provide for the right to court review of deportation orders.

47. In 2009, the Federal Court of Justice (Bundesgerichtshof) was designated the last instance court for all cases of detention for the purpose of removal in Germany. Since then, it has delivered a great number of judgments improving the position and rights of persons, including asylum seekers, in detention. Most of the decisions concerned the right to a fair hearing and the formal requirements of a request for detention.

48. In 2013, the Federal Court of Justice ruled that a person in pre-deportation detention must be provided with the means necessary to legally defend him- or herself against the detention order, including by the appointment of a lawyer, if a person in his or her position would reasonably hire a lawyer but does not have the financial means to pay for one him- or herself.[4]

49. Legal aid is paid in order that a person in pre-deportation detention hire a lawyer in appeals against negative decisions only if the appeal is likely to succeed according to the court's summary assessment.

[4] Federal Court of Justice, decision of 28 February 2013, case No. V ZB 138/12.

50. Other decisions of the Federal Court of Justice show that a request for detention has to detail the country of destination, the specific procedure that is expected to be carried out and the time frame that the enforcement of a deportation to that specific country would take.[5]

51. Moreover, the decisions of the various courts examine the proportionality of detention orders, for example, the following: an illegal border crossing in itself does not justify detention;[6] the detention period must be limited to the minimum amount of time necessary to execute a removal order;[7] and any indication of a change of circumstances possibly affecting the legality of the (continued) detention must lead the court in charge to investigate and reconsider the original detention order.[8]

52. Several thousand asylum seekers whose application has been definitively rejected and who are required to leave the country and a majority of those who are the subject in the cases under the Dublin II Protocol continue to be accommodated in Länder detention facilities immediately upon arrival, sometimes for long periods. This practice would contravene Directive 2008/115/EC of the European Parliament. The Government stated that this is simply wrong in fact.

53. With regard to detention prior to deportation, the Residence Act and the related General Administrative Rules already provide for alternative measures. The authorities are required to examine whether less severe means are sufficient, which is also mentioned in section 62 (1) of the Residence Act, for example. Reducing the length of detention to the period of time strictly necessary is required under section 62 (1) of the Residence Act. The use of detention as *ultima ratio* already ensues from the principle of proportionality which stems directly from the Constitution. According to the Government, the Working Group should sufficiently recognize this constitutional dimension of the principle of proportionality in German law.

54. Decisions on the necessity of separate accommodation for persons in pre-removal detention and ordinary prisoners detained under criminal law had a great impact. Most importantly, some German courts submitted requests to the Court of Justice of the European Union concerning the interpretation of the principle of separation of pre-removal detainees from detainees under criminal law under article 16 (1) of Directive 2008/115/EC.[9]

55. Specialized detention facilities exist in only 5 of 16 Länder. Several regional courts had (preliminarily) suspended the execution of detention orders where a separated placement of third-country nationals in pre-removal detention and ordinary prisoners was not guaranteed.[10]

56. The Court of Justice of the European Union ruled on 17 July 2014 in its decision on the joint cases of *Bero and Bouzalmate*, and the case of *Pham*, that a Member State — irrespective of its federal structure — cannot rely on the fact that there are no specialized detention facilities in a part of its territory to justify keeping aliens in an ordinary prison pending their removal (*Bero and Bouzalmate*), and that the same rule applies even if the migration detainee has consented to being confined in a penitentiary (*Pham*). Thus, several Länder had to find other practical solutions.

[5] For example, Regional Court Frankfurt/Oder, decision of 2 October 2013, case No. 15 T 122/13; Federal Court of Justice, decision of 7 March 2013, case No. V ZB 116/12.

[6] For example, Regional Court of Munich I, decision of 31 July 2013, case No. 13 T 16164/13.

[7] For example, Federal Court of Justice, decision of 26 September 2013, case No. V ZB 2/13; Federal Court of Justice, decision of 10 October2013, case No. V ZB 25/13; Regional Court of Dresden, decision of 12 November 2013, case No. 2 T 821/13.

[8] Federal Court of Justice, decision of 30 October 2013, case No. V ZB 69/13.

[9] Federal Court of Justice, decision of 11 July 2013, case No. V ZB 40/11.

[10] For example, Local Court of Laufen, decision of 12 November 2013, case No. XIC 221/13; Regional Court of Görlitz, decision of 23 October 2013, case No. 2 T 102/13; Regional Court of Munich II, decision of 16 October 2013, case No. 6 T 4334/13.

57. The decision of the Court of Justice of the European Union resulted in several Länder not being able to accommodate their pre-removal detainees anymore. As a consequence, some of them are transferring them to other Länder, such as Berlin, where separated immigration detention facilities exist. Such practice was explicitly regarded as compatible with Directive 2008/115/EC by the Court. In fact, some large detention centres (such as the Büren prison in North-Rhine-Westphalia) that had served as a detention facility for significant numbers of pre-removal detainees are no longer used for that purpose.

58. Furthermore, at the political level, there are discussions about the abolition of immigration detention and the removal of immigration detention facilities in general.

59. Pre-deportation detention has also been applied for securing asylum seekers' Dublin transfers to another member State of the European Union determined to be responsible according to the Dublin II Regulation.

60. Under the new Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (the Dublin III Regulation), detention securing Dublin transfers of asylum seekers to another member State (to date based on certain provisions in national law) must be based on article 28 of the Dublin III Regulation and the criteria set out therein. Inter alia, this requires "a significant risk of absconding" to be present.

61. However, in accordance with article 2 (n) of the Dublin III Regulation, objective criteria for "risk of absconding" must be set out in national law. The Federal Court of Justice decided recently that the most relevant existing national provisions do not comply with article 2 (n), so there is currently no legal basis for Dublin detention, as a rule; certain rather exceptional situations of a risk of absconding were considered by the Federal Court of Justice to be sufficiently defined as to constitute a provision in accordance with article 2 (n) of the Dublin III Regulation (for instance, a change of the place of stay without informing the authorities of the new address).[11]

62. This led to a situation where there is practically no pre-deportation detention of asylum seekers for securing "Dublin transfers" in Germany at the time of the Working Group's follow-up visit. The Federal Government is working on the adoption of the necessary provisions. The process is ongoing and it is likely that Dublin detention will become relevant again after the adoption of legal amendments.

63. The Working Group continues to be concerned at the lack of procedure for the identification of vulnerable asylum seekers, such as unaccompanied minors or traumatized refugees, in a number of Länder. The only mandatory medical checks are those for tuberculosis. Systematic examinations to diagnose mental illnesses or traumatization upon arrival are not conducted.

The "fast-track" procedure at German airports

64. The legal basis for the "fast-track" procedure at German airports is paragraph 18 of the Asylum Procedure Act.[12] According to a landmark decision by the German Federal Constitutional Court,[13] the restriction of movement and liberty at these facilities does not constitute detention as, according to the Court, there is the option to leave by plane; although this is a problematic argumentation with regard to asylum seekers and will in fact not be possible

[11] Federal Court of Justice, decision of 26 June 2014, case No. V ZB 31/14.

[12] For an English translation of the Asylum Procedure Act, see **Error! Hyperlink reference not valid.**www.gesetze-im-internet.de/englisch_ asylvfg/index.html.

[13] In 1996, decision of 14 May 1996 (case No. 2 BvR 1516/93), BVerfGE 94, 166).

in many cases given the need for personal documentation and sufficient financial means to purchase a plane ticket. Neither the leading decision of the European Court of Human Rights *Amuur v. France* (application No. 17/1995/523/609, judgement of 25 June 1996), nor the subsequent decision *Gebremedhin [Gaberamadhien] v. France* (application No. 25389/05, judgement of 26 April 2007) brought any changes in German jurisprudence.

65. The "fast-track" airport procedure remains problematic as it emphasizes speediness and shortened deadlines for legal remedies. However, the significance of the airport procedure in terms of proportionality of numbers has decreased in recent years. In 2012, only about 60 decisions have been reached with 787 applications made in German airports and 77,651 asylum applications made in Germany in total. In 2013, only 48 decisions were taken, with 972 applications made in German airports and 127,023 asylum applications made in Germany in total.[14]

(h) Recommendation: The Government should consider extending the mandate of the German Institute for Human Rights to structural and factual monitoring, as well as its consultative role in the process of drafting legislation with human rights relevance. The Institute should be allocated adequate human, financial and technical resources

66. The Working Group supports the adoption of legislation that would qualify the German Institute for Human Rights as a national human rights institution in category A in the United Nations human rights system and under the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles), which would appropriately reflect the position of Germany in the international community.

(i) Recommendation: The Government should consider promulgating a binding legal regulation by the Parliament establishing that the Convention on the Rights of the Child and its Optional Protocols have priority over alien and asylum laws

67. The Working Group notes that Germany has signed the Optional Protocol to the Convention on the Rights of the Child on a communications procedure. The law ratifying the Optional Protocol was adopted in 2012, and the same year Germany submitted the declarations regarding individual or inter-State communications in accordance with articles 31 and 32 of the International Convention for the Protection of All Persons from Enforced Disappearance.

68. The Working Group has also noted with approval the statements by Germany on observing the obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights in military operations abroad. Within the scope of peace missions, Germany guarantees to all persons subject to its authority or acts of its officials and troops the rights acknowledged in international human rights conventions by which Germany is bound. The Working Group notes that this is done in compliance with international law and in recognition thereof. The Working Group also commends Germany for its early ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, the duties of States under which is customary international law and apply in military operations and other acts of the State or State officials abroad.

IV. Conclusions

69. **The Working Group considers that the reduction in prison population is a remarkable achievement for Germany, as many countries struggle with the consequences**

[14] See most recent statistics available in the Federal Government's reply to a Parliamentary request on asylum statistics (2013, official document 18/705). Available (in German only) at http://dipbt.bundestag.de/doc/btd/18/007/1800705.pdf.

of over-incarceration. The trends noted during the Working Group's 2011 visit have continued.

70. **The reduction of the number of persons in preventive detention (from more than 500 persons in 2009 and 2010 to 252 at the time of the Working Group's follow-up visit) is also noteworthy.**

71. **The constitutional discourse, giving effect to international law obligations, on the proportionality of measures limiting the liberty of individuals is active in the German political and legal system. The German sentencing regime, and the review of pretrial detention, constitutes international best practice.**

72. **The Working Group continues the discussion with the Government on several detention issues. There is a need to monitor and remedy the disproportionate application of pretrial detention in the case of foreign nationals and Roma, including minors.**

73. **Necessity and proportionality under international law require alternatives to the detention of migrants who do not obtain the right to remain in the country. International law, restated in the jurisprudence of the Working Group, requires that migration-related detention is a last resort and only for the shortest period of time.**

74. **The Working Group is following how the process of giving effect to international law requirements to the post-sentence preventive detention regime continues in a dialogue with the European Court of Human Rights, which has further related cases under consideration.**

75. **The International Covenant on Civil and Political Rights and customary international law require that additional detention be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of similar crimes being committed in the future. Such detention is a last resort, and regular periodic reviews by an independent body must be ensured to decide whether continued detention is justified.**

76. **States must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society.**

77. **Although the European Court of Human Rights has on several occasions accepted the German system of preventive detention as such (e.g. *G. v. Germany*, application No. 65210/09, judgement of 7 June 2012, paras. 46 ff.), it is still unsatisfactory that certain detention regimes and restrictions on personal liberty that under international law are considered punishment are not so considered under German law, and consequently there are different guarantees against retroactivity, including less effective remedies.**

78. **The abolition of the maximum duration for the first-time preventive detention in 1998 and the introduction of retrospective preventive detention in 2004 led to serious concerns with respect to retroactivity under the European Convention on Human Rights. These concerns have been addressed by legislation and the corresponding changes in the detention regime. Public trust in the police is of paramount importance in democratic societies. Accountability and transparency of the police forces are necessary conditions for such trust. The Working Group invites the Government to provide it with information on the measures adopted to identify individual police officers when their uniform and equipment make them unidentifiable.**

79. **The Working Group notes with approval statements by Germany on observing the obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights in military operations abroad. Within the scope of peace missions, Germany guarantees to all persons subject to its authority or acts of its**

officials and troops the rights acknowledged in international human rights conventions by which Germany is bound.

80. **The Working Group has noted the high degree of compliance with the current draft of the basic principles on the right of anyone deprived of their liberty by arrest or detention to bring proceedings before court that the Working Group has presented in accordance with Human Rights Council resolution 20/16, and which is declaratory of international law and based on the human rights conventions, customary international law and general principles of international law.**

V. Recommendations

81. **The Working Group reiterates its recommendation that deprivation of liberty must be used as a measure of last resort in all cases, and for the shortest possible time. Alternative sentences, such as probation or community service, should be examined.**

82. **The Working Group highlights the ongoing dialogue on preventive detention between the Federal Government and the European Court of Human Rights and the Council of Europe Committee of Ministers.**

83. **Authorities should take into account the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) when devising the measures alternative to preventive detention.**

84. **To safeguard the rights of asylum seekers and refugees, the Government should prohibit pre-deportation custody orders against persons belonging to particularly vulnerable groups, such as unaccompanied minors. The Working Group recommends that the Government reduce the length of the detention to the period of time strictly necessary for identification.**

85. **There is a need for special attention to be given to vulnerable asylum seekers during the initial medical check.**

86. **The Working Group recommends that the Government adopt law and practice so that traumatized and psychologically ill persons are not detained, but instead receive the treatment necessary. The Government should also take steps to prevent human rights violations during deportations.**

87. **The Working Group recommends that the Government not limit court review of deportation orders, and build on the achievements in reducing the number of foreign nationals awaiting deportation in detention.**

88. **The duration of detention pending deportation should be subjected to the strict application of the principle of proportionality and limited to the shortest possible period. The Working Group recommends that the duration of pre-deportation custody be significantly decreased.**

89. **Germany should revise its Asylum Procedure Act to extend the one-week time limit to challenge an order for deportation and submit a legal remedy and to allow suspensive orders in case of transfers of asylum seekers to any State bound by the Dublin II Regulation. Deportation should not be permissible before a court decision is handed down. The legal provisions of the Asylum Procedure Act excluding suspensive effects of the appeals against a decision to transfer an asylum seeker to another State participating in the Dublin system should also be abolished.**

90. **Access to independent, qualified and free-of-charge counselling for asylum seekers before hearings, as well as legal aid after a negative decision, should be guaranteed.**

91. **Independent, impartial and effective investigation and prosecution in cases of alleged police violence should be ensured. Länder should consider the model of independent special commissions for the investigation of police officers in cases of alleged misconduct or alleged ill-treatment, such as that established in Hamburg, which constitute best practice. Alleged victims of ill-treatment or misconduct by the police should be aware of other complaints procedures than complaints to the Police. The Working Group welcomes continued dialogue on this issue and on independent complaints mechanisms open to all individuals.**

92. **The Working Group reiterates its recommendations that members of the police in all Länder should be effectively identifiable so that they can be held accountable. The identification of individual police officers on duty should be ensured in the Federal Police and in all Länder. The Working Group follows the development of best practices that comply with international law, including obligatory identification badges in Berlin.**

93. **The Working Group supports the adoption of legislation that would qualify the German Institute for Human Rights as a national human rights institution in category A in the United Nations human rights system according to the Paris Principles, which would appropriately reflect the position of Germany in the international community.**