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Statement for Parallel Session 1: "Pre-trial detention: too frequent? Too long? Which alternatives?" – Simon Pschorr / case study from Germany

Dear Ladies and Gentlemen,

Thank you very much for the opportunity to comment on precautions in German criminal procedural law against overcrowding in German prisons, in particular on measures to limit pre-trial detention. Before I will speak about the specific legal requirements in substantive and procedural terms, I would like to present you with concrete figures on the development of pre-trial detention in Germany. All persons who are in a prison or forensic accommodation on the basis of a criminal charge and whose main proceedings have not yet been concluded in force of law were taken into account as pre-trial detainees.

The number of imprisoned suspects in Germany has been declining slightly for years. While in 2003 there were still over 16,000 people in pre-trial detention, their number fell to just over 10,000 by 2011. Especially from 2015 onwards, there has been an increase to a peak of 14,000 prisoners. Empirical evidence for the cause of this increase is lacking – as is the case for many different questions surrounding pre-trial detention in Germany. One can assume that the influx of a large number of refugees from Iraq, Afghanistan and especially Syria during this period plays just as much a role as the tightening of sexual criminal law, which is associated with high penalties, with the introduction of the "no-means-no solution". During the coronavirus pandemic, the number of pre-trial detainees fell to 12,000 – not so much due to targeted legal measures, but mainly as a result of pandemic-related curfews, capacity restrictions in the police and judiciary, and infection control measures that led to a reduction in prison places. Since the return to normal, the number of pre-trial detainees has returned to pre-pandemic levels. In the reference period, the total number of prisoners ranged between 55,000 and 57,000, so that pre-trial detainees accounted for between 17% and 29% of prison places.

According to § 112 of the German Code of Criminal Procedure, the ordering of pre-trial detention in Germany presupposes an urgent – not only predominant or sufficient – suspicion of a criminal offence. Furthermore, a so-called reason for detention must be given. These are conclusively: escape, hiding or risk of absconding; tempering with evidence and the risk thereof and finally the risk of recurrence for offences enumerated in § 112a of the German Code of Criminal Procedure. In cases of capital delinquency,

lowered examination requirements apply in accordance with § 112.3 of the German Code of Criminal Procedure.

In addition to pre-trial detention, provisional confinement in a forensic-psychiatric clinic or a rehab clinic pursuant to § 126a of the German Code of Criminal Procedure is a viable measure. In addition to the urgent suspicion of a criminal offence, this requires (only) the urgent expectation of an order for placement in a psychiatric clinic or a rehab clinic.

Neither instrument is limited in time. An exception applies to pre-trial detention due to the risk of recurrence. Here, § 122a of the German Code of Criminal Procedure prescribes a maximum period of one year. Furthermore, pre-trial detention must be proportionate. This is not the case if the detention objectives can also be achieved by milder measures pursuant to § 116 of the German Code of Criminal Procedure. The law gives the court extensive freedom of action. In addition to ordering release against payment of bail, registration requirements, obligations to take up residence or the deposit of identity documents can be made mandatory. Even without explicit mention, this is the legal basis of the – still rather rare – order of the obligation to wear an electronic shackle. In addition, the order of pre-trial detention for petty crimes, which does not give rise to a prison sentence, is ruled out.

As a special expression of the principle of proportionality, § 72.2 of the German Code of Criminal Procedure against Youths limits the reason for detention of the risk of absconding in the case of accused persons between the ages of 14 and 16 to cases of concretely demonstrable preparations to flee. For accused persons between the ages of 14 and 18, the prison court must continue to give separate reasons as to why milder means are not sufficient to achieve the detention objectives. In this context, §§ 72.4 and 71.2 of the German Code of Criminal Procedure against Yourths provide a special instrument for avoiding imprisonment: (temporary) residential education. The children's foster care institutions are mainly operated by non-state providers, but supported by state funding. Most institutions are open, which in any case conflicts with a sceptical, repressive judicial culture. In practice, however, the main challenge is to have to distribute very limited places in many cases that become known at short notice. There is no central platform for allocating places in nursing homes, nor are there any generalizable criteria for prioritization. The juvenile court assistance regularly takes on the task of checking the availability of such places to avoid detention. The few closed youth foster care institutions, which hardly differ from an original prison, are experiencing even greater demand. Despite this, these facilities record an high irregular release rate (due to termination of accommodation and return to pre-trial detention) of 33%.

In addition to the substantive restrictions on pre-trial detention, there are practically effective procedural requirements in German criminal procedure law. The so-called principle of acceleration, which is anchored in § 121 of the German Code of Criminal

Procedure, requires that investigations be carried out particularly rapidly as well as consistently and that the main proceedings be promoted in detention matters. If pre-trial detention has been carried out for a period of six months, the proceedings must be submitted to the competent Higher Regional Court via the Office of the Public Prosecutor General. Both not only examine the conditions for issuing the arrest warrant at the current stage of the proceedings, but also demand an account of their acceleration. If avoidable delays are detected, the pre-trial detention is lifted (for this reason alone). The review is then repeated every three months. Admittedly, the Higher Regional Courts confirm 98% of all pre-trial arrest warrants, but evident cases are already filtered out by the Detention Court and the Public Prosecutor General's Office in the course of the referral procedure and are not even submitted to the Higher Regional Court. The Federal Constitutional Court has tightened the standard of review for the execution of pre-trial detention for more than one year: This is the absolute exception and must be specifically justified. But in reality, this ruling of the Federal Constitutional Court has hardly any noticeable impact on the duration of pre-trial detention. In 2024, 8.2% of pre-trial detainees were detained for more than 12 months, and just under 30% were imprisoned for at least six months. It is problematic that in about 11% of cases, the duration of pre-trial detention does not reach the final sentence and therefore the sentence was executed before it was given with the pre-trial detention already.

Accordingly, there is still a need for improvement, especially for acceleration, in Germany.