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Rapport du Groupe de travail sur la détention arbitraire

Additif

Mission en Allemagne* **

Résumé

Le Groupe de travail sur la détention arbitraire s'est rendu en mission en Allemagne du 26 septembre au 5 octobre 2011, à l'invitation du Gouvernement. Tout au long de cette visite, il a bénéficié à tous égards de l'entière coopération des autorités. La délégation a eu la possibilité de se rendre dans tous les lieux de détention et de s'entretenir en privé avec tous les détenus qu'elle souhaitait rencontrer.

Le Groupe de travail a tenu plusieurs réunions avec les autorités fédérales et les autorités des États fédérés à Berlin, Hambourg, Karlsruhe et Stuttgart. Il a rencontré de hauts responsables des pouvoirs exécutif, législatif et judiciaire, ainsi que des représentants de la société civile allemande, notamment des représentants d'Églises et d'organisations non gouvernementales, des défenseurs des droits de l'homme, des avocats, des juristes et des universitaires.

Dans le présent rapport, le Groupe de travail prend acte d'un certain nombre d'aspects positifs concernant les institutions et la législation visant à prévenir toute privation arbitraire de liberté. Il salue les efforts accomplis par l'État, en particulier par des mesures législatives, afin d'améliorer les dispositions régissant la privation de liberté en Allemagne et la situation concrète dans ce domaine. Le Groupe de travail estime que l'approche interinstitutionnelle adoptée par l'État pour traiter les causes socioéconomiques de la délinquance et des comportements délictueux et la réduction des taux de criminalité qui en a résulté jusqu'ici sont d'une importance capitale et que cette approche pourrait être

* Le résumé du présent rapport est distribué dans toutes les langues officielles. Le rapport proprement dit est joint en annexe au résumé, et il est distribué dans la langue originale seulement.

** Soumission tardive.

partagée et diffusée à l'étranger. Il fait référence, en particulier, aux initiatives tendant à assurer la collaboration entre les départements de la police et de l'éducation afin de traiter les facteurs qui ont une incidence sur la criminalité. Il relève également l'établissement à Hambourg d'une commission spéciale indépendante chargée d'enquêter sur les fonctionnaires de police à qui sont imputées des fautes de mauvais traitements. Comme autre exemple de bonne pratique, le Groupe de travail cite la suppression de l'obligation pour les directeurs d'établissements scolaires et les administrations hospitalières de signaler les enfants de migrants en situation irrégulière inscrits à l'école ou admis dans un service médical d'urgence.

Malgré ces réalisations positives, le Groupe de travail relève avec inquiétude le système de la détention de sûreté, en vertu duquel les condamnés qui ont déjà exécuté leur peine continuent d'être privés de liberté parce qu'ils sont réputés représenter encore un danger pour la société. Dans certains cas, l'éventualité du maintien en détention de sûreté était prévue dans la condamnation initiale, mais dans d'autres la mesure est ordonnée après la condamnation parce que le détenu est réputé représenter un danger pour la société pour des raisons qui n'étaient pas connues lors de sa condamnation. Le Groupe de travail soulève dans son rapport les questions de proportionnalité et de rétroactivité et recommande que la réforme engagée par la Cour constitutionnelle fédérale afin de régler ces questions soit poursuivie et appliquée.

Les questions suivantes donnent aussi matière à préoccupation: l'utilisation non uniforme des moyens de contention tels que les menottes ou les entraves à l'audience de mise en détention, le Groupe de travail ayant observé de nettes différences dans la pratique, selon les tribunaux locaux dans lesquels il s'est rendu; les nouvelles lois sur le placement des patients aux fins de traitement thérapeutique, comme la *Therapienunterbringungsgesetz*; et le nombre disproportionné d'étrangers et d'Allemands d'origine étrangère en détention. Le Groupe de travail relève que cette dernière situation est peut-être due à des facteurs comme les lois relatives à l'immigration, la situation socioéconomique particulièrement vulnérable de nombre de ces détenus ou le manque de connaissance de la langue ou de soutien social. Il note également que le système judiciaire n'est pas favorable aux étrangers pour ce qui est de la détention avant jugement, car l'argument selon lequel les étrangers n'ont pas de liens avec la ville ou le pays et peuvent prendre la fuite est aisément invoqué.

Le Groupe de travail soulève la question de la proportionnalité concernant le placement en détention des étrangers qui n'ont pas de visa d'entrée valide ou dont le visa a expiré, et le placement en détention pour entrée illégale sur le territoire allemand ou franchissement illégal de frontières, d'autant plus qu'ensuite les peines prononcées sont sévères. Il recommande au Gouvernement d'envisager la possibilité d'appliquer des mesures de substitution à la privation de liberté.

Un autre sujet de préoccupation mentionné dans le présent rapport est la procédure aéroportuaire «accélérée», appliquée notamment à l'aéroport de Francfort. Le Groupe de travail estime que le délai de trois jours accordé pour faire appel du rejet d'une demande d'asile politique devant le Tribunal administratif n'est pas suffisant pour permettre au requérant de préparer son recours. Il recommande qu'une évaluation individuelle du risque soit demandée avant de procéder à un renvoi forcé. Le risque de persécution et de discrimination dans les pays d'origine devrait être évalué scrupuleusement et il faudrait porter une atttention particulière aux droits économiques et sociaux essentiels.

Annexe

Report of the Working Group on Arbitrary Detention on its mission to Germany (26 September – 5 October 2011)

Contents

I. Introduction

1. The Working Group on Arbitrary Detention, which was established by the Commission on Human Rights in its resolution 1991/42 and whose mandate was assumed by the Human Rights Council in its decision 1/102 and extended for a further three-year period in Council resolution 15/18, conducted a country mission to Germany from 26 September 2010 to 5 October 2011 at the invitation of the Government. The promptness of the Government's positive response to the Working Group's request for an invitation was particularly appreciated. The Working Group's Chair-Rapporteur, El Hadji Malick Sow, its Vice-Chair, Shaheen Sardar Ali, and member Mads Andenas express the Working Group's appreciation to the Government for the full cooperation extended to the delegation during its mission. The three members of the Working Group were accompanied by the Secretary of the Working Group and a staff member of the Office of the United Nations High Commissioner for Human Rights, as well as by local interpreters.

2. Throughout the entire visit and in all respects, the Working Group enjoyed the fullest cooperation of the Government and of all federal and state authorities with which it dealt. German authorities provided the delegation with all the necessary information and arranged all the meetings it requested. The delegation was able to conduct visits to detention facilities and to interview, without the presence of witnesses and in confidence, 69 detainees chosen at random. The detainees interviewed had previously indicated their full willingness to speak to the delegation.

3. The Working Group would also like to thank the representatives of German civil society for their support during the mission, in particular representatives of churches and faiths, as well as non-governmental organizations, human rights defenders, lawyers, academics and jurists, for the information and assistance they provided.

II. Programme of the visit

4. The Working Group held various meetings with federal and state authorities in Berlin, Hamburg, Karlsruhe and Stuttgart. It met with senior authorities from the executive, legislative and judicial branches of the State, including the Federal Government Commissioner for Human Rights Policy and Humanitarian Aid, Markus Löning, and other officials representing the Federal Foreign Office; Parliamentary State Secretary in the Federal Ministry of the Interior Ole Schröder; the State Secretary of the Federal Ministry of Justice, Birgit Grundmann; Eva Hugo, Jürgen Mez, Frank Mengel, Jakob Sperl, Roland Brunger, Thomas Plank, Bernhard Böhm, Hans-Jörg Behrens, Christian Meiners and Jörg Filipponi, officials representing the Ministry of Justice; representatives from the Federal Ministry of Labour and Social Affairs; and representatives from the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (among them, Ralf Busch).

5. In Berlin, the Working Group was also received by representatives of the Local Court of Berlin Tiergarten; by a judge at the Higher Regional Court; and by representatives of the Senate Department for the Interior and Sport. It also met with the President of the Federal Police Regional Office, officials from the Ministry of Defence, and staff of the German Institute for Human Rights, including the Director, Beate Rudolf.

6. In the State of Baden-Württemberg, the Working Group met with judges of the Federal Constitutional Court in Karlsruhe, including Andreas L. Paulus, Erik Goetze, Andreas Stadler and Andreas Sturm. It also met with the Presiding Judge of the Federal Court of Justice, Justice Sost-Scheible, Ms. Haubmann and Federal Judge Sander. In

Stuttgart, the delegation met with the Presiding Judge of the Local Court, Justice Brigitte Legler, and Judge Gerhard Gauch.

7. In Hamburg, the Working Group met with the Presiding Judge of the Regional Superior Court, Sibylle Umlauf; the State Attorney General, Holger Lund, and Senior Public Prosecutor, Janhenning Kuhn; the State Secretary of the Senate Department of Justice and Gender Equality, Ralf Kleindiek; Senior Public Prosecutor Eva Maria Ogiermann and lawyer Jonas Finke; Stefan Lengefeld and other representatives of the Senate Department of Health, Environment and Consumer Protection; officials representing the Senate Department for the Interior and Sport; and police authorities Jost-Wilhelm Willemer, Wolfang Brand and Jens Stammer. The Working Group also held a meeting with representatives of the Hamburg Association of Defence Lawyers.

III. Overview of the institutional and legal framework

A. Political and institutional system

8. Germany is a parliamentary democracy. Its Constitution, known as the Basic Law, was promulgated on 23 May 1949. At the federal level, the legislative power is vested both in the Federal Diet or Bundestag (598 seats) and the Federal Council or Bundesrat (69 members). The Bundestag is elected by popular vote for a four-year term under a system of personalized proportional representation, which combines the election of individual constituency candidates in a first-past-the-post mode with the election of party lists on the level of the states (*Länder*) by proportional representation. The Head of the Government, the Chancellor, is elected by the Bundestag.

9. The legal system of Germany may be considered a civil law system. The judicial system includes ordinary courts (local courts, regional courts, higher regional courts and the Federal Court of Justice) and four types of specialized courts: administrative, labour and social (each with three levels of jurisdiction) and fiscal (two levels of jurisdiction). The Federal Constitutional Court reviews laws to ensure their compatibility with the Constitution and adjudicates disputes between different branches of government on questions of competences. It also has jurisdiction to decide claims based on the infringement of a person's basic constitutional rights by a public authority. Half of the judges of the Federal Constitutional Court are elected by the Bundestag and half by the Bundesrat.

10. The national human rights infrastructure in Germany comprises, in addition to a differentiated and specialized court system, active human rights institutions and civil society organizations, including the German Institute for Human Rights, which serves as the national human rights institution, and the Federal Anti-Discrimination Agency (ADS) created in 2006.

11. The 16 states enjoy autonomy, particularly regarding law enforcement and the courts. The police are organized at the state level. The jurisdiction of the Federal Criminal Police Office is limited to counter-terrorism, international organized crime, narcotics trafficking, weapons smuggling and currency counterfeiting. Most institutions for the incarceration of detainees are the responsibility of the states.

12. The Federal Agency for the Prevention of Torture and the Joint Commission of the States (Länder) for the prevention of torture make up the national preventive mechanism required by under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Only institutions under federal jurisdiction, namely, the Federal Defence Forces of Germany, the federal police and

Customs, fall under the mandate of the Federal Agency for the Prevention of Torture. Other institutions, such as police stations, psychiatric hospitals and prisons, lie within the jurisdiction of the Joint Commission.

13. The German Institute for Human Rights was established in March 2001 as an independent national human rights institution and given "A" status by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights two years later. However, the Institute does not enjoy the powers to investigate complaints, conduct national enquiries and formulate recommendations.

B. International human rights obligations

14. Germany is a party to the core universal international human rights treaties (see appendix II). It has recognized the specific competences contained in article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (individual complaints); in articles 8 and 9 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (inquiry procedure) and in articles 20, 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the inquiry procedure, inter-State complaints and individual complaints, respectively).

15. However, Germany is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

16. Concerning the International Covenant on Civil and Political Rights, Germany has submitted declarations or reservations to articles 14, paragraph 3 (d); 14, paragraph 5; 15, paragraph 1; 19; 21 and 22 in conjunction with article 2, paragraph 1; as well as to article 5, paragraph 2 (a) of the first Optional Protocol.

17. Germany has formally acknowledged the full applicability of the International Covenant on Civil and Political Rights to persons subjected to its jurisdiction in situations where its troops or police forces operate abroad.

18. The Working Group was told during its visit that German legislation and jurisdiction only rarely refer explicitly to international human rights norms.

C. Judicial guarantees

19. The Constitution prohibits arbitrary detention. Article 2, paragraph 2, of the Constitution states that freedom of the person is inviolable. Article 104, paragraph 2, adds that only judges may decide on the validity of any deprivation of liberty. Police officers must bring a person detained before a judge no later than the day after his or her arrest. They may arrest an individual only on the basis of a judicial warrant issued by a competent judicial authority, with the exception of cases in flagrante delicto (when the suspect is arrested in the act of committing an offense or when the police have strong reasons to believe that the individual intends to commit a crime). The court must charge the individual at the latest by the end of the day following the arrest.

20. The usual practice is to release detainees unless there is a clear danger of flight outside the country. Bail is infrequently imposed. Authorities can hold detainees for the duration of the investigation and subsequent trial, subject to judicial review. If a court acquits a defendant who was held in detention, the Government compensates the defendant for financial losses as well as for moral prejudice due to incarceration. Detention is executed by the states. Detainees have the right to challenge their detention at any time. They have the right to appeal before a regional Court of Appeal. If the Court of Appeal

considers that the detention should be maintained, it is possible to file an appeal before the Federal High Court.

21. The Constitution provides for the right to a fair and public trial. The law entitles a detainee to prompt access to an attorney. The required appointment of defence counsel ex officio does not depend on an accused's financial circumstances, but rather on whether the circumstances described in section 140, paragraph 1, subparagraphs 1-8, or paragraph 2, of the Code of Criminal Procedure (Strafprozessordnung, or StPO) apply. Also taken into account are the circumstances described in section 140, paragraph 2, relating to the severity of the offence, the difficulty of the factual or legal situation, and evidence indicating that the accused cannot defend himself or herself. The latter is determined by the accused's mental capacity, his or her health condition or other circumstances of the case, for example if the accused is a foreigner with comprehension difficulties that cannot be overcome through the use of an interpreter. Defendants and their attorneys have access to all court-held evidence related to their cases. Defendants enjoy a presumption of innocence and have a right of appeal.

IV. Findings

A. Positive aspects

22. With regard to its findings, the Working Group would like to commend the Government for the positive efforts it has made, particularly through legislative reforms, to improve the situation of deprivation of liberty in Germany. The Working Group observed that all detainees with whom it met expressed they had a good relationship with detention facility staff. The infrastructure of detention facilities all conformed to international standards. In Berlin, the Working Group found laws and regulations providing for the protection of persons with special needs, such as disabled people, elderly persons, pregnant women, victims of violence, and traumatized persons.

23. The Working Group was also informed of a number of important initiatives regarding collaboration between the police and education departments to respond to the underlying factors that have an impact on criminality. This inter-agency approach to address the socio-economic causes of offences and offending behaviour and its impact to date in reducing crime is of vital importance, and one that could be disseminated and shared beyond Germany. The Working Group would like to seek further information in this regard and recommends wide replication of the approach.

24. The Working Group notes that human rights are protected in Germany by an independent and impartial court system, with assistance from active non-governmental organizations. Among the good practices it observed is the establishment in Hamburg of an independent special commission for investigation of police officers in cases of alleged misconduct or alleged ill-treatment. The abrogation of the obligation of head teachers and hospital authorities to report children of irregular immigrants receiving education or emergency medical treatment is also a positive change.

25. The Working Group was informed that out of the estimated total number of prisoners (69,385), 10,864 are in remand detention, including an estimated 374 juveniles (statistics for 2011). This is a low rate in comparative terms. Of those in remand detention, some 3,000 have been detained for less than six months; another 4,000 have been detained for less than one year. A total of 487 persons are in preventive detention (see paras. 28 to 37 below).

26. The Working Group notes that the Government concluded a broad modification in the Aliens Act, to include measures for the protection of victims of trafficking.

27. Notwithstanding these positive achievements, the Working Group would like to raise the following issues for the attention of the Government.

B. Preventive detention

28. The term "*Sicherungsverwahrung*" describes the situation of detainees who have already served their sentences and are detained subsequently (preventive detention). Courts may foresee this measure initially during sentencing (foreseen preventive detention), or later, when the prisoner is deemed to represent a danger to society for reasons that were unknown at the time of his or her sentencing (post-sentence preventive detention). On 2 December 2010, a new law on post-sentence preventive detention was passed by Parliament, taking into account the judgement of the European Court of Human Rights of 17 December 2009 (*M. v. Germany*, application No. 19359/04). The Court stated that post-sentence preventive detention is subject to the ban on retroactivity in a strict sense. To date, however, the Court has not ruled out foreseen preventive detention.

29. The European Court of Human Rights has never objected to the current detention regime itself, nor have other international bodies. It has restricted itself to the consideration that post-sentence preventive detention was to be regarded as a "penalty" in terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms and therefore subject to its ban on retroactivity. The Court did not rule out preventive detention in general. The ongoing reform was initiated by the Federal Constitutional Court in a ruling issued on 4 May 2011. The Working Group points out that compliance with international and European human rights standards now depends on the way in which the Federal Constitutional Court's judgments are followed up, in the first instance, in legislation. It has been explained that this depends on action by both federal and state legislators, and the Working Group was apprised of the work thus far, including the conclusions reached at a conference of the Ministers of Justice at both levels the week before the Working Group's visit commenced. In order to comply with international and European human rights standards, the Constitutional Court's requirements for the standards of the detention regime must be followed, in particular so that the conditions satisfy the proportionality requirements; this entails establishing a difference between preventive detention and an ordinary prison sentence. The Council of Europe procedures for the implementation of judgments, new cases before international courts and other human rights bodies, and further international monitoring will continue to contribute to this process. The continuing dialogue initiated with the Government during the visit may be of assistance in this regard.

30. The Working Group's visits to prisons in three German states have highlighted the challenges in making the regime or conditions of post-sentence preventive detention clearly different from the normal prison conditions.

31. During its visit the Working Group was able to interview several detainees subjected to the preventive detention regime, particularly in Hamburg Fuhlsbüttel Prison. These persons had already served their sentences, but continued to be deprived of their liberty because it was deemed that they still represented a danger to society. In some cases, the possibility of preventive detention had been foreseen in their initial sentencing. In other cases, preventive detention was subsequently established because it was considered that those persons constituted a danger for society for reasons that were unknown at the time of their sentencing. The detainees interviewed in the various prison and detention institutions visited showed scepticism as to the prospect of achieving a different regime.

32. During the course of its visit, the Working Group was also provided with information supporting allegations that preventive detention was being used in cases of social disorder in which the requirements, both statutory and of the Federal Constitutional Court, for such detention were not met. In one instance, a woman who had completed a medium-length sentence was being kept in preventive detention because she was suffering from a social disorder. Her detention conditions were different than those of other inmates serving criminal sentences, and there did not seem to be any prospect of any specific procedures being initiated for her release. This is one example of the types of cases in which compliance with the constitutional and international requirements will require monitoring.

33. The Working Group also raises the issue of retroactivity. Article 11, paragraph 2, of the Universal Declaration of Human Rights provides that a penalty heavier than the one that was applicable at the time the penal offence was committed cannot be imposed. Article 15, paragraph 1, of the International Covenant on Civil and Political Rights provides that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed".

34. It is clear from the decision of 17 December 2009 of the European Court of Human Rights that, contrary to the long-standing domestic consensus in Germany, post-sentence preventive detention was to be regarded as a "penalty" in terms of the European Convention on Human Rights. The quoted decision was the first one ever to challenge the domestic consensus. German legislators reacted to that decision by introducing a law that was passed at the end of 2010. The issue of post-sentence preventive detention was recognized as highly problematic in all the meetings with government legal officials in federal and state ministries, prosecutors, prison officials and judges. Concerns regarding this issue are plentiful and well documented. The issue of retroactivity in the strict sense of the term was raised after the decision of the European Court of Human Rights. This is a fundamental rights issue that should not depend on European or international supervision to be set right.

35. The Working Group notes that the Constitutional Court has maintained that the German constitutional concept of punishment does not follow that of international human rights law as expressed by the European Court of Human Rights, a view with which the Working Group concurs. Namely, the latter Court's interpretation of the European Convention on Human Rights gives effect to international law, according to which post-sentence preventive detention is a penalty for which a strict ban on retroactivity applies. However, the Working Group recognizes the practical problems of declaring that the German legislation was in violation of the German ban on retroactive penalties, for instance with regard to the release of detainees.

36. The solution implemented by the German Constitutional Court, that is, invoking legitimate expectations instead of the ban on retroactivity, avoids automatic releases but requires a review of the terms and conditions of the individual detentions. The Working Group is not concerned with the interpretation of the German Constitution as such, which is for the Federal Constitutional Court. However, it is concerned that priority has not been given to international law and its ban on retroactive penalties. Instead, priority was given to the concept of legitimate expectations included in German law.

37. The Constitutional Court, in its May 2011 judgment, set out a mechanism for compliance with the decision of the European Court of Human Rights on retroactivity. This also has to be given effect, and the time limits set by the Constitutional Court require swift action.

C. The uneven use of restraints

38. The Working Group visited first instance courts and interviewed magistrates, judges, prosecutors, defence advocates, police officials, prisoners and detainees. One issue of concern is the use of restraints, such as handcuffs and shackling, in remand hearings. The general proportionality test applied seems to be in conformity with fair trial and other relevant international standards. The issue of concern is the uneven application of restraints, with clear differences among the local courts that the Working Group visited.

39. The Working Group recommends that the use of restraints be monitored. Guidelines may provide assistance at different levels, also for the judges who must apply the relevant proportionality test.

D. Patients detained for medical treatment

40. The Working Group is impressed by the active constitutional dialogue over human rights that takes place in the German legislative and judicial process. However, it notes that new legislation, such as the Therapieunterbringungsgesetz (the Act that contains provisions for forcibly detaining patients for therapeutic treatment), raises some concerns. The legislation provides for the detention of a person in a closed institution when she or he is considered "highly likely" ("*mit hoher Wahrscheinlichkeit*") to harm life, sexual self-determination or personal freedom or cause bodily harm, thereby "severely impacting" ("*erheblich beeinträchtigen*") others. Pressure on psychiatric diagnostics, given the uncertainty as to what constitutes a mental disturbance in medicine and in law, and the questionable prospects of treatment or therapy in instances where there is no recognized treatment are issues that need further attention and clarity.

E. Foreigners in detention

41. Another area of interest and concern for the Working Group is the phenomenon of a significantly disproportionate number of detainees who are foreign or Germans of foreign origin. Remand detention is too easily ordered for foreigners, under the rationale of a lack of local connections. Foreigners and Germans of foreign origin constitute a high proportion of remand detainees. In Berlin, the delegation was informed that 45 per cent of detainees were foreigners, representing 55 different nationalities; in Stuttgart, 30 per cent of inmates were foreigners; in one court hearing attended, three of five juveniles were foreigners, and in holding cells at the court on the day, all were foreigners; in Hamburg, of 404 remand detainees, 249 were of non-German origin. With regard to assessing flight risk, the Government does not differentiate between residence in a European Union State and residence in other States; that is, European Union nationals are not considered to represent less of a flight risk within the meaning of section 112, paragraph 2, subparagraph 2, of the Code of Criminal Procedure, as to do otherwise would represent a violation of the prohibition against discrimination under European law. German case law also recognizes that residence abroad—be it on the part of a German or a foreigner—does not ipso facto constitute a danger of flight.

42. The disproportionately high numbers of foreigners in detention raises a number of important questions from a socio-legal perspective. Causes and factors that possibly contribute to such a profile of the detained population, may include, inter alia, the residence and immigration laws in Germany; the vulnerable socio-economic position of the group; and/or a lack of language skills and social support.

43. The criteria used to determine who is to be held in pretrial detention can also have an adverse impact on foreigners, as one of the deciding factors is whether the detainee has any links, including friends and family, to hold him or her in the city or country and hence prevent him or her from jumping pretrial bail or release. Here the judicial system works against foreigners, as it is easily argued that they have no ties to the city or country and may flee. Hence the large numbers of foreigners in pretrial detention.

44. Foreigners who unlawfully reside in Germany and who have been expelled with final and binding effect are subject to detention pending deportation. Not being in possession of a valid visa or such visa being expired are criminal offences in and of themselves. However, unauthorized residence alone does not necessarily lead to the imposition of a prison sentence. According to section 95, paragraph 1, of the Residence Act (Aufenthaltsgesetz), the statutory sentencing range for unauthorized residence is a prison sentence of up to one year or a fine. The imposition of a prison sentence is an exception, that is, imposed as a last resort. Authorities reported that in 2010, there were about 2,700 convictions for unauthorized residence; only in 251 of these cases were prison sentences handed down, and of those, 181 were commuted to a suspended sentence. In other words, in only 70 of a total of 2,700 cases did the convicted person have to serve a prison sentence solely on the grounds that they had violated residence regulations.

45. Similarly, the Working Group notes that when a foreigner is detained for a petty theft or other offence the situation becomes aggravated if the foreigner is a migrant with irregular status. Sections 112, 112 (a) and 113 of the Code of Criminal Procedure provide that the commission of a criminal offence is not ipso facto sufficient grounds for ordering remand detention. The Working Group is concerned that immigrants are more prone to being detained and arrested due to the very fact that they are foreign.

F. Foreigners awaiting deportation

46. Persons awaiting deportation is a further category of foreigners held in detention. On 6 July 2011, the Committee on Internal Affairs of the German Parliament adopted a draft law on, inter alia, the revision of the Residence Act for the purpose of implementing European Union Directive 2008/115/EG on common standards and procedures in Member States for returning illegally staying third-country nationals (the European Return Directive). The Directive stipulates special proportionality requirements that must be met to ensure the legality of the detention order.

47. The Working Group was informed that there are specific statutory requirements for the imposition of pre-deportation detention, especially with regard to proportionality. Section 62 of the Residence Act stipulates that detention pending deportation of more than six months up to a maximum 18 months is only permissible if the person concerned is attempting to evade deportation. Authorities are obliged by law to do everything to carry out the deportation as quickly as possible. Although according to the European Union Directive the use of pre-deportation detention is supposed to be a last resort, the Working Group received information that detention pending deportation, in practice, is often imposed too readily and for too long. If the authorities fail to comply with their obligation to accelerate matters, courts may not impose detention pending deportation. The Working Group considers that the resort to the detention of minors for the purpose of their deportation seems disproportionate, especially in the case of unaccompanied minors. The best interests of the child should be a priority, in accordance with the Convention on the Rights of the Child (art. 3, para. 1).

48. Germany has a population of approximately 82 million, of which about 7 million are foreigners. The Working Group was informed that, at the time of its visit, about 7,600 foreigners were awaiting deportation. While an average of 7,700 foreigners have been

deported each year, the number has been decreasing annually. Once the detainees have served their prison sentences, they are held in immigration detention centres for a maximum of 18 months while awaiting deportation to their countries of origin. Many foreigners reach the 18-month detention limit, after which they have to be released with a "tolerated status" (*Duldung*). This tolerated status is a short-term measure, which leaves those beneficiaries vulnerable to be deported any time. The governmental institutions for law and order and justice appear to be aware of the problem.

49. Migrants and persons of non-German origin tend to live as groups in neighbourhoods with high migrant populations. Since these neighbourhoods normally constitute some of the most socio-economically vulnerable areas of towns and cities, it is important to try and integrate them into wider society by raising the residents' awareness of their rights and obligations and of the legal and judicial system, and by increasing opportunities for better social mobility. The delegation was informed that the police are working with schools and other institutions to achieve this goal. The Working Group agrees that good social policy is an effective method of crime prevention, and would be interested in receiving more information regarding these initiatives throughout the country, and any reviews of such programmes.

50. The Working Group was informed that 10 to 15 per cent of police officers in Hamburg are of non-German origin, representing 40 different nationalities.

51. With regard to punishment for illegal entry to Germany, the detention of foreigners for having crossed the border illegally, coupled with harsh sentencing, raises again the issue of proportionality and how this needs to be carefully addressed and remedied by the Government. These are examples of situations where alternatives to detention can be used.

52. Citizens of countries with a strong consular presence can be deported relatively easily. However, those nationals whose countries do not have a consulate in German cities, or whose Governments refuse to intervene, may stay in detention for the maximum allowable period (see para. 48).

G. The "fast-track" procedure at airports

53. The "fast-track" procedure is an accelerated process for asylum applicants from countries considered to be "safe States" of origin and asylum applicants without identification papers who try to enter Germany via an international airport. It is intended to make possible a prompt decision in simple cases, in which it is evident that the asylum application is manifestly unfounded and the Federal Office for Migrants and Refugees can determine this within two days. The Working Group is concerned about this fast-track procedure, particularly at Frankfurt Airport. According to information received by the Working Group, if the application for political asylum is rejected, the applicant has only three days to appeal to the Administrative Court. This period seems to be insufficient to allow the applicant to prepare her or his appeal. The Working Group also notes that according to the German Asylum Procedure Act, unaccompanied children aged 16 and 17 may be required to undertake the asylum procedures as adults, without the assistance of a guardian. The authorities reported that this airport procedure is, in practice, used with restraint. For example, in 2011, of 772 asylum applications submitted at Frankfurt Airport, only 58 cases were decided using the airport procedure, that is, within two days. The applicants who have been denied asylum are immediately given the opportunity to contact a legal counsel of their choice, and they may be provided with legal advice free of charge. For unaccompanied minor asylum applicants, a curator is appointed by the Youth Welfare Office.

54. Concerning the transfer of deportees, the Working Group considers that there needs to be clarity about which European Union State is responsible for asylum claims in cases of transfer. Often people are transferred for deportation purposes, against their will, to countries that may not be their country of origin. The Working Group considers that an individual risk assessment should be requested to process forcible returns. The risk of persecution and discrimination in countries of origin should also be conscientiously evaluated. This evaluation should include the consideration of essential economic and social rights, such as access to health care, education and housing.

55. The authorities pointed out that the detention in the transit area of an international airport during the airport procedure does not constitute imprisonment. The foreigner is only prevented from entering Germany, but not from continuing his or her journey on another plane. The Federal Constitutional Court upheld the airport procedure in its decision of 14 May 1996, case No. 2 BvR 1516/93. The Working Group notes that immigration detainees, particularly in Hamburg, should be accommodated in centres specifically designated for that purpose and not in prisons.

56. Given that its mandate covers the protection of asylum-seekers, immigrants and refugees against arbitrary deprivation of liberty, the Working Group requests the Government to ensure that the rights of these individuals are fully protected in accordance with international human rights standards. It requests the Government to ensure that individual procedural guarantees are granted to individuals immediately upon their detention, and to pay particular attention to issues such as interpretation, legal counselling and the provision of information, such as on the right to seek asylum. Detention should also be used as a last resort and applied in exceptional cases, for a clearly specified reason and for the shortest possible duration.

V. Conclusions

57. **Human rights are protected in Germany by an independent, solid and impartial court system, with the assistance of an active civil society and non-governmental organizations. The Working Group notes the positive efforts the Government has made, particularly through legislative reforms, to improve the situation of deprivation of liberty in Germany. A number of important initiatives regarding collaboration between the police and education departments have been taken to respond to factors impacting on criminality. This inter-agency approach to addressing socio-economic causes of offences and offending behaviour and its impact to date in reducing crime should be widely disseminated.**

58. **The Working Group notes a number of positive aspects with respect to the institutions and laws safeguarding against occurrences of arbitrary deprivation of liberty. In this regard, the abrogation of the obligation of head teachers and hospital authorities to report children of irregular immigrants receiving education or emergency medical treatment deserves to be mentioned. Among the good practices, the Working Group also notes the establishment in Hamburg of an independent special commission for the investigation of police officers in cases of alleged misconduct or alleged ill-treatment.**

59. **The Working Group has some concerns with regard to the preventive detention system, in which persons who have already served their sentences are held deprived of their liberty because it is deemed that they continue to represent a danger for society. The Working Group notes that, in some cases, the possibility of preventive detention was foreseen in the initial sentences. However, in other cases, preventive detention has been applied subsequently in situations in which the prisoner is deemed to represent a**

danger for society for reasons that were unknown at the time of her or his sentencing. Post-sentence preventive detention is to be regarded as a penalty and is therefore subject to the ban on retroactivity in a strict sense. The Federal Constitutional Court requirements for the standards of the detention regime should be followed, in particular so that the conditions satisfy the proportionality requirements by establishing a difference between post-sentence preventive detention and an ordinary prison sentence.

60. **The Working Group would like to note that during its meetings with detainees (who included detainees being held in pretrial detention, detainees who had been sentenced and detainees who had been subjected to the preventive detention regime), it did not receive any complaint of ill-treatment against detention facility personnel or police officials.**

61. **The Working Group notes with concern the uneven use of restraints, such as handcuffs and shackling, in remand hearings, with clear differences among the local courts that the Working Group visited.**

62. **It also observes with concern the application of new legislation with regard to the detention of patients for medical treatment, such as the Therapieunterbringungsgesetz, in instances where there is no recognized medical treatment. This legislation provides for the detention of a person in a closed institution when he or she is considered likely to make an attempt against his or her own life, or against the sexual self-determination or personal freedom of others, or cause bodily harm. The treatment provided for in the Therapieunterbringungsgesetz should be aimed at addressing the cause of the mental disorder.**

63. **The Working Group notes the disproportionate number of foreigners and Germans of foreign origin in detention. Remand detention seems to be too easily ordered for foreigners under the rationale of a lack of local connections. This phenomenon may be due to factors such as the residence and immigration laws, the vulnerable socio-economic position of many such detainees, and/or a lack of language skills or social support. The criteria used to determine who is to be held in pretrial detention can also have an adverse impact on foreigners.**

64. **Foreigners who unlawfully reside in Germany and have been expelled with final and binding effect are subject to detention pending deportation. Migrants are more prone to being arrested and detained due to the very fact of being foreigners in an irregular situation. Not being in possession of a valid visa or such visa being expired are criminal offences in and of themselves. The detention of foreigners for having crossed the border illegally, coupled with harsh sentencing, raises the issue of proportionality.**

65. **Concerning the "fast-track" airport procedure, particularly at Frankfurt Airport, the Working Group considers that, even if foreigners are immediately given the opportunity to contact a legal counsel of their choice, the three-day period to appeal the rejection of a request for political asylum to the Administrative Court does not seem to be sufficient to allow the applicant to prepare her or his appeal. Detention should be used only as a last resort and applied in exceptional cases, for a clearly specified reason and for the shortest possible duration. The risk of persecution and discrimination in countries of origin should be conscientiously evaluated.**

66. **The Working Group reiterates its thanks to the Government for the cooperation extended during its visit on official mission. It has been impressed by the openness, sincerity and honesty of the Government's various institutions and the manner in which they gave the delegation access to persons in prisons, detention centres, psychiatric hospitals, courts and police stations.**

VI. Recommendations

67. **The Working Group encourages the Government to continue in its efforts to ensure that its institutional and legal framework regarding deprivation of liberty fully conforms to the human rights standards enshrined in international human rights standards and in its legislation.**

68. **On the basis of its findings, the Working Group makes the following recommendations to the Government:**

(a) 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;

(b) 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;

(c) 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;

(d) 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;

(e) 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;

(f) 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;

(g) 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;

(h) 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;

(i) 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.

Appendices

Appendix I

Detention facilities visited

In Berlin

- The police station at Berlin's main rail station (no detainees at the time of the visit; 1,776 detainees since 1 January 2011)
- The Moabit Remand Prison (a 130-year-old prison; at the time of the Working Group's visit, 1,050 male detainees from 55 different nationalities; maximum capacity of the prison is 1,100 persons)
- The Köpenick Centre for persons detained pending deportation

In Hamburg

- The Remand Prison (UHA)
- Fuhlsbüttel Prison (400 places)

In Karlsruhe

- The Nordbaden Psychiatric Centre

In Stuttgart

- The Schwäbisch Gmünd Penal Institution (JVA Schwäbisch Gmünd)

Appendix II

Core United Nations human rights conventions to which Germany is a State party

- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- Optional Protocol to the International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
- Convention on the Elimination of All Forms of Discrimination against Women
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Optional Protocol to the Convention on the Right of the Child on the involvement of children in armed conflict
- Optional Protocol to the Convention on the Right of the Child on the sale of children, child prostitution and child pornography
- Convention on the Rights of Persons with Disabilities
- Optional Protocol to the Convention on the Rights of Persons with Disabilities
- International Convention for the Protection of All Persons from Enforced Disappearance

Other main relevant international instruments

- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention relating to the Status of Refugees
- Convention relating to the Status of Stateless Persons
- Geneva Conventions of 12 August 1949 and Additional Protocols thereto; except its Protocol III
- Fundamental conventions of the International Labour Organization
- The Rome Statute of the International Criminal Court
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)
- The Convention against Discrimination in Education