



Germany

Joint Global Detention Project and Jesuit Refugee Service Germany Submission to the Universal Periodic Review

30th session of the UPR Working Group, May 2018

Submitting organisations

The Global Detention Project (GDP) is an independent research centre based in Geneva, which investigates the use of detention as a response to international migration. Its objectives are to improve transparency in the treatment of detainees, to encourage adherence to fundamental norms, to reinforce advocacy aimed at reforming detention practices, and to promote scholarship and comparative analysis of immigration control regimes.

The Jesuit Refugee Service (JRS) is an international Catholic organisation with a mission to accompany, serve and advocate for the rights of refugees and others who are forcibly displaced. In Germany, JRS supports, inter alia, persons in immigration detention, asylum seekers, and persons with a “toleration” or without any migration status (“sans-papiers”).

As per these objectives, this UPR submission focuses on human rights concerns stemming from Germany’s policies related to the detention of persons for immigration or asylum-related reasons.

Issues concerning immigration detention¹

During the 2nd cycle of the Universal Periodic Review of Germany (16th session, 25 April 2013) the following recommendations were accepted by the country:

[...] reduce administrative detention to a minimum (Mexico) (para. 124.186)

Pay particular attention to [...] the detention of asylum seekers and ensure that account is taken of the principle of the best interests of the rights of the child in any decision relating to asylum seeking minors (France) (para. 124.197)

¹ This submission is drawn from the Global Detention Project’s profile of Germany, September 2017, <https://www.globaldetentionproject.org/countries/europe/germany>, as well as from experience from JRS’ work in detention centres.

Immigration detention context

Since 2012, Germany has received the highest annual numbers of asylum applications (in absolute terms) in the European Union (EU). The increase in the number of people searching for international protection in the EU since 2015 led to a significant rise in asylum applications in Germany. In 2016, Germany received 745,155 asylum applications, which accounted for almost 60 percent of all the asylum applications in the EU and almost six times more than Italy, which ranked second (with almost 123,000 applications).² (However, the ratio becomes different if the number of asylum applicants is compared with the total population.)

Despite rising numbers of asylum seekers, Germany offered them a generous welcome. In September 2015, Germany's government under Chancellor Angela Merkel agreed to open German borders to more than 10,000 asylum seekers stranded in Hungary.³ Thousands of volunteers have been active in providing accommodation, language training, legal support, and other services to asylum seekers. However, more recently, the administration has moved toward more stringent policies, including increased rate of deportations to Afghanistan,⁴ limitation of family reunion rights,⁵ plans to set up shelters for returned children in Morocco,⁶ and decision to resume sending migrants back to Greece under the Dublin Regulation.⁷

In 2011, the [UN Committee against Torture](#) (CAT) and in 2015 the [UN Working Group on Arbitrary Detention](#) (WGAD) urged Germany to limit the number of immigration detainees.⁸

² Eurostat, "Asylum and Dublin statistics," accessed 17 July 2017,

<http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>.

³ Allan Hall and John Lichfield, "Germany opens its gates: Berlin says all Syrian asylum-seekers are welcome to remain, as Britain is urged to make a 'similar statement'," *Independent*, 24 August 2015, <http://www.independent.co.uk/news/world/europe/germany-opens-its-gates-berlin-says-all-syrian-asylum-seekers-are-welcome-to-remain-as-britain-is-10470062.html>; Kate Connolly, "Angela Merkel defends Germany's refugee policy after attacks," *The Guardian*, 28 July 2016, <https://www.theguardian.com/world/2016/jul/28/merkel-rejects-calls-to-change-germanys-refugee-policy-after-attacks>.

⁴ Mary Bulman, "Germany suspends deportations to Afghanistan following Kabul attack," *Independent*, 31 May 2017, <http://www.independent.co.uk/news/world/europe/germany-kabul-attack-deportation-flight-afghanistan-migrants-cancel-a7764811.html>.

⁵ AITIMA, "Serious Problem Regarding Family Reunification For Asylum Seekers In Germany Under Dublin Iii Regulation," 14 July 2017, <http://aitima.gr/index.php/en/news/421-14-07-2017-serious-problem-regarding-family-reunification-for-asylum-seekers-in-germany-under-dublin-iii-regulation>.

⁶ Lorena Gazzotti, "German plans to send migrant children to reception centres in Morocco ignore lessons from history," *The Conversation*, 29 June 2017, http://theconversation.com/german-plans-to-send-migrant-children-to-reception-centres-in-morocco-ignore-lessons-from-history-78012?utm_source=twitter&utm_medium=twitterbutton.

⁷ BBC News, "Germany to resume sending migrants back to Greece," *BBC News*, 7 August 2017, <http://www.bbc.com/news/world-europe-40850938>.

⁸ Committee Against Torture, *Consideration of Reports Submitted by States Parties under article 19 of the Convention: Concluding Observations of the Committee Against Torture: Germany*, CAT/C/DEU/CO/5, 12 December 2011,

www.ohchr.org/EN/countries/ENACARRegion/Pages/DEIndex.aspx (Committee Against Torture, 2011); Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Addendum: Follow-up mission to Germany*, A/HRC/30/36/Add.1, 10 July 2015, <http://www.ohchr.org/EN/Countries/ENACARRegion/Pages/DEIndex.aspx> (Working Group on Arbitrary Detention, 2015).

For a few years, the number of immigration detainees has been decreasing in Germany. According to [National Agency for the Prevention of Torture](#), in 2013, the country detained 4,812 non-citizens, compared to 5,748 in 2012, and 6,781 in 2011.⁹ According to official sources, in 2014 the country detained 1,850 non-citizens slated for removal and in the first half of 2015, 563.¹⁰

However, according to information from organisations working in detention centres, the numbers of detainees have been on the rise: for instance, as of early August 2017, about 80 persons were held in the recently opened Eichstätt detention facility (Bavaria) and approximately 74 persons in Ingelheim am Rhein (Rhineland-Palatinate). A lawyer who is an expert in immigration detention law has reported in May 2017 that since 2002 he had represented 1,299 clients in detention cases; in 666 of these cases courts have ruled that the respective clients had been unlawfully held in detention.¹¹

Laws, policies, practices

Key norms. Germany's legal framework for immigration detention is provided in the 2008 [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory](#) (Residence Act) (*Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet* (*Aufenthaltsgesetz*)) and the 2008 [Asylum Act](#) (*Asylgesetz*).

Within German decentralized legal and administrative framework, the enforcement of immigration detention is under the remit of the federal *Länder* and federal legal provisions are intended to provide only a general framework for immigration detention.¹² The Residence Act provides the grounds for detention, rules on the length of detention, and basic procedural safeguards. Yet, it contains few provisions dealing with conditions of detention. It is in the *Länder's* capacity to adopt such laws, since they are in charge of implementation of detention orders. It appears that only five states—[Baden-Württemberg](#), [Berlin](#), [Brandenburg](#), [Bremen](#), and [North Rhine-Westphalia](#) — have adopted specific laws regulating enforcement of immigration detention.¹³ In the remaining states, the [Prison Act](#) (*Strafvollzugsgesetz*), complemented by non-binding *Länder* standards, regulates conditions and overall detention regimes. [Saxony](#) has recently adopted a law on detention conditions in the

⁹ Federal Government, *Response of the Federal Government to the major interpellation of the deputies Ulla Jelpke, Jan Korte, Agnes Alpers, other MPs and the DIE LINKE: printed matter 17/10597: implementation of the deportation policy of the European Union and the practice of detention*, Ministry of Interior, 4 September 2012, dipbt.bundestag.de/dip21/btd/17/105/1710597.pdf (Federal Government, 2012); National Agency for the Prevention of Torture, *Annual Report 2013 of the Federal Agency and the Commission countries*, April 2014, www.nationale-stelle.de/26.html (National Agency for the Prevention of Torture, 2013).

¹⁰ Federal government, *Antwort der Bundesregierung auf die Große Anfrage der Abgeordneten Ulla Jelpke, Jan Korte, Sevim Dağdelen, weiterer Abgeordneter und der Fraktion DIE LINKE: Drucksache 18/3769, Drucksache 18/7196*, 6 January 2016, <http://dipbt.bundestag.de/doc/btd/18/071/1807196.pdf> (Federal Government, 2016).

¹¹ Peter Fahlbusch, email message to JRS Germany, 8 May 2017.

¹² Federal Office for Migration and Refugees (EMN National Contact Point Germany), *The Use of Detention and Alternatives to Detention in Germany*, 2014, <http://www.asyl-in-deutschland.rs/SharedDocs/Anlagen/EN/Publikationen/EMN/Studien/wp59-emn-abschiebungshaft.html?nn=7660242> (Federal Office for Migration and Refugees, 2014).

¹³ Federal Government, 2016, *op. cit.*

Ausreisegewahrsam which, for most details, refers to the relevant provisions in the Prison Act. The [European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment](#) called upon Germany to ensure that in all *Länder* detention pending deportation is governed by specific rules reflecting the particular status of immigration detainees.¹⁴

Grounds for detention. The Residence Act and the Asylum Act provide for several grounds justifying immigration detention.

If the person has been refused entry to Germany and the refusal of entry cannot be enforced immediately, the non-citizen may be placed in “detention pending exit from the federal territory” (*Zurückweisungshaft*) (Residence Act, Section 15(5)).

In cases of entry by air, non-citizens coming from a safe country of origin or those without identity documents who apply for asylum with the border authority may be kept in custody at airport premises during the asylum procedure for up to 19 days (Asylum Act, Section 18(a)).¹⁵ In 1996, the German Federal Constitutional Court ruled that the placement of foreigners at airport transit zone premises does not constitute detention, as, according to the court, the people concerned have an option to leave by plane.¹⁶ In contrast, the European Court of Human Rights ruled, in *Amuur v France*,¹⁷ that accommodation of asylum seekers in transit zones, even if they could freely leave the premises by leaving the country and irrespective of domestic classification of the practice, may amount to detention. This ruling, as the UN Working Group on Arbitrary Detention has noted, failed to bring any changes in German jurisprudence.¹⁸

Under “custody to prepare deportation” (*Vorbereitungshaft*), a non-citizen may be detained to enable the preparation of deportation if a decision on deportation cannot be reached immediately and deportation would be much more difficult or impossible without such detention (Residence Act, Section 62(2)).

A person can be placed in “custody to secure deportation” (*Sicherungshaft*) for several reasons, including being required to leave the federal territory because of unlawful entry, having evaded or being presumed to intend

¹⁴ For more details on this point, see the 2014 Global Detention Project report on Germany, <https://www.globaldetentionproject.org/immigration-detention-in-germany>.

¹⁵ Informationsverbund Asyl und Migration, “Country report: Germany,” *Asylum Information Database (AIDA)*, European Council on Refugees and Exiles (ECRE), December 2016, <http://www.asylumineurope.org/reports/country/germany> (Informationsverbund Asyl und Migration, 2016).

¹⁶ Bundesverfassungsgericht, judgment, 14 May 1996, 2 BvR 1516/93.

¹⁷ European Court of Human Rights, judgment, 25 June 1996, 17/1995/523/609.

¹⁸ Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Addendum: Follow-up mission to Germany*, A/HRC/30/36/Add.1, 10 July 2015, <http://www.ohchr.org/EN/Countries/ENACARRegion/Pages/DEIndex.aspx>; Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Addendum: Mission to Germany*, A/HRC/19/57/Add.3, 23 February 2012, <http://www.ohchr.org/EN/Countries/ENACARRegion/Pages/DEIndex.aspx>.

evasion of deportation (Residence Act, Section 62(3)). This provision is used in most cases.

People subject to Dublin procedures may be detained if there is a risk of absconding and if a non-citizen has left another member state prior to the conclusion of Dublin or asylum proceedings.

Under “custody to secure departure” (*Ausreisegewahrsam*), a foreigner may be detained in an airport transit area or in a special facility to ensure deportation once the period for voluntary departure has expired (Residence Act, Section 62b).

Minors and families. The detention of minors, including unaccompanied minors, is not prohibited under German law. The Residence Act provides that minors and families with minors may be placed in pre-removal detention only in exceptional cases and only for as long as is reasonable, taking into account the well-being of the child (Residence Act, Section 62(1)). According to the government, minors are detained “extremely rarely” in practice.¹⁹ Non-governmental sources concur that the numbers of detained children have dropped since 2011. Fifteen minors were placed in immigration detention 2013; 55 in 2012; 61 in 2011, 114 in 2010, and 142 in 2009.²⁰

In 2014, the [UN Committee on the Rights of the Child](#) expressed concern that children can be held in pre-removal detention for up to 18 months. The Committee found that this was a direct contravention of the right of the child to have his best interests taken as a primary consideration. The Committee urged Germany to ensure that detention of asylum-seeking and migrant children is always used as a measure of last resort and for the shortest appropriate time—in compliance with article 37(b) of the Convention on the Right of the Child—and that detention is made subject to time limits and judicial review.²¹ Following its visit to Germany in November 2014, the WGAD noted the lack of procedure for the identification of vulnerable asylum seekers, such as unaccompanied minors, in a number of *Länder*. The Working Group urged Germany to prohibit pre-removal detention of persons belonging to particularly vulnerable groups, such as unaccompanied minors.²²

Length of detention. The most common immigration detention measures (“custody to secure deportation” and “detention pending exit from the federal territory”) may be ordered for up to six months. If an immigration detainee hinders his deportation, detention may be extended up to maximum of eighteen months (Residence Act, Sections 62(4) and 15(5)). Asylum seekers

¹⁹ Working Group on Arbitrary Detention, 2015, *op. cit.*

²⁰ Federal Government, 2012, *op. cit.*; Pro Asyl and Diakonie in Hessen and Nassau, *Schutzlos hinter Gittern: Abschiebungshaft in Deutschland*, June 2013, <https://www.proasyl.de/material/schutzlos-hinter-gittern-abschiebungshaft-in-deutschland/> (Pro Asyl and Diakonie in Hessen and Nassau, 2013).

²¹ Committee on the Rights of the Child (CRC), *Concluding Observations on the combined third and fourth periodic reports of Germany*, CRC/C/DEU/CO/3-4, 25 February 2014, www.ohchr.org/EN/countries/ENACARRegion/Pages/DEIndex.aspx.

²² Working Group on Arbitrary Detention, 2015, *op. cit.* On the link between vulnerability and detention see also JRS Europe, *Becoming Vulnerable in Detention. Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union* (The DEVAS Project). Brussels, June 2010.

coming from “safe countries” or being unable to produce proper travel documents can be confined in the airport transit zones for up to 19 days.²³ The detention of persons who applied for asylum while in detention is allowed for up to four weeks. However this limit does not apply to people subject to the Dublin Regulation, who may stay in detention during the entire proceedings (Asylum Act, Section 14(3)).

The WGAD urged Germany to subject the duration of detention pending deportation to the strict application of the principle of proportionality and limit it to the shortest possible period. The WGAD also recommended that the duration of pre-deportation custody be significantly decreased.²⁴ Likewise, the CAT urged Germany to limit the length of pre-removal detention.²⁵

Procedural guarantees. A non-citizen can only be placed in detention by a judicial order (Residence Act, Section 62(2)-(3)). Before the district court makes a decision, the person concerned has the right to a personal hearing. Detention orders must provide reasons for detention measures and specify the date they will end. Court-ordered extension of detention is subject to the same rules as the initial detention order. The German legal framework thus provides for automatic judicial review of immigration detention. Also, detainees have the right to appeal against a detention order before a regional court.²⁶ A further appeal to a Higher Regional Court is not possible, only legal redress to the Federal Court.

The quality of detention orders issued by district courts is sometimes very poor. A judge at the Federal Court has estimated that about 85 to 90 percent of detention orders issued by district courts had to be declared unlawful when reviewed by the Federal Court.²⁷ For instance, judges frequently issue detention orders even when authorities have not sufficiently explained the reasons justifying this measure.²⁸

There is a possibility to apply for legal aid in the context of judicial review of detention.²⁹ However, free legal aid is dependent on how the court assesses the chances of success. Thus, in practice, free legal aid is rarely granted.³⁰ Migrants have the right to compensation for unlawful immigration detention but the rules are not explicitly laid down in the Residence Act. People concerned would need to rely on the Constitution and Civil Code.³¹

²³ Informationsverbund Asyl und Migration, 2016, *op. cit.*

²⁴ Working Group on Arbitrary Detention, 2015, *op. cit.*

²⁵ Committee Against Torture, 2011, *op. cit.*

²⁶ Federal Office for Migration and Refugees, 2014, *op. cit.*

²⁷ J. Schmidt-Räntsch, Freiheitsentziehungssachen gem. §§ 415 FamFG. *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*, 2014, p. 110.

²⁸ Peter Fahlbusch, “Haft in Verfahren nach der Dublin II-Verordnung (Detention in the context of the Dublin procedure),” *Asylmagazin* 9/2010, 289-295.

²⁹ Federal Office for Migration and Refugees, 2014, *op. cit.*

³⁰ Informationsverbund Asyl und Migration, 2016, *op. cit.*

³¹ Kay Hailbronner and Daniel Thym, *Completed Questionnaire for the project Contention: National Report – Germany*, 2014, <http://contention.eu/country-reports/>.

Alternatives to detention. According to the Residence Act, pre-removal detention is not permissible if the purpose of the custody can be achieved by other, less severe means, which are also sufficient (Residence Act, Section 62(1)). However, unlike in most of the EU countries, the Residence Act does not clearly enumerate alternatives to detention. Consequently, it is very rare that alternatives to detention are checked in an individual case before a detention order is issued.³²

The WGAD addressed alternatives to detention during recent visits to Germany. Following its 2011 visit to Germany, the WGAD urged authorities to use alternatives to detention for non-citizens who do not have valid visas.³³ Following its 2014 visit, the WGAD noted that the principles of necessity and proportionality under international law require the use of alternatives to detention.³⁴

Privatisation. Several private contractors have been involved in the operation of detention centres in Germany. The private firms providing services in immigration detention facilities in Germany include B.O.S.S. Security and Service, Kötter and European Homecare.³⁵ Following the overhaul of the Germany's immigration detention system in 2014, as of 2016, at least two facilities (Ingelheim and Büren) outsourced some of the services to a private contractor.³⁶

Cost of detention. In 2014, the daily detention costs per person ranged between approximately 43 euros in Bremen and 420 in Hannover Langenhagen.³⁷ The Residence Act (Section 66(1) and 67(1)) stipulates that costs relating to deportation, including the costs of detention, are to be borne by the non-citizen. Non-citizen should pay these costs to be permitted to re-enter Germany, even after the period of validity of re-entry ban.³⁸ Reportedly these costs are to be paid by non-citizen only in the event of deportation, thus the obligation to pay for deportation and detention functions as an incentive for migrants to leave voluntarily.³⁹

³² For the discussion on alternatives to detention see JRS Europe, *From Deprivation to Liberty. Alternatives to detention in Belgium, Germany and the United Kingdom*. Brussels, December 2011; JRS Deutschland, *Abschiebungshaft vermeiden. Alternativen zur Abschiebungshaft in Belgien, Deutschland und dem Vereinigten Königreich*. Berlin, April 2012.

³³ Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Addendum: Mission to Germany*, A/HRC/19/57/Add.3, 23 February 2012, <http://www.ohchr.org/EN/Countries/ENACARegion/Pages/DEIndex.aspx>.

³⁴ Working Group on Arbitrary Detention, 2015, *op. cit.*

³⁵ Michael Flynn and Cecilia Cannon, "The Privatization of Immigration Detention: Towards a Global View," *Global Detention Project Working Paper No.1*, Global Detention Project, 2009, www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf; Pro Asyl and Diakonie in Hessen and Nassau, 2013, *op. cit.*; Federal government, 2016, *op. cit.*

³⁶ Federal government, 2016, *op. cit.*

³⁷ Federal government, 2016, *op. cit.*

³⁸ Christine Graebisch and Beate Selders, "Der Zugang zum Bundesgerichtshof ist das geringste Problem: Interview mit Christine Graebisch von Beate Selders," In *Haft ohne Straftat. Fakten und Argumente gegen Abschiebungshaft*, Edited by Flüchtlingsrat Brandenburg, Flüchtlingsrat Schleswig-Holstein and Humanistische Union, Berlin, 2013, quoted in Federal Office for Migration and Refugees, 2014, *op. cit.*

³⁹ Federal Office for Migration and Refugees, 2014, *op. cit.*

Detention infrastructure

Until recently, Germany was one of a very small number of European countries that used prisons for carrying out immigration detention. In 2014, the Court of Justice of European Union (CJEU) ruled in *Bero & Bouzalamate* that this practice was incompatible with the EU Returns Directive, which provides that, as a rule, immigration detainees should be confined in dedicated centres. This ruling prompted an overhaul of the immigration detention practice and estate in Germany. At the time of the ruling, 17 prisons were in use. As of July 2017, German *Länder* operated five long-term dedicated centres: Pforzheim (Baden-Württemberg), Eichstätt (Bavaria), Hannover (Langenhagen) (Lower Saxony), Büren (North-Rhine-Westphalia), and Ingelheim am Rhein (Rhineland-Palatinate)⁴⁰. In Bremen, a facility in the police headquarters compound is used to confine migrants. Another detention centre, Eisenhüttenstadt (Brandenburg) is temporarily closed for structural alteration works. In addition to these centres, Saxony (Dresden) and Hamburg operate detention facilities for the *Ausreisegewahrsam*. Also the Hannover (Langenhagen) centre is used for this purpose. Most of these centres were set up at the premises of former prisons.

⁴⁰ Informationsverbund Asyl und Migration, 2016, *op. cit*; Ricarda Breyton and Tobias Heimbach, "Das Comeback der Abschiebehaft in Deutschland," *Welt*, 1 August 2017, <https://www.welt.de/politik/deutschland/article167243145/Das-Comeback-der-Abschiebehaft-in-Deutschland.html>.

Key priorities concerning immigration detention in Germany:

- **To ensure that grounds justifying detention under the Residence Act and Asylum Act are clear and foreseeable in their application, in line with the requirement of lawfulness;**
- **To recognize that confinement of asylum seekers at the airport transit zones amounts to detention and consequently to ensure detention-related guarantees to these people;**
- **As recommended by the European Committee for the Prevention of Torture, to ensure that the Prison Act does not govern immigration detention in any federal states;**
- **To ensure that detention is imposed only where it is necessary and proportionate in the person's individual circumstances;**
- **As recommended by the UN Committee against Torture and the UN Working Group on Arbitrary Detention, to reduce the numbers of immigration detainees;**
- **As recommended by the UN Committee against Torture and the UN Working Group on Arbitrary Detention, to reduce the length of immigration detention;**
- **As recommended by the UN Committee on the Rights of the Child, to apply detention to children as a last resort and for the shortest period of time;**
- **To ensure that judges order detention only based on a case-by-case examination of the individual circumstance, as required by the principle of necessity;**
- **To ensure that migrants are provided access to legal aid;**
- **To set up procedures facilitating access to compensation schemes for unlawful immigration detention;**
- **As recommended by the UN Working Group on Arbitrary Detention, to use alternatives to detention, in line with the principles of proportionality and necessity; and to clearly enumerate alternatives to detention in the Residence Act;**
- **To ensure that private firms involved in operating detention centers are properly trained and accountable for their acts;**
- **To cease requiring immigration detainees to pay for their detention in order to ensure that detention is a non-punitive measure;**
- **To ensure adequate material conditions and regime of detention in all of the country's detention facilities;**
- **To ensure that detention centers located in the former prisons provide a non-punitive environment.**