Germany

1. Introduction

Germany today has about 82.21 million inhabitants. Around 7.25 million are foreign citizens[1] (while around 15 million have a migration background), of whom ca. 15% are Turkish citizens and 14% are citizens of the countries that once formed Yugoslavia; other sizeable groups are Italian, Greek and Polish citizens. Most of these foreigners have lived in Germany for a long time. After a period of being divided into the Federal Republic of Germany (West Germany) and the German Democratic Republic (East Germany), since 3 October 1990, the Federal Republic of Germany consists of sixteen Federal States. Although this reunification was a consequence of the fall of the iron curtain, Germany, unlike other countries affected by this radical political change, is not one of the "countries in transition" with regard to the legal development: The scope of most laws was simply extended to the New Federal States ("Neue Bundesländer") by the "Einigungsvertrag".

The Federal Republic of Germany is a member of the Council of Europe since 13 July 1950 and party to both UN International Covenants since 1973.[2] It ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1952 and Protocol No. 6, abolishing the death penalty, in 1989.[3] Germany has been a member of the European Union from its beginnings (1951/1957). It is also party to the European Convention for the Prevention of Torture (CPT) since 1990. Just very recently, in December 2008, Germany ratified the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).[4]

The relevant legislation for arrest within the criminal procedure as well as for pre-trial detention can be found in the German Code of Criminal Procedure ("Strafprozessordnung" or StPO, hereinafter: CCP)[5]. The German Constitution ("Grundgesetz" or GG) of 1949, however, is crucial for criminal procedure law. It contains the principle of the rule of law ("Rechtsstaatsprinzip", Art. 1 and 20 III GG), from which basic tenets for the criminal procedure – such as the presumption of innocence and the privilege against self-incrimination as well as the principle of proportionality – derive. It should be added that international treaties are an integral part of domestic law from the moment of their ratification. Thus, for example, since 1952, the European Convention on Human Rights, in particular its Art. 6 II, has been directly applicable in domestic law on the same basis as federal statutory law.

Concerning arrest and pre-trial detention, Art. 104 GG provides certain legal guarantees (*habeas corpus*): "(2) Only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law. (3) Any person provisionally detained on suspicion of having committed a criminal offense shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefore or order his release."[6]

1 It has to be noted, however, that the share of foreigners amounts to 30% in the bigger cities in West Germany, whereas the Eastern States ("Neue Bundesländer") of the former German Democratic Republic only have a share of 2-3%. Source: Statistisches Bundesamt. www.destatis.de.

2 http://www2.ohchr.org/english/bodies/ratification/4.htm (last retrieved 8 January 2009).

3 The complete ratification status for the Council of Europe conventions can be found at http://conventions.coe.int (last retrieved 7 January 2009).

4 http://www2.ohchr.org/english/bodies/ratification/9_b.htm (last retrieved 7 January 2009).

5 The Strafprozessordnung dates from 1877 and the current version is from 1987; it was updated for the last time in March 2008. Since it came into force, it has been altered about 170 times.

6 The English translation of German statutory law mentioned in this text can be found at www.iuscomp.org.

These provisions concerning the maximum of 48 hours of provisional detention secure that police custody plays almost no role in Germany. The basic choice to restrict police custody was based on the experiences in the Third Reich, where the Gestapo (the Secret Police), the police and other State authorities had far-reaching competences to detain and keep persons in police custody with restricted or without judicial guarantees.

Chapter 9 (§§ 112 – 131) of the CCP establishes the specific terms of the broad protections outlined in Art. 104 of the Basic Law. After specifying the rights and duties of the judge concerning arrest in 1950 (in the CCP), important legal reforms concerning the law governing pre-trial detention only came in 1964, with the Criminal Procedure Amendment Act.[7] The principle of proportionality that applies to all acts of the State authorities (as part of the rule of law) was clearly spelled out for pre-trial detention in § 112 (1) CCP: pre-trial detention "may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed". Later reforms brought extensions in the grounds for pre-trial detention (for details, see paragraph 4) or were characterised by the effort to speed up the criminal procedure in general.[8] Some of these reforms, in particular with regard to the expedited procedure ("beschleunigtes Verfahren"), were widely criticised as further restrictions of the rights of the accused and the equality of arms.

Decisions and review of decisions during the pre-trial stage of the criminal procedure (including pre-trial detention) lie within the competence of the criminal courts. But an important actor in the German reality of law is the Federal Constitutional Court (FCC, "Bundesverfassungsgericht"), located in Karlsruhe, with its jurisdiction in all matters concerning individual rights granted by the constitution. The court frequently rules on issues of criminal procedure and, therefore, has had much influence on the development of pre-trial detention over the last decades.[9] Although the points of reference – fair trial with the presumption of innocence, the equality of arms and a speedy procedure on the one hand, and an effective criminal justice system on the other – are the same, priorities sometimes differ. That is why we can find conflicting decisions between the Federal Constitutional Court and higher criminal courts, in particular concerning the justified length of procedures;[10] criminal courts sometimes react sensitively and even offended to overruling verdicts from Karlsruhe.[11]

The human rights expressed in the German Constitution are the yardstick for all decisions by the Federal Constitutional Court. In practically the same way, it takes into account the human rights provisions of the ECHR; it also relies on the jurisdiction of the European Court of Human Rights (ECtHR).[12] Until recently, it was an accepted fact that the German Constitution comprises all human rights and guarantees given by the ECHR and that there are no obvious conflicts between the two laws (and the two courts) in that regard. This "assumption has been shattered",[13] at least slightly, by a few cases Germany has lost before the ECtHR, in particular concerning a full, fair and effective judicial review of pre-trial detention.[14]

Not only the courts but also the critical discourse among academics and practitioners has influenced the development of pre-trial detention in Germany. In particular in the 1980s, it was criticised that pre-trial detention was imposed too frequently and that its use often was disproportionate ("too quick and too much").[15] Other criticism concerned the difficult

7 Gesetz zur Änderung der StPO und des GVG vom 19.12.1964.

8 Verbrechensbekämpfungsgesetz vom 28.10.1994 with an extension of § 112 III CCP, now also including "intentional serious bodily injury", § 226 II PC; Gesetz zur Änderung der StPO vom 17.7.1997, introducing § 127 b CCP ("Hauptverhandlungshaft"), Gesetz zur Strafbarkeit beharrlicher Nachstellungen (Stalking) vom 22.3.2007. A minor change deals with the problem of pre-trial detention after reopening a case (§ 47 III CCP, 2. Justizmodernisierungsgesetz of 22 December 2006).

9 In particular during the 1960s and 1970s, e. g. concerning the proportionality of pre-trial detention BVerfGE 19,349 ff.; 20, 49 ff.; 32, 87 ff. More recent decisions with regard to the length of pre-trial detention: BVerfGE vom 29.11.2005 (2BvR 1737/05, NJW 2006, 668); vom 5.12.2005 (2 BvR 1964/05, NJW 2006, 672); 29.12.2005 (2 BvR 2057/05, NJW 2006, 677). A comprehensive compendium on the constitutional aspects of pre-trial detention, addressed in particular to practitioners, was published by Kazele in 2008.

10 The FCC can overrule Supreme Court decisions, but this is (in theory) strictly limited to violations of the constitution – it is not allowed to act as a "super appellate court" ("Superrevisionsinstanz").

11 For a review of FCC decisions during recent years: Jahn 2007, 255; Schmidt, 2006, 313.

12 The relevant case-law of the court as well as a comprehensive analysis can be found in Esser 2002.

13 Weigend/Salditt, p. 80.

14 For details, see paragraph 3.5.

15 Hassemer 1984, 37; summing up Dünkel 1994, Heinz 2008.

circumstances for defence counsels to prepare proper appeals during pre-trial detention because of the refusal of access to the files during the investigation (147 II CCP)[16], the living conditions of pre-trial detainees,[17] and the very slender legal basis (only §§ 119, 148 CCP) for the execution of pre-trial detention. In September 2006, on the political level,[18] it was decided that the execution of all forms of detention – be it pre-trial detention, be it imprisonment – should fall in the competence of the sixteen "Länder". Since January 2008, this is the case.

2. Empirical background information

There are different ways to measure "pre-trial detention" and compare data (see also the introductory chapter of this study), but whatever statistics are used in Germany, a specific German problem (as a consequence of the federal structure and the reunification) has to be pointed out beforehand: Although prison and court statistics are prepared and provided by a federal office (Federal Statistical Office, "Statistisches Bundesamt"), the individual Federal States have to collect and provide the data. As it took the Federal States in the East a few years after the reunification to implement the collection routines, longitudinal comparisons still only make sense for Berlin and the Federal States in the West. This is why the reader should look carefully (also in this report) whether only data from the "Old Länder" is used, or for Germany as a whole.

All prisoners without a final sentence are counted as "pre-trial detainees"; in the German understanding, there is no difference between untried prisoners during the investigation or in the first trial stage, and prisoners without a final sentence during the appeals procedure. In recent years, in the SPACE I statistics,[19] data for both groups can be found for Germany. The rates per 100,000 of the population according to the CoE statistics show that pre-trial detainees during the appeals procedure form only a small part of the total number of pre-trial detainees: In 2005, the rate of all pre-trial detainees was 19.2 and that of untried prisoners 18.7. In 2006, these rates were 18.2 and 17.7 respectively.

The German authorities provide for statistics concerning the number of pre-trial detainees and sentenced prisoners. With respect to the length of detention and the grounds for detention, statistics also exist for all suspects who were officially charged. However, we do not have any data concerning persons who were arrested but not charged because of a lack of evidence, nor concerning persons who were released because the ground for detention ceased to exist or because they were deported during the investigation period.[20]

16 For detailed references, see Meyer-Goßner 2007, § 147 ref. 25a.
17 Summing up (in English): Dünkel 1994.
18 The reform was meant to strengthen the federal character of Germany ("Föderalismusreform").
19 Aebi/Delgrande 2007, table 5.
20 Although this is probably only a small number of cases, Heinz 2008, 2.2.5.

Table 1: Characteristics of the prison population (latest data from different sources)

Source	Date	Total prison population	Number of remand detainees	Pre-trial detainees as a percentage of the total prison population	Total prison population rate per 100,000	Pre-trial detention rate per 100,000	Foreigners in prison[21] (numbers and percentage)		Female prisoners (numbers and percentage)		Prisoners in youth prisons[22] (numbers and percentage)	
							All prisoners	Remand detainees	All prisoners	Remand detainees	All prisoners	Remand detainees
ICPS[23]	31 August 2008	73,203	11,713	16%	89	*15*	---	---	*3,880* 5.3%	---	*3,075* 4.2%	---
SPACE I (Council of Europe)[24]	31 March 2006	79,146	14,634	18%	96	18	21,263 26.9%*	6,483 44.3%**	4,061 5.1%	---	---	---
National Statistics[25]	31 March 2008 31 August 2008	75,056 73,203	12,358 11,709	16.5%	90.8	17	Only sentenced: 14,235 22%	---	3,999 3,916 5.3%*	648 627 5.2%**	6,326 6,110 8.4%*	1,849 1,699 15%**

--- no data available; *: of all prisoners; ** of all remand detainees; data in italics represents own calculations

21 See paragraph 8.3 for explanations, in particular with regard to citizenship.
22 This data concerns all prisoners in juvenile prisons; they can be up to 25 years of age. The data for remand prisoners is specified: 558 are under 18, 1,291 are under 21.
23 ICPS 2008.
24 Aebi/Delgrande 2007.
25 Statistisches Bundesamt 2008 and 2008a.

Figure 1a: The prison population according to legal status (absolute numbers), 1962-2008: Old Federal States[26]

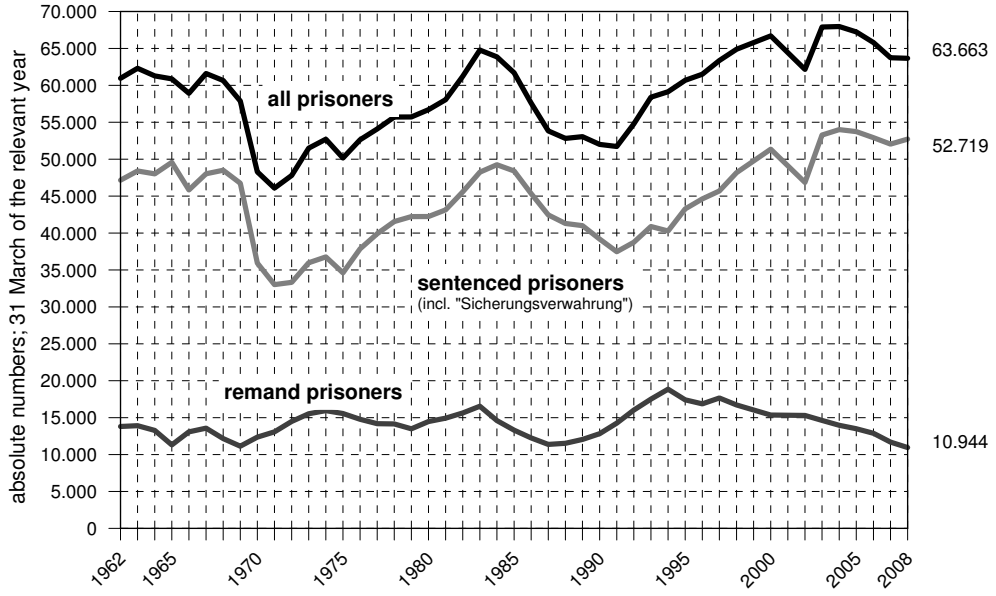
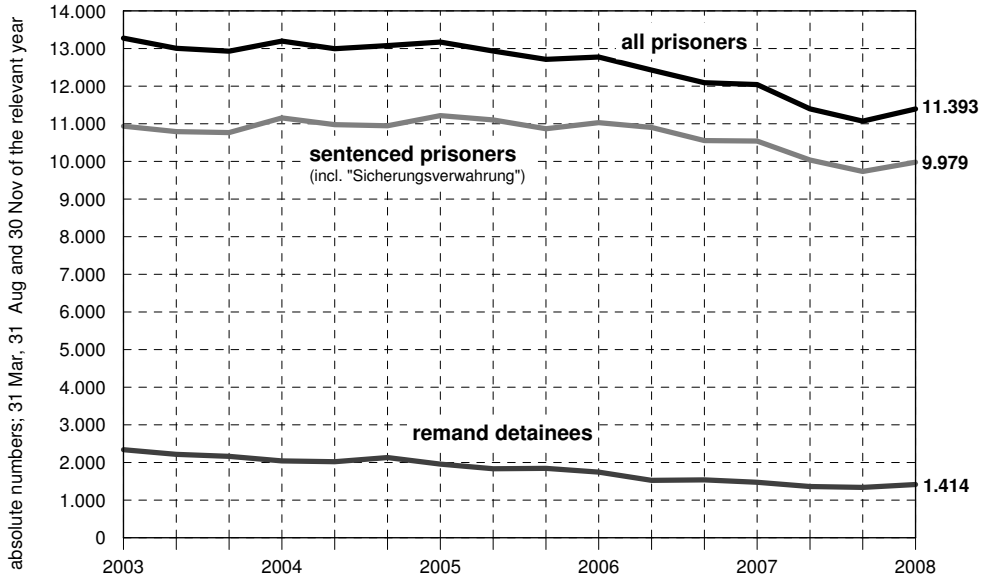


Figure 1b: The prison population according to legal status (absolute numbers), 2003-2008: New Federal States[27]



In the longitudinal overview (Figures 1a and 1b), we can see that the absolute numbers of pre-trial detainees have fallen since 1962 – this could be regarded as a success, because overall crime rates have risen significantly.[28] But a closer look reveals that the situation could be better and, in fact, has been better: In round figures, the number of pre-trial detainees (relating to a due date) rose and fell in the 1960s, then increased significantly from about 11,000 in the early 1970s to 15,000 in 1975. After a period of decline, it rose to more than 16,000 in 1982. In the following years, the number dropped significantly to less than 12,000 in July 1987, after which it started to climb again. In 1994, a new "high" was reached, with almost 19,000 pre-trial detainees. Since then, the numbers have fallen, slowly but steadily, to a level of less than 12,000. Therefore, it can be said

26 Statistisches Bundesamt 2008 and 2008a, and the respective statistics for earlier years.
27 See previous footnote.
28 For more details, see Federal Police Statistics (English version) 2006, p. 18 (available at www.bka.de).

that pre-trial detention rates, in particular in the last ten years, do not follow the overall trend of prisoner rates (see Figures 1a and 1b – the prisoner rates have risen significantly over the last decade), even if their increase seems to have come to a halt.

The rise in the early 1990s coincided with the reunification of the two parts of Germany, the opening of the borders towards Eastern Europe, and widespread amnesties in Eastern Germany. This was accompanied by a strikingly harsh use of pre-trial detention in the former "border-states" to the German Democratic Republic Hesse, Niedersachsen and Bayern as well as the big cities Hamburg, Berlin and Bremen, whereas pre-trial detention rates remained more or less stable in the rest of Germany.[29] As we do not have comparable data for the new Länder in the East, Figure 1b only shows the development from 2003 to the Spring of 2008. Here again, we see a decrease in the number of remand prisoners, from about 2005 onwards. But in the East, this went along with a decline in the overall prison population starting in 2005. This might be a result of the demographic development in these five Federal States. Due to the economic situation, a lot of people migrated from the East to the states in the West, mostly the South-West and the city states. From 1991 to 2005, on balance, 949,000 people left the East.[30] As these were mainly young, employable people – the group also predominant in the prison population – the number of potential pre-trial detainees has diminished significantly. The critical and cautious use of pre-trial detention that could already be observed as a reaction to the above-mentioned critical discourse during the 1980s (which resulted in decreasing rates until 1987)[31] was slowly regarded as appropriate again during the late 1990s; it has since dominated the overall use of pre-trial detention – with some reservations concerning specific groups (see below).

As mentioned before, important differences in the use of pre-trial detention can be found between the different parts of Germany. To be able to make a comparison, the "remand prisoner rate" (remand prisoners per 100,000 of the population) has to be taken into account. Data by the sources mentioned above for 2006 was used for own calculations: The average rate for Germany was 17.8, the average rate for the Old Federal States was 18.7, and for the New Federal States 13.1.[32] The huge differences found here can only partly be explained by the much higher exposition to crime e.g. in the urban areas of Berlin, Hamburg and Nordrhein-Westfahlen. For the difference between Schleswig-Holstein (with a pre-trial detention rate of 8.8) and Bayern (with 23.5), both rural states with only few big cities, other reasons – in the area of general criminal policy – have to be found. If we compare rates over time, however, the above-mentioned trend of generally decreasing pre-trial detention rates can be confirmed for each single Federal State, with the exception of the "border state" Saarland (2000: 17.5, 2006: 20) and Hamburg (with its practically stable rate – 33.6 in 2000 and 33.7 in 2006 – which is, at the same time, the highest in Germany).

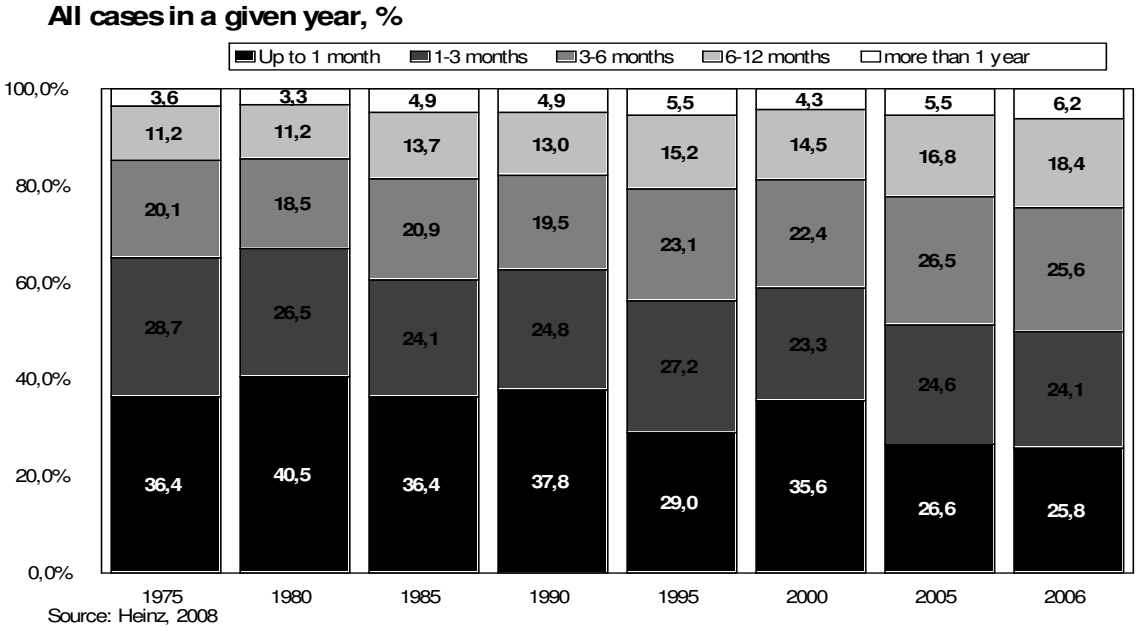
Pre-trial detention numbers can also be looked at from another point of view – by taking all prisoners and then identifying the share of pre-trial detainees in a given year. The picture is somewhat different here, because this percentage is rather stable, decreasing slightly only over the last years. As indicated before, the numbers of pre-trial detainees decreased in the 1980s under the influence of a critical discourse advocated openly by the then Federal Minister of Justice.[33] This is reflected in the fact that in 1990 only 3.7% of all convicted prisoners had been detained pending trial. However, a closer look at the development in the 1990s reveals that since then the percentage increased significantly to 5.0% in 1999; this can be explained partly as a reaction to crimes committed by foreigners.[34] Only between 2004 and 2006, we can find a slight decrease (back to 3.7%) again. A final point concerning statistics is related to the outcome of the criminal procedure – the final sentence. Almost all persons in pre-trial detention were eventually convicted: Only 0.9% (2006) of the pre-trial detainees were acquitted, compared to 2.7% in all criminal procedures. But statistical data for the Old Federal States and Berlin reveals that only 55.7% of the pre-trial detainees (both juveniles and adults) were sentenced to an unconditional prison sentence. The rest received a suspended prison sentence (about 40%) or even a fine (about 10%). This problematic practice has not changed significantly over the last thirty years. Therefore, a

29 For more details, see Dünkel 1994, 137 et seq.
30 Statistisches Bundesamt 2007, p. 18.
31 Hilger 1989, 107 et seq.; Dünkel 1994, 137 et seq.
32 Detailed data for all Länder can be found in Dünkel/Drenkhahn/Geng.
33 Engelhard 1986, as cited in Dünkel 1994, 143.
34 Heinz 2008, 77.

considerable number of persons detained "experiences imprisonment only in the form that can just be regarded as adversarial to the rehabilitation ideal".[35]

Figure 2 and Table 3 show the length of pre-trial detention in the western Federal States between 1975 and 2005. Although the number of pre-trial detainees has decreased recently, the detention periods have become longer; in particular, the share of persons being detained for six months or more has increased over the past thirty years. At the same time, it must be acknowledged that the share of persons detained, compared to all convicted persons, has decreased. This could be explained by the fact that courts order pre-trial detention (only) in cases that are more severe and/or more complicated; therefore, the proceedings and pre-trial detention last longer.

Figure 2: Length of pre-trial detention in West Germany 1975-2005



Source: Heinz, 2008

35 Heinz 2008, 83.

Table 3: Pre-trial detention – cases and length (Old Federal States and West Berlin; since 1995 Berlin as a whole)[36]

	All suspects (persons in the "Strafverfolgungs-statistik")	Persons detained pending trial	Length of pre-trial detention				
			Up to 1 month	1-3 months	3-6 months	6-9 months	More than 1 year
1975	868,821	42,105	15,317	12,066	8,458	4,735	1,529
1980	947,434	37,401	15,138	9,900	6,919	4,176	1,248
1985	955,698	31,036	11,297	7,494	6,479	4,250	1,516
1990	893,240	27,553	10,410	6,828	5,386	3,588	1,341
1995	951,064	36,070	10,452	9,749	8,332	5,495	1,997
2000	923,760	36,683	13,049	8,531	8,206	5,310	1,587
2005	980,936	27,252	7,247	6,717	7,214	4,587	1,487
2006	947,837	24,352	6,272	5,869	6,227	4,485	1,499
		percentage of all persons convicted					
1975		4.8	36.4	28.7	20.1	11.2	3.6
1980		3.9	40.5	26.5	18.5	11.2	3.3
1985		3.2	36.4	24.1	20.9	13.7	4.9
1990		3.1	37.8	24.8	19.5	13.0	4.9
1995		3.8	29.0	27.2	23.1	15.2	5.5
2000		4.0	35.6	23.3	22.4	14.5	4.3
2005		2.8	26.6	24.6	26.5	16.8	5.5
2006		2.6	25.8	24.1	25.6	18.4	6.2

The following table and figures relate to special parts of the (remand) prison population and provide additional information to Table 1. According to statistical data (see Figure 3 and Table 4), not only fewer adults, but also fewer adolescent and juvenile suspects are detained in German prisons. (Please note: Table 1 shows the number for Germany as a whole, Figure 3 and Table 3 only for West Germany!)

36 Source: Heinz 2008.

Figure 3: Pre-trial detainees according to age group, West Germany, 1970-2008

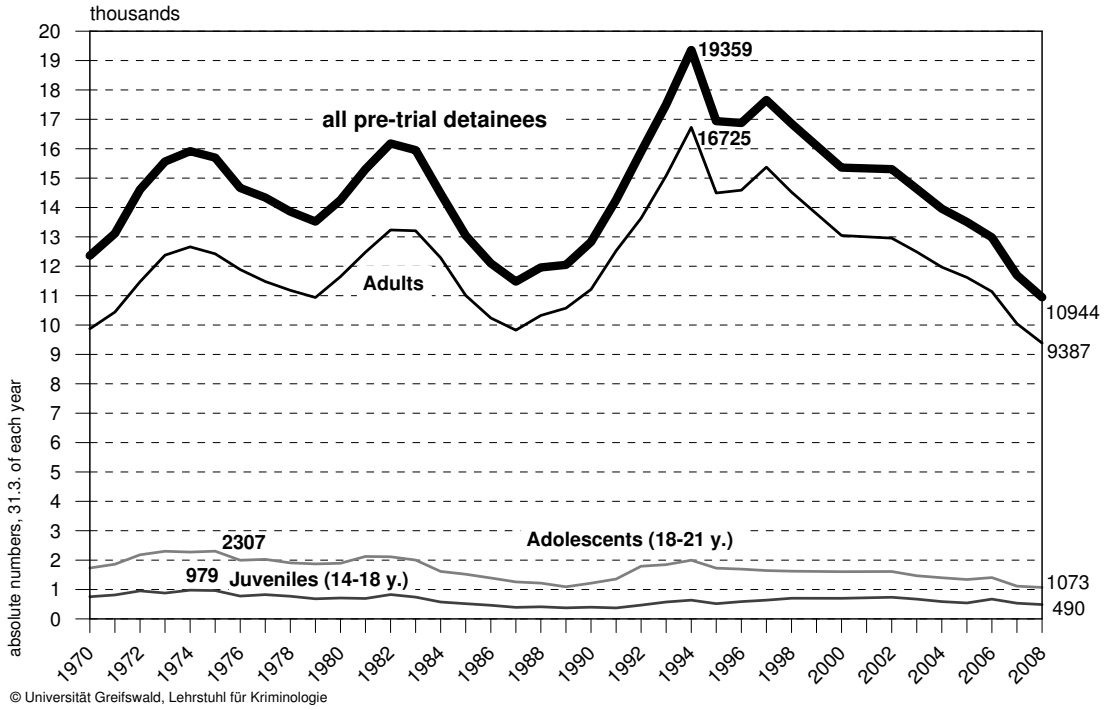


Table 4: Adolescents and juveniles in pre-trial detention, West Germany, 1990-2008

	Adolescents	Juveniles
1990	1,215	400
1992	1,791	471
1994	1,997	637
1996	1,697	592
1998	1,626	703
2000	1,609	702
2002	1,613	737
2004	1,401	588
2006	1,408	674
2008	1,073	490

Female prisoners form only a very small proportion of all prisoners, with an average of roughly 5.0%. The same holds true for female pre-trial detainees (see Tables 1 and 5). This leads to the problem that female prisoners in pre-trial detention are often kept either quite isolated or – if accommodated in larger prisons designed only for female prisoners – further away from friends and family, with the risk of even more limited contact with the outside world (for details, see below).

Table 5: Prison population according to legal status and gender, absolute numbers and shares, 2003-2008[37]

	All prisoners	Female prisoners		All pre-trial detainees	Female pre-trial detainees	
	Number	Number	Percentage	Number	Number	Percentage
2003	81,176	3,882	4.8	16,973	907	5.3
2004	81,166	4,125	5.1	15,999	861	5.4
2005	80,410	4,035	5.0	15,459	815	5.3
2006	78,581	4,104	5.2	14,634	799	5.5
2007	75,756	4,068	5.4	13,169	727	5.5
2008	75,056	3,999	5.3	12,358	648	5.2

As regards foreigners, no data on the exact citizenship of pre-trial detainees is collected officially. Therefore, the author of this report tried to obtain data from the Ministries of Justice of the sixteen Federal States. As can be seen below, not all Ministries replied, so no valid statements for Germany as a whole can be made. The preliminary result for fourteen states, however, seems to be in line with the data from SPACE mentioned above, stating that around 41% of all pre-trial detainees are foreigners. Additionally, it shows that the average share of EU citizens in pre-trial detention is about 15.8% of the total pre-trial population. However, it must be kept in mind that the percentage of detained foreigners differs enormously between the Federal States.

Table 6: Foreign pre-trial detainees according to origin, 2008[38]

Federal State	Pre-trial detainees	Foreign pre-trial detainees		Foreign pre-trial detainees from other EU Member States	
	Number	Number	Share (of column 2)	Number	Share (of column 2)
Baden-Württemberg	1,600	763	48%	279	17%
Bayern	2,537	1,095	43%	474	19%
Berlin	739	408	55%	124	17%
Brandenburg	220	50	23%	31	14%
Bremen	---	---	---	---	---
Hamburg	359	205	57%	54	15%
Hessen	950	523	55%	207	22%
Mecklenburg-Vorpommern	215	21	10%	14	7%
Nordrhein-Westfahlen	---	---	---	---	---
Niedersachsen	917	322	35%	90	10%
Rheinland Pfalz	357	137	38%	36	10%
Saarland	136	38	28%	18	13%
Sachsen	491	136	27%	64	13%
Sachsen-Anhalt	202	34	17%	10	5%
Schleswig-Holstein	203	69	34%	22	11%
Thüringen	220	26	12%	9	5%
Total (14 Federal States)	8,914	3,687	41.4%	1,411	15.8%

37 Source: Statistisches Bundesamt 2008 (31. March of the respective year) and own calculation.

38 Source: direct communication with the Ministries of Justice of the respective Federal States; data for 31 March 2008, except for Hamburg (24 July 2008); Schleswig-Holstein, Mecklenburg-Vorpommern (31 July 2008), Sachsen-Anhalt (31 August 2008), Rheinland-Pfalz (31 August 2008).

3. Legal basis: scope and notion of pre-trial detention

3.1 Definition of pre-trial detention

"Untersuchungshaft" in German law is the deprivation of liberty of an untried or not yet finally convicted person. Therefore, the term "pre-trial detention" used in this text is, in principle, not correct, because Untersuchungshaft comprises a longer period: not only the pre-trial phase but also the period of detention during an appeals procedure. This has to be borne in mind when the term "pre-trial detention" is nevertheless used due to the uniformity within the research project. Translations e.g. of the Code of Criminal Procedure generally use the term "remand detention" instead.

A person can be detained under different circumstances: In criminal law, he or she might be arrested and detained as a suspect or detained as a convict. With regard to the CCP, arrest and pre-trial detention are the focus of this report. Within the CCP and the police laws (regulating preventive action by the police), however, other grounds for detention exist: A person can also be detained by the police for the purpose of establishing his/her identity, in which case a time limit of twelve hours is provided for in Sec. 163c CCP.[39] According to the respective police laws of the Federal States, persons can also be detained in police establishments for longer periods and for other reasons than the investigation of criminal offences (e.g. for administrative offences), ranging from four days to two weeks with judicial authorisation (this is, however, rarely used). Foreign nationals may be detained (with judicial authorisation) in police establishments pending their removal from Germany ("Abschiebehaft"), on the basis of the aliens legislation (Residence Act, "Aufenthaltsgesetz" from 2005, before: Foreigners Act, "Ausländergesetz"). In practice, such persons are usually transferred at the earliest opportunity to a designated detention facility for foreign nationals (i.e. a detention centre for foreigners or a special unit in a prison establishment).[40] Other possible forms of detention (as coercive under civil or administrative law) do not play a role in practice.

3.2 Primary objective of pre-trial detention and underlying principles

According to German law and doctrine, the only objectives of pre-trial detention are to ensure the public right to a thorough investigation of a crime, to ensure a criminal procedure according to the rule of law, and – if applicable – to ensure the execution of the sentence.[41] The technical aspect of ensuring the presence of the accused during the trial (as part of due process) seems in practice to be in the foreground: In German criminal procedure, trial and conviction "in absentia" are not possible. This view is also supported by the fact that pre-trial detention is usually substantiated by the risk to abscond (see paragraph 4). Nevertheless, the prevention of new (serious) crimes is also accepted as one objective of pre-trial detention, although several scholars[42] are highly critical about that preventive aim, because it is incoherent in the system, in particular with regard to the presumption of innocence (see paragraph 4).

The mentioned purposes may justify the interference with an individual's right to liberty, but they are limited by the presumption of innocence (Art. 6 II ECHR). The public need for effective law enforcement and the individual's human right to liberty (Art. 2 II GG) always have to be balanced, because they are of equal value. According to case-law of the Federal Constitutional Court, this means: "Pre-trial detention has to be dominated by the principle of proportionality when it is ordered and when it is enforced."[43] This decision originates from 1966.[44] In 1964, the Code of Criminal Procedure was reformed with regard to pre-trial detention; the principle of proportionality was incorporated in § 112 I 2 CCP (see paragraph 5). It is repeated in § 116 CCP (see paragraph 7), dealing with less invasive substitutes to detention, and in § 120 CCP, which stresses that continued detention must be weighed regularly against the expected sentence or measure: In the course of prolonged detention, the individual's right to liberty gains more and more weight. This also follows from the imperative of a speedy procedure (in particular in cases of detention), which, in principle, governs the German Criminal Procedure. Summing up: The three

39 And of six to twelve hours in accordance with the police laws (administrative laws) of the Länder.
40 For more details, see Dünkel/Gensing/Morgenstern 2007, 376 pp.
41 BVerfGE 19, 342 (348); BVerfGE 32, 87 (93); Meyer-Goßner vor § 122 Rn 4.
42 Paeffgen 1986, p. 138 pp.; Roxin 1998, p. 246.
43 BVerfGE 19, 342 (347).
44 The decision dealt with the "gravity of the offence" as a ground for detention. See paragraph 4.1 (d).

mentioned human rights aspects (doctrine of proportionality, speedy procedure and the presumption of innocence) that are anchored in the constitutional "Rechtsstaatsprinzip" (rule of law) as well as in Art. 5 III 2 and 6 II ECHR were incorporated in the CCP in 1964 and demand that, if there is little likelihood of the imposition of an unconditional prison sentence, pre-trial detention must not be ordered. Where a prison sentence is likely, the period of pre-trial detention must not outweigh its objective – to ensure the criminal procedure and, finally, the serving of the sentence (so-called "prohibition of excess").[45]

3.3 The period of pre-trial detention: beginning and end

As mentioned above, after arrest, the police can hold a suspect on their own authority or on behalf of the public prosecution only until the expiry of the day following that of the apprehension. The police then has to release the suspect or bring him or her before the judge of investigation (Art. 104 II GG; § 128 I CCP). This means that the maximum period of police detention without judicial authorisation is 47 hours and 59 minutes (if the suspect is arrested at midnight of a given day). This maximum period should not be (and in practice is not) exhausted; the police and the public prosecutor must strive for a presentation before the judge as soon as possible. Although this is a critical point, according to case-law of the Supreme Court ("Bundesgerichtshof"),[46] the police may use this time to collect evidence and to interrogate the suspect – there is no obligation to bring the suspect before the judge immediately.

The judge then decides whether to uphold the detention, provided that he shares the view that sufficient grounds for a warrant ("Haftbefehl") exist. If that is the case, the provisional arrest passes into pre-trial detention (§ 128 II 2); this takes place in a prison designated for pre-trial detainees or in a separate section of a regular prison. If the suspect was unknown or absconding while the warrant was issued, pre-trial detention may start immediately. If in such a case the person is apprehended, a hearing before the investigating judge also has to take place as soon as possible (§ 115), but this may be postponed until the next day. However, it has to be borne in mind that the decision to uphold the deprivation of liberty must always be taken within 48 hours.

According to German law, pre-trial detention then lasts until release (when the arrest warrant is revoked or expires) or until the final conviction. That means that during the stage of appeal the detainee keeps his legal status (as a consequence of the presumption of innocence) and is not part of the category of convicted prisoners. A general time limit in the pre-trial phase is set to six months; the detention period can be extended under certain circumstances (see paragraph 6).[47]

It is possible that two or more arrest warrants against one person exist, concerning several alleged crimes. If this is the case, only the first warrant is enforced; the others are kept in the suspect's file ("Überhaft").

45 An overview of the different aspects of the doctrine of proportionality with regard to pre-trial detention is given by Paeffgen 1986, 156 pp.

46 BGH NStZ 1991, 195; this decision was harshly critizised by some scholars.

47 It has to be noted, however, that the time counts from the day the detention actually begins; the time between apprehension and detention (max. 48 hours) is not counted: Meyer-Goßner § 121 ref.4.

Table 2: Timeline for arrest and remand detention in Germany

TIME Max.	PROCEDURAL ACTION OR EVENT	LEGAL BASIS	WHO? (competent authority to decide)	WHERE?
0.00	(Provisional) arrest	§ 127 CCP	§ 127 (1) CCP, citizens' arrest: Anyone, if the person is caught in the act or immediately after § 127 (2) CCP: Police officers and Prosecution Service in cases where a ground for detention and "imminent danger" for the objective of detention exist, but the judge cannot be reached in due time	Police station (Ministry of the Interior)
Without undue delay, at the latest after 48 hours	Request for an arrest warrant Hearing and decision to issue an arrest warrant and maintain detention (otherwise release)	§ 125 CCP § 128, 115 CCP	Public prosecutor Investigating judge of the Local Court ("Amtsgericht")	
6 months	Pre-trial/remand detention First instance judgement must be rendered within 6 months			Remand prison or remand section of a regular prison (Ministry of Justice)
More than 6 months (no further limit applies)	Extension in cases of particular complexity or extent (otherwise release); examination of grounds for detention every 3 months	§ 121 CCP	§ 121 (2), § 122 (4): Higher Regional Court ("Oberlandesgericht")	

3.4 Competent authorities for arrest/further detention etc.

An overview of competent authorities during the different stages of detention can be taken from Table 2. Art. 127 et sqq. CCP regulate the details concerning arrest and pre-trial detention. Anyone, that means every citizen as well as every police officer, has the right to temporarily arrest *in flagrante delicto* (§ 127a CCP, see below). The public prosecutor and the police are further able to arrest a person in case of imminent danger, if the requirements for a warrant are met. If a suspect, according to the assessment of the police, cannot be released, he or she can be detained in a police station until the end of the following day. The suspect must then be presented to the competent judge (the "Ermittlungsrichter", investigative judge). If the competent judge (§ 115 StPO)[48] cannot be reached, the suspect must be presented to the judge of the nearest Local Court (§ 115a StPO). Several (often neglected problems) arise from the fact that this judge only has limited competences to decide, so that in some cases the suspect might have to wait for a decision on his detention until he has reached the competent judge, which, for various reasons, can take several days.[49]

The competent judge has to decide on maintaining the detention. The Higher Regional Court ("Oberlandesgericht") is competent for the decision to extend remand detention for a period of six months, according to § 121 (2) CCP. With regard to necessary measures or restrictions, the investigative judge who issued the arrest warrant stays competent, §§ 119 (6), 126 CCP (as a so-called "Haftrichter"); urgent measures can be taken by the public prosecutor or the prison administration (these have to be confirmed by the judge later). As will be explained below, the few statutory provisions for the enforcement of remand detention are complemented by an ordinance all Federal States have agreed upon ("Untersuchungshaftvollzugsordnung"). They are usually enforced by the competent judge as the relevant guidelines for the respective case.

3.5 Procedure and procedural rights of the accused at the time of arrest/during detention

After apprehension by the police, the suspect has to be questioned as soon as possible. To this questioning, the normal rules apply. This means that the suspect has to be told which offence he is being charged with, and that he is informed of his right to silence and of the fact that whatever he says may be used against him in a future trial (§§ 136 pp., § 163a CCP). The suspect must also be told that he can contact a lawyer in person or through an investigating official. Assistance of a defence counsel can be obtained at any stage of the procedure, meaning that the suspect can communicate with a lawyer before the first interrogation (§ 136 (1) CCP). No restrictions apply. In several cases, a defence counsel is mandatory, for instance. if the suspect or accused has been in detention for at least three months.

Art. 104 (4) GG stipulates that a close person has to be notified of the judicial decision to detain a suspect. This is repeated in § 114b CCP. The notification to the suspect's relatives (or, in cases of foreign citizens, to the embassy or consulate) is given by the judge without undue delay, at the latest after 48 hours. This is mandatory; the suspect cannot waive this right.

The arrested person is brought before the investigative judge as soon as possible to be heard, §§ 128, 115 (3) CCP. The arrest warrant has to be issued in written form according to § 114 CCP. It must contain the facts that substantiate the suspicion as well as the ground for detention. It is important to note that the warrant must state why a milder measure was not deemed sufficient (only) in cases where the suspect has requested so or where it is obvious that detention might touch upon the principle of proportionality (§ 114 (3) CCP).

With regard to the procedural rights, in recent years, one point has particularly been disputed in Germany: The CCP states that, in principle, the defence counsel is entitled to inspect the case files (a suspect who does not have a lawyer is only entitled to receive certain information). But in most (if not all) jurisdictions, the right of access to the files can be restricted until the end of the pre-trial period if and in so far as access to the case files might impede the investigation according to § 147 (2) CCP.

However, Germany lost several cases before the European Court of Human Rights[50] in Strasbourg because the CCP did not guarantee an unrestricted way of contesting the reasons for

48 This is the judge who issued the arrest warrant or – in cases where no arrest warrant yet exists – the judge of the Local Court of the place of arrest.

49 Schmitz 1998.

50 Erdem vs. Germany, No. 38321/97, 5 July 2001; Lietzow vs. Germany, No. 24479/94, 13 February 2001; Garcia Alva vs. Germany, No. 23541/94, 13 February 2001.

arrest and detention, and thus Art. 5 (4) ECHR was infringed. The last of these decisions[51] concerned a case in which the defence counsel had applied for a review of detention at the Local Court ("Amtsgericht") and, at the same time, requested access to the public prosecutor's files. The defence counsel argued that he needed to see the files to be able to assess whether the legal prerequisites for detention were met. The public prosecutor had refused access to the files completely, because otherwise the investigation would have been impeded. The European Court of Human Rights, with reference to the former decisions, objected to this refusal and ruled that a detained suspect or accused must have access to the relevant information at least to the extent that would enable him to argue against the lawfulness of his detention. In the meantime, a bill changing the provisions accordingly was drafted by the Ministry of Justice[52] and accepted by the government. It will now be presented to Parliament for debate.

4. Grounds for pre-trial detention

4.1 Grounds for arrest

The justification for an initial arrest has to be distinguished from the justification for detention. According to § 127 (1) and (2) CCP, a person can be arrested if:

- he or she was caught in the act or immediately after and it can be believed that he or she will abscond or the identity cannot be established at once;
- all prerequisites for an arrest warrant are given but imminent danger for the procedure does not allow waiting for such a judicial order.

4.2 Grounds for detention and further preconditions

a) According to § 112 (1) CCP, besides one or more grounds for detention, an "exigent suspicion" has to justify detention. This means that the degree of suspicion has to be even higher than for the bill of indictment – at the moment of the issuance of the arrest warrant, it must be highly probable that the suspect or accused committed the crime, that he is fully or partly responsible, that no legal justification applies, all investigated evidence can be used etc.[53]

b) As mentioned above, pre-trial detention may only be applied in conformity with the principle of proportionality. This is also made clear in § 112 (1) CCP, according to which detention may not be ordered if "it is not in proportion with regard to the importance of the case and the punishment that can be expected". Explicit thresholds, as far as they exist, will be presented after discussing the grounds for detention.

c) No mandatory grounds for detention exist. The (closed) catalogue of possible grounds for detention can be found in § 112 (2) and (3), and in §112a CCP. Every ground, in particular the presumption of a "risk", must be substantiated by facts. The grounds are:

- flight/hiding, or the risk of absconding or hiding ("Fluchtgefahr");
- tampering with evidence by obstructing evidence or collusion ("Verdunkelungsgefahr");
- the gravity of the crime ("Schwere der Tat");
- the need to prevent new similar crimes ("Wiederholungsgefahr").

With regard to the gravity of the crime as a ground for detention, the listed crimes are genocide, formation of a terrorist organisation (§ 129a Penal Code; this came into force as an amendment in 1976, as part of the "Anti-Terrorist Laws" of the 1970s, directed against the German left-extreme terror groups), murder, homicide, assault[54] with deadly consequences, and arson with deadly or very serious consequences. The wording of the law foresees that in those cases no further ground for detention is necessary to detain a suspect. However, the Federal Constitutional Court ruled that this provision – to keep it in conformity with the Constitution – has to be interpreted differently, namely that even in the cases mentioned, a (lesser) degree of risk of absconding must be

51 Mooren vs. Deutschland, No. 11364/03, 13 December 2007 (now transferred to the Grand Chamber).

52 Press Release by the Ministry of Justice of 3 November 2008, www.bmj.bund.de. The bill is also available for download on this website (last retrieved 2 February 2009).

53 Meyer-Goßner § 112 ref. 5.

54 Since the Verbrechensbekämpfungsgesetz of 28 October 1994, "intentional serious bodily injury", § 226 II PC, is included in § 112 III CCP.

found.[55] As these verdicts by the FCC have a binding character, also in cases of grave crime, the judge has to check whether any risk of absconding exists – usually, he will be able to reason that the threat of lifelong imprisonment or another very long custodial penalty constitutes a sufficient stimulus for absconding or hiding. Although the decision of the FCC saves the provision from being unconstitutional, it has been criticised by scholars for being a reconstruction rather than an interpretation.[56] The restriction is quite weak; in the reception of the decision, courts go as far as stating that § 112 (3) CCP provides for the assumption that pre-trial detention can be applied in the grave cases mentioned in the law.[57] Critics also argue that, even in the restrictive interpretation of the FCC, the suspect carries the burden of proof with regard to the existence or non-existence of the risk of flight: Judges only have to reason that (and why) in the actual case the risk of flight cannot be excluded; to argue against this requires considerable argumentative efforts.

The risk of committing new crimes as a ground for detention (§ 112a CCP) can also only be used for certain crimes, but the catalogue differs from that in § 112 (2) CCP. As mentioned above, this ground for detention is questioned by scholars,[58] because it is preventive by nature and incompatible with the concept of securing the proceedings as well as with the presumption of innocence (see above). Nevertheless, it is accepted by Art. 5 (3) ECHR) and the German legislator, who introduced the highly controversial ground to prevent the repetition of crimes in cases of certain sexual, violent and property offences. This ground has been amended and extended several times – obviously being more easily affected by criminal policy tendencies – by just adding new offences to the list. Currently, two types of "Wiederholungsgefahr" must be distinguished: If a person is suspected or accused of having committed a serious sexual crime or "stalking",[59] it is sufficient that there is a risk of repeating a similar offence or continue with the alleged offence. If a person has several times or continuously been involved in serious cases of riot, assault or burglary, robbery, professional and organised concealment, fraud, arson, or certain drug offences, he may be detained, if there is a (substantiated) risk that he will repeat a similar offence or continue with the alleged offence.

d) A few concrete thresholds with regard to the principle of proportionality can be found: Detention may only be based on the risk of re-offending in the second type of "Wiederholungsgefahr" mentioned above, if a concrete prison sentence of more than one year can be expected (§ 112a (1) CCP). If the offence only carries a maximum penalty of six months of imprisonment or a fine of 180 day rates (very few offences in the Penal Code do, most of them have a much higher upper limit), pre-trial detention may not be ordered on the ground of the risk of tampering with evidence (§ 113 CCP). Restrictions for juveniles are mentioned below.

e) Several more "grounds" for detention should be included in this report to be concise: First, if the accused is at large and does not appear for the trial, he may be summoned or – without further justification – an arrest warrant may be issued, § 230 (2) CCP. No formal time limits for detention are provided by law, so that the suspect can stay in detention for the rest of the trial (however, the overall principles for a speedy procedure in detention matters remain relevant). Secondly, in expedited proceedings, a new possibility of "arrest for the main hearing" (§ 127b CCP)[60] has been created. This allows detaining a person if a speedy conviction in the expedited procedure is probable and certain facts indicate that the arrested person would otherwise not attend the trial. Detention for up to one week is only possible if the person was arrested "caught in the act". The expedited proceedings are not used very often (see below), but they were relatively popular during the Football World Cup in 2006 and during the G-8 summit, in order to proceed quickly with foreign football hooligans and violent anti-globalisation activists. The provision is harshly criticised by scholars and, in particular, defence lawyers.[61] Thirdly, an "organisational" form of detention exists that is not foreseen by law at all, namely when the conviction has become final and the execution of the sentence should have begun (or, in case a security measure instead of a sentence

55 BVerfGE 19, 342. The constitutionality of this ground is still disputed by many scholars. See Dünkel 1994, p. 134.

56 Roxin 1998, p. 246.

57 References can be found in Meyer-Goßner 2008, § 112 ref. 38.

58 See above all Paeffgen 1986, p. 138 ff.; Roxin 1998, p. 247; Dünkel 1994 with further references.

59 This offence was introduced to the Penal Code (§ 238 PC) with the "Gesetz zur Strafbarkeit beharrlicher Nachstellungen (Stalking)" of 22 March 2007.

60 Gesetz zur Änderung der StPO vom 17.7.1997, introducing § 127 b CCP ("Hauptverhandlungshaft").

61 Stinzing/Hecker 1997.

was imposed, the person should have been transferred to a psychiatric clinic). This time is called "Zwischenhaft" or "Organisationshaft" (Interim detention or organisational detention). Although this type of detention is always counted as part of the sentence later on, problems may arise with regard to the legal status of the detained person during this period. Courts tend to acknowledge that it might sometimes be difficult to find a place for a person in due time, but still demand that all efforts are made to let the execution of the sentence start properly and as soon as possible. Usually, a term of up to three months is accepted.[62]

f) Finally, some empirical data (which may raise criticism) will be included in this part of the report. In Germany, the ground for detention applied the most is, by far, the risk of absconding.[63] In 2006, 93.1% of all cases were justified by this ground, 5.9% by the risk of tampering with evidence, 4.6% by the gravity of the crime (but, as we have seen, never as a stand-alone ground), and 9.2% by the risk of re-offending. (The total amounts to more than 100%, because two or more grounds may be applied at the same time.) The last-mentioned ground has gained popularity over the last years; traditionally, the percentage was much lower. Arrest prior to the main hearing in an expedited procedure was applied only in 0.2% of all cases where a main hearing was held.[64]
Another point concerning statistics is related to the outcome of the criminal procedure – the final sentence. Almost all persons in pre-trial detention were eventually convicted: Only 0.9% (2006) were acquitted, compared to 2.7% in all criminal procedures.[65] Much more problematic is the fact that in all cases of adult pre-trial detention only 55.7% (2006) of the detainees later received an unconditional sentence. The rest received a suspended prison sentence (about 40%) or even a fine (about 10%). This practice has not changed significantly over the last thirty years (see also above).

5. Review of pre-trial detention

The judicial control of detention in Germany is based on a two-track system providing two types of legal remedy. The detainee can use the normal appeals procedure ("Beschwere") to the higher court (§§ 303, 306 CCP); this can be done once.

Alternatively, the detainee can apply for judicial review of the warrant to the investigating judge ("Haftrichter"). This can be done repeatedly at any stage of the proceedings (§ 117 CCP, "Haftbeschwerde") and is not bound to any formal preconditions, as long as the arrest warrant or the prolongation of detention is contested, or a replacement of arrest by less restrictive measures is requested (see below). A hearing takes place if the detainee requests so (§ 118 CCP; no hearing is held if a hearing has already taken place in the review procedure and the new hearing is requested within less than two months from this first hearing). This judicial review precedes the normal appeal. In both procedures, the decisions are subject to further judicial review ("weitere Beschwerde"). The two-track system appears to be irritating; sometimes, it might not be clear to the detained person, in particular if he is not assisted by a counsel, which way is better – as the normal appeal ("Haftbeschwerde") is subsidiary to the judicial review, the latter makes it invalid if both are initiated at the same time. On the other hand, it might bring tactical advantages to be able to choose between different remedies to different levels of the judiciary.[66]

After three months, there is an *ex officio* judicial review if the accused has not applied for a review before and is not (yet) represented by a lawyer at that stage of the proceedings (a counsel has to be appointed now; see above).

After six months (the time limit set for normal cases), a judicial review must be instituted *ex officio* in any case if the public prosecutor requests the extension of detention. The review is carried out by the Higher Regional Court ("Oberlandesgericht"), § 122 CCP.

As mentioned before, the constitutional complaint to the FCC as an extraordinary legal remedy (after all regular remedies have been exhausted) is used relatively often in detention matters, partly contesting prolonged periods of detention, partly contesting restrictions during the enforcement of detention.

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62 See for more details Meyer-Goßner 2008, vor § 112 ref. 7.
63 Own calculation on the basis of the Strafverfolgunsstatistik (Statistisches Bundesamt 2008a). The data refers to adult cases only.
64 1,821 cases according to the statistics "Strafgerichte" for 2006, www.destatis.de.
65 Heinz 2008, 83.
66 Roxin 1998, p. 260; with regard to the problems, see also Dahs 2005, p. 246.

6. Length of pre-trial detention

According to the dominating German doctrine and case-law, the individual right to personal liberty gains more weight the longer the procedure (and the pre-trial detention) lasts.

Since the above-mentioned reforms of the CCP governing pre-trial detention, time limits have been established. The CCP requires that the normal duration of pre-trial detention may not exceed six months[67] and firmly establishes the imperative of a speedy procedure for cases of detention. However, German law sets no absolute maximum but allows longer periods of pre-trial detention if "the particular difficulty or the unusual extent of the investigation or another important reason do not yet admit pronouncement of judgment and justify continuation of remand detention" (§ 121 (1) CCP). Particular difficulties or extensive investigations in relation to an average criminal procedure are only accepted if a multitude of offences have to be examined, many witnesses have to be heard, comprehensive or complicated expertise has to be obtained, translations have to be made, or if the suspect does not make any statements (which, in itself, might be problematic with regard to the suspect's right to silence). "Another important reason" for longer pre-trial detention can only be assumed within strict limits. Case-law accepted such reasons e.g. in cases where young children – the alleged victims of sexual assault – had to be questioned with particular caution, in cases where the suspect changed his defence counsel very often, and in cases when important participants of the proceedings (such as the competent prosecutor or an important witness) were unavailable due to illness etc.[68]

As we can see in Figure 2, obviously quite a number of cases are "particularly difficult": Although the number of pre-trial detainees has been decreasing recently, they are detained for longer periods. While in 1975, only about one-third spent three months or longer in remand custody, by 2006 this had increased to half of the detainees. Even more important is the increasing share of detainees held in remand detention for six months or longer. This share has grown from about 15% to about 25% over the past thirty years.

The extensive case-law of the Higher Regional Courts ("Oberlandesgerichte", OLG),[69] responsible (§ 122 CCP) for deciding whether pre-trial detention should be extended after the six-month period has ended, as well as the case-law of the Federal Constitutional Court[70] underline that restricted resources and organisational difficulties are not a reason for prolonging pre-trial detention. Although details are much disputed,[71] failures and omission by the courts and/or the police and the public prosecution agencies cannot lead to continuing pre-trial detention, as long as the authorities are liable for them. If delays in the proceedings were avoidable, the warrant has to be revoked and the suspect has to be released. § 121 CCP is, first of all, meant to speed up the investigation process. According to the wording of § 121 (1) CCP, the judgment is decisive for the six-month limit, but § 121 (3) CCP stipulates that this deadline is postponed as long as the trial is pending. That means that the public prosecutor has to further the proceedings in a way that enables the court to begin with the main hearing within the six months (in other words, "once the

67 A Bill (2004) that foresaw a prolongation of that period to eight months was drafted, but did not succeed in the further legislative proceedings.

68 Many examples can be found in Meyer-Goßner 2007 § 121 ref. 18 pp.

69 Research analysing the judicial control of detention periods has been conducted in 1998 by Jehle/Hoch, and in 2007 the first results of comprehensive research by Dessecker, analysing published decisions by all higher courts between 1998 and 2007, were published.

70 Important decisions in that regard are BVerfGE 20, 45 and 20, 144 (149) from 1966 and a decision of the FCC (BverfG) published in Neue Juristische Wochenschrift (NJW) 2006, 652. These and other rulings are intensely discussed by scholars and practitioners. See e. g. Schmidt 2006, 313-317 and Jahn 2007, 255-265, who comment on several decisions in that matter by different courts.

71 In particular between the High Criminal Courts – the various OLGs and the Bundesgerichtshof (Supreme Court) – and the Federal Constitutional Court. The Criminal Courts and many practitioners (see Temming/Lange 1998, 62-66 and Schmidt NStZ 2006, 313-317) are of the opinion that the Federal Constitutional Court is blind with respect to the practical needs of everyday work, in particular in difficult criminal proceedings. Difficulties are often tied to either the gravity or extent of the offence (one of the much disputed cases was a multiple murder case) or to protracted action by the defence. The Constitutional Court itself insists on the need for a speedy procedure in all detention cases and argues that, according to the rule of law, even difficult proceedings must not continue over eight years (as in one of the cases) and have to be furthered by the courts in a concentrated manner.

main hearing has begun, the race against time is won");[72] according to § 121 (3) 2 CCP, a judgement is not necessary within that period. Nevertheless, the above-mentioned case-law has made it clear enough that lengthy trials with only one hearing per week can infringe the suspect's right to a speedy procedure that derives from Art. 5 III 2 ECHR as well as Art. 2 II 2 and 20 III GG.

Although the case-law, in particular that of the Federal Constitutional Court, seems to be far-reaching, in several cases, the European Court of Human Rights has examined violations with regard to Art. 5 ECHR due to an inadequate length of criminal proceedings and, therefore, unjustified length of pre-trial and remand detention.[73] In two cases, the Federal Constitutional Court had not even entertained the applicant's constitutional complaint before. In the last of the cases decided by the Court in that matter,[74] the ECtHR held that there had been no violation of Art. 5 III ECHR, although the applicant had been held in pre-trial detention for more than five years and six months. Before, he had been held in Lebanon awaiting extradition to Germany; after the conviction in first instance, he had been held in detention during the appeals procedure. The Court argued that the case involved a particularly complex investigation and that, therefore, exceptional circumstances justified the length of detention.

With regard to average proceedings, the case-law of the higher courts in general seems to have controlled the length of pre-trial detention – more than half of the pre-trial detainees are detained for a maximum of three months. But Figure 2 and Table 3 also show that the number of cases with longer terms of pre-trial detention has increased: In 1975, only 14.8% of all detainees were detained for more than six months; in 2006, the percentage had risen to 24.6. At the same time, it must be acknowledged that the share of persons detained, compared to all convicted persons, has decreased significantly (from 4.8% to 2.6%). This could be explained by the fact that courts order pre-trial detention (only) in cases that are more severe and/or more complicated; the proceedings and pre-trial detention, therefore, last longer. This assumption is supported by data (for West Germany and Berlin) with regard to the length of pre-trial detention for different offence categories (according to the final sentence): The long terms of remand custody appear in cases of more serious offences like homicide, sexual offences and robbery. In a study examining cases brought to the Regional Court ("Landgericht") in first instance (mostly capital crimes), the average length of pre-trial detention was between 280 and 295 days.[75]

7. Other relevant aspects

7.1 Consideration of pre-trial detention in the sentencing stage

According to § 51 (1) Penal Code, all the time the suspect or accused spent in detention prior to the final conviction has to be taken into account, be it police arrest, detention in surrender proceedings, detention pending expulsion etc. – as long as the detention took place on the basis of or in direct connection with the offence that is now being punished. The ration is 1:1, meaning that one day of detention counts as one day of a prison sentence (be it unconditional, be it conditional) or one day of a day fine. As basically no other sanctions are applied, no further problems emerge here. It must be noted, however, that electronic monitoring applied as a condition for suspending the arrest warrant would impose such a burden on the suspect or accused that it should be deducted from the sentence. How this could be done is not clear. With regard to the model project that will be described below, it transpired that the persons concerned – some having been under electronic surveillance for several months – particularly criticised this point.[76]

Two particularities apply: According to § 51 (1) PC, no deduction has to be allowed if deduction "is not justified because of the behaviour of the convict during trial". Case-law has

72 Temming/Lange 1998, 62.

73 Erdem vs. Germany, No. 38321/97, 5 July 2001 (detention of 5 years and 11 months); Cevizovic vs. Germany, No. 49746/99, 29 October 2004 (detention of 4 years and 9 months), and Dzelili vs. Germany, No. 65745/01, 10 February 2006 (detention of 5 years and 4 months).

74 Chraidi vs. Germany, No. 65655/01 of 26 January 2007.

75 Dölling/Feltes Strafverteidiger 2000, 174.

76 Mayer 2004, p. 24.

restricted this possibility to very serious incidents, e.g. escape or an attempt to escape during the trial that indeed led to a deferral of the trial.[77]

With regard to foreign detention, it is noteworthy that the German Penal Code (§ 51 (4) PC) generally stipulates that this has to be taken into account in the same way as German detention, but that the ratio can be different. According to the law, another (usually a more favourable) ratio can be chosen at the courts discretion (but based on some facts, e.g. reported bad living conditions in the foreign prison, imposing a heavier burden on the detainee than German detention would have done). Relevant case-law in this context is inconsistent, because evaluation criteria for measuring the conditions in foreign institutions are often missing or assessed very differently by the courts. Therefore, it can occur that, in the case of a prisoner who spent six months in pre-trial detention in Spain, one court deducts exactly six months from a full three-year sentence, while another court – taking the conditions of detention in Spain into consideration – could have deducted one year or even 18 months.[78]

7.2 Compensation

Compensation for unlawful or unjustified detention is granted under the provisions of the Compensation in Criminal Procedures Act ("Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen", StrEG) of 1971 in its 2001 version. It amounts to 11 Euros per day; in addition, financial losses can be compensated if they were caused by the detention. As the costs for accommodation and food during the detention might be deducted, the actual sum that is paid might be even smaller.

Compensation is granted if the detained person is acquitted or the procedure discontinued. It can be denied if the suspect or accused himself has given reason for the investigation by contradictory behaviour (false confessions etc.).

7.3 Alternatives to pre-trial detention

Unlike in other countries, German law does not foresee a range of different measures to secure the criminal procedure, one of which being detention. It is (at least theoretically) clear that detention should not be applied in cases where it is not absolutely necessary according to the principle of proportionality. However, it is possible to use the arrest warrant as a means to secure the proceeding without actually detaining the suspect (or by releasing him later) according to § 116 CCP, which states: "The judge shall suspend the execution of a warrant of arrest which had been issued only for risk of flight if less incisive measures sufficiently substantiate the expectation that the purpose of remand detention can be achieved thereby." The law specifies measures such as regular reporting, indicating a certain place of residence, the prohibition to contact other suspects or witnesses in the case, and bail as substitutions of the arrest warrant. The possibility of bail (according to § 116 (2) No. 4 CCP, "payment of an appropriate amount of money by the suspect or somebody else") is disputed with regard to equality before the law (Art. 3 GG) and, in fact, is usually only applied to wealthy suspects. It has to be acknowledged, however, that this measure seems to be not very popular in Germany, although no reliable data exists in this regard. Another measure that is not explicitly mentioned in the law but is used quite frequently (also with regard to foreigners) is the order to add the suspect's passport or ID to the files. Additionally, it should be noted that electronic monitoring is in theory possible as a condition, if the arrest warrant is suspended. Because there is still much scepticism amongst scholars and practitioners with regard to this far-reaching measure (which also affects the suspect's family), it is currently only used in Hessen (since the year 2000 – first as a pilot project but later on in the whole Federal State). According to the Minister of Justice of Hessen in a recent statement, most of the cases of electronic monitoring concern prisoners under probation, but about 25% are suspects for whom electronic monitoring is used as a supervision measure to avoid pre-trial detention.[79] As already pointed out above, one problematic point is the consideration of electronic monitoring with regard to the sentence – conditions connected to the suspension of the arrest warrant up to now are not considered, because they usually do not restrict the rights and liberties of the suspect to such an extent. This must be assessed differently with regard to electronic monitoring; otherwise (as has

77 The relevant case-law can be found in Lackner 2007, § 51 ref. 8.
78 A survey of the relevant (published) case-law can be found in Franke (2003) § 51 Ref. 24.
79 Bantzer 2009.

been the case in Hessen), it leads to an unjustified disadvantage for those being supervised. Another problem is that, even if the imperative to a speedy procedure and the duty to further the proceedings with special diligence also apply if the arrest warrant is substituted, the explicit time limits described above do not apply to electronic monitoring. In the model project, it could thus be seen that the proceedings took quite long. The researchers evaluating the model project, therefore, came to the conclusion that on the basis of the current legislation electronic monitoring is not suitable as an alternative to detention.[80] In the reform project planned to introduce electronic monitoring in the Federal State of Baden-Württemberg, it will therefore not be used as an alternative to pre-trial detention.[81]

7.4 Enforcement of pre-trial detention

The only statutory law governing the execution of pre-trial detention up to now is § 119 CCP.[82] This was widely and for a long time criticised by scholars and practitioners,[83] although a more comprehensive regulation in the form of an administrative ordinance ("Untersuchungshaftvollzugsordnung") exists that is uniformly used by all Federal States.[84]

§ 119 CCP contains the principle of segregation of remand and sentenced prisoners (as far as possible) and a provision stating that the detainee may only be subject to such restrictions that are required by the objective of pre-trial detention and the maintenance of the order of the institution. Far-reaching restrictions such as captivation must be ordered by a judge.

In September 2006, it was decided on the political level[85] that the execution of all forms of detention – be it pre-trial detention, be it imprisonment – should fall in the competence of the sixteen "Länder" (which is the case since 2008). This is why several Prison Acts and Pre-trial Detention Execution Acts[86] were drafted recently, although the fragmentation of parts of the legislation of criminal procedure is widely criticised and the problem becomes obvious when we look at pre-trial detention. During its execution, both Federal (criminal procedure) and "Länder" (prisons) competences are concerned; these may collide, in particular with regard to restrictions that are justified by the objective of detention (namely censoring of letters, restricted rights to receive visits etc.) or with respect to legal remedies – both these areas are more closely related to the criminal procedure than to the administration of prisons, so they have remained in the competence of the Federal State.[87]

Although § 119 (3) CCP stipulates that the suspect may only be subject to those restrictions that are necessary to comply with the objective of detention or that are necessary to maintain the order of the prison, in practice, this general provision is interpreted by the ordinance mentioned above in a way that leads to many constraints. For instance, the detainee is not obliged to work (No.42 UVollzO), but he only has to have one hour of outdoor exercise per day (No.55 UvollzO) – both facts often lead to the situation that the detainee has no meaningful activities at all. According to No.24, 25 UvollzO, detainees are usually only entitled to one 30-minute visit every second week; these visits are usually supervised (No.27 UVollzO). Written contacts are usually also monitored (No.30 UVollzO) and the right to make telephone calls is often not easy to obtain.

Relatively recent case-law of the FCC highlights some of the problems. The FCC did not accept a constitutional complaint where the complainant had argued that the unequal payment of sentenced and pre-trial prisoners was discriminatory. The FCC argued this was acceptable because sentenced prisoners are obliged to work and pre-trial prisoners are not; the difference in

80 For more details, see Mayer 2004.

81 Press Release of the Ministry of Justice of Baden-Württemberg from 18 November 2008, www.justiz.baden-wuerttemberg.de.

82 Also § 148 (2) CCP, which allows for restrictions during visits by the suspect's lawyer in exceptional cases of certain terrorist offences, ordered by the judge.

83 Roxin 1998, p. 254 with further references; an overview can also be found in Feest/Köhne 2008 and Seebode 2008.

84 For details, see Dünkel 1994, 155 pp.

85 The reform was meant to strengthen the federal character of Germany ("Föderalismusreform").

86 On 3 November 2008, twelve of the sixteen Federal States, under the guidance of Thüringen and Berlin, presented a common Detention Execution Act ("Untersuchungshaftvollzugsgesetz"). Niedersachsen had already enacted a separate Act; Nordrhein-Westfahlen is currently drafting one. No plans are yet known with regard to Bayern and Baden-Württemberg.

87 Seebode 2008.

payment was within the feasible discretion of the legislator.[88] This difference in payment is foreseen in § 177 Prison Act and also in the new Detention Execution Act of Niedersachsen, but obviously at least some of the legislation that follows the 12-States draft will provide for equal payment for sentenced and pre-trial prisoners.[89] Interesting in that regard is also that at least some of the drafts foresee the granting of a small allowance for those who are in need but cannot be provided with work or cannot work for other reasons.

The second aspect relates to the right to receive visits. In theory, this right has to be granted in accordance with the general rule of § 119 (3) CCP; in practice, however, it is often limited very much for organisational reasons within the prisons. Usually, hardly more than the 30 minutes every second week mentioned above are granted. With regard to visits by family members, the FCC made clear that this is also protected by Art. 6 of the Constitution, which protects family life. In the concrete case, a pre-trial detainee was only allowed to be visited by his girlfriend (to whom he was not married) and his baby child within the normal limits; he was not granted the extra time usually given to married couples with children. In its decision, stating that it was unconstitutional not to extend the visits in this case, the FCC strengthened the importance of this right and made clear that organisational issues (the prison argued that it was impossible to grant more visits because of the overcrowding) cannot be a reason to deny such a right.[90]

To summarise the reality of pre-trial detention for those undergoing it, it must be stated that in Germany – like in many other countries – the situation of pre-trial detainees, instead of being "as normal as possible" with regard to the presumption of innocence, in general, is worse than the situation of sentenced prisoners.[91] As far as can be seen, prisons only very rarely[92] try to create a "constructive" climate, e.g. accommodating prisoners in smaller units where they can move relatively freely and keeping them occupied with meaningful activities. This view is widely expressed and was confirmed by prison authorities,[93] but only few studies have been undertaken to explore the problem further, none of which are recent. The CPT did not visit any remand prisons during its two last visits (only sections where foreigners were held under the Alien's Law).[94] When, in 2007, the Department of Criminology of the University of Greifswald[95] asked for examples of "good practice" in prison reality, sending out a survey to the Ministries of Justice, many projects were sent in. Only one (the one referred to above) was designed for pre-trial detainees – maybe this can also highlight the situation of remand prisoners in Germany.

8. Special groups

8.1 Juveniles

According to statistical data (see Fig. 3 and Table 4), not only fewer adults, but also fewer adolescent and juvenile suspects are detained in German prisons. (Please note: Table 1 shows the numbers for Germany as a whole, Figure 3 and Table 3 only for West Germany; for the reasons, see paragraph 2.) 1,073 persons between the ages of 18 and 21 were in pre-trial detention on 31 March 2008 – less than half of the 1974 peak number (2,307). The number of juveniles has also decreased significantly compared to the 1970s. But the long-term development differs from the rather steady decrease in the number of adult remand prisoners, because particularly in the early 1990s the pre-trial detention numbers for adolescents (1994: 1,997) increased rapidly, followed by rising numbers of juvenile remand detainees, with a peak in 2002.

As crimes committed by juvenile offenders are constantly a subject of interest in the media, in particular with regard to these groups, the public and also the enforcement agencies sometimes put

88 Bundesverfassungsgerichtsentscheidung (2BvR 406/03) of 15 March 2004, published in the Neue Juristische Wochenschrift (NJW) 2004, p. 3030.

89 Feest/Köhne 2008.

90 Bundesverfassungsgerichtsentscheidung (2 BvR 1797/06) of 23 October 2006, available at www.bundesverfassungsgericht.de (last retrieved 2 February 2009).

91 This is particularly underlined by defence counsels; see e. g. Dahs 2005, p. 236. For further references, see also Schlothauer/Weider 2000 and Gatzweiler/Münchhalffen 2002.

92 A good example (the only one?) can be found in Seifert 2008.

93 Based on personal communication with prison officials from Hamburg and Berlin. An overview of the older studies is provided by Dünkel 1994; the most comprehensive study was undertaken by Gebauer 1987.

94 CPT 2007.

95 Dünkel/Drenkhahn/Morgenstern 2008.

enormous pressure on the judiciary to keep arrested juveniles in detention (e.g. by emphasising the supposed efficiency of a "short sharp shock").[96] That this pressure shows some results can be seen from the relatively high percentage of juvenile and adolescent remand detainees (15% in 2008) compared to the percentage of juveniles and adolescents in youth prisons (8.4% in 2008); see Table 1.

The legal framework concerning pre-trial detention for young suspects is basically the same as for adults and follows the relevant regulations in the CCP. The Juvenile Justice Act (JJA) of 1990, nevertheless, includes several important restrictions: According to §§ 71, 72 JJA, priority should be given to educational alternatives over pre-trial detention. This regulation is another clarification of the principle of proportionality that has to be taken into account even more than for adults, because of the even stronger effects of detention on young people (see § 72 (1) JJA). In 1990, the legislator again strengthened the preconditions for pre-trial detention: Pre-trial detention for persons under 14 years of age is prohibited (because these minors are below the age of criminal responsibility). For 14- and 15-year-old offenders, in cases where there is a risk of absconding, pre-trial detention is only permitted if the juvenile has already escaped, prepared to escape or has no permanent home address (see § 72 (2) JJA). With regard to the enforcement of pre-trial detention, the segregation principle must be followed – adults and juveniles have to be separated as well as remand detainees and convicted prisoners. Both rules are not always observed, because in youth prisons 14-25 year old prisoners can be accommodated. However, in general, very young prisoners are accommodated separately from older inmates, and convicted prisoners are accommodated in other sections than remand prisoners.

It should be noted that even if a harsh detention policy with regard to young offenders is sometimes publicly supported, in fact, pre-trial detention in juvenile cases is generally used with caution. The time spent in pre-trial detention rarely exceeds two to three months.[97]

8.2 Women

With regard to the order and execution of pre-trial detention, no particular provisions for female suspects or accused are available in German law. The problems arise from the practice.

Female prisoners[98] form only a very small share of all prisoners, with an average of roughly 5.0%. This is also true for female pre-trial detainees (see Tables 1 and 5). The existing problems and structural disadvantages result from the fact that, in general, prisons are geared towards male prisoners and therefore more severe security measures are implemented – a security standard that is not necessary for female prisoners but restricts their everyday life in prison. Female prisoners in pre-trial detention are subject to a double "segregation principle" (that is: the need to separate convicted from unconvicted prisoners, § 119 (1) CCP, and the need to keep females separated from male prisoners, Nr. 22 (3) UVollzO)[99] and are often kept either quite isolated or – if accommodated in larger prisons designed only for female prisoners – further away from friends and family, with the risk of even more limited contact with the outside world. So, the usual structural problems are even intensified for female pre-trial detainees, let alone for juvenile female pre-trial detainees (who again should be kept separate from adults), as prisoners in that early und particularly uncertain stage of imprisonment are generally suffering the most from isolation and separation from their families.

8.3 Foreigners

As can be seen in Table 1, the percentage of foreigners among the prison population is relatively high, with (according to the statistics compiled on behalf of the Council of Europe, SPACE I) almost 27%. This is even more true for remand prisoners, with a share of more than 44%. Because the prison population data file created by the Federal Statistical Office does not contain any data

96 This idea was openly supported by a high-ranking public prosecutor in a debate between the prosecutor (who was responsible for young multiple offenders in Berlin) and a well-known criminologist that was published in a weekly magazine. See Demmer/Verbeet 2007.

97 A comprehensive overview of the Juvenile Justice System in English is provided by Dünkel 2009, with further references.

98 For details, see Zolondek 2007.

99 The German legislation insofar is in accordance with international regulations, namely Nr. 18.8 of the European Prison Rules.

with regard to citizenship, recent data is only available for sentenced prisoners: Their share is 22%. The percentage of foreigners among the overall population is less than 10%; their share among suspects (according to the Crime Statistics) is around 21%.[100] Police statistics emphasise that this percentage is misleading for several reasons: Some offences can only be committed by foreigners (the crime statistics also include all illegal migrants, tourists, foreign soldiers etc., but these are not included in the populations statistics – this means the reference points are different);[101] the composition of the group of foreigners differs from that of the German population (more foreigners live in urban areas, they are younger, and the foreign population has a higher share of males than the German population); and social conditions are different (in particular the educational background of foreigners is usually much worse than that of Germans). If all these factors are eliminated and matching sub-groups are compared, the differences vanish.

Several studies indicate that, when the criminal proceeding is initiated, foreigners are more often reported to the police than Germans; some studies also indicate that the police tend to overstate reported crimes and the foreigner is finally sentenced for an offence less severe than originally charged.[102]

With regard to the development over time, it should be mentioned that the share of foreigners among suspects has, according to the police statistics, significantly decreased over the last fifteen years. However, this development is not reflected by the share of foreigners among prisoners seen in the statistics; as far as can be concluded from the few studies available, this also holds true for the share of foreigners among pre-trial detainees.

Research suggests that the most important stage of overrepresentation within the criminal procedure is the period of pre-trial detention. In a comprehensive report[103] on pre-trial detention, it was stated that many cases were found of foreigners who were remanded to pre-trial detention and "who, if they had been Germans, would not have been detained". The negative consequence of this practice is also that suspects who are remanded to pre-trial detention run a much greater risk of receiving an unconditional prison sentence than suspects who stay outside detention. This might be one of the reasons why foreigners are so over-represented in prison.[104]

As mentioned above, the author of this report has tried to obtain data concerning the citizenship of foreign detainees from the Ministries of Justice of the sixteen Federal States. As can be seen in Table 6, not all Ministries replied, so no valid statements for Germany as a whole can be made. The preliminary result for fourteen states, however, seems to be in line with the data from SPACE, mentioned above. What can be seen is that the share of foreigners differs enormously between the Länder – from 10% in Mecklenburg-Vorpommern to 57% in Hamburg. These results reflect the demographic situation and support the high overrepresentation of remand detainees. In that survey, for the first time, also the number and percentage of foreigners coming from within the EU was covered. Their share ranges from 5% in Sachsen and Sachsen-Anhalt to 22% in Hessen. Keeping in mind that two Federal States are missing (one of which is Nordrhein-Westfahlen – the State with the largest population), it can be said that currently, at a given point of time in 2008, far more than 1,400 remand prisoners come from other EU Member States. This observation is important because, as can be seen from the data, the ground for detention applied by far most often is the risk of absconding. As this ground is used in a routinely manner by prosecutors and judges for suspects who have no residence/no fixed abode in Germany, even EU citizens are often detained for minor offences.

Several measures within the criminal procedure exist with regard to foreign citizens – partly meant to protect them and create equal opportunities to exercise their rights, but partly also to control them and, if applicable, to consider consequences for their legal status. According to the Court Act ("Gerichtsverfassungsgesetz", GVG), the language used in courts is German (§ 184 GVG), so everything that is presented in writing to the court has to be translated into German. On the other hand, the Act provides (and insofar also implements Art. 6e ECHR) for interpretation of all relevant action before the court, so that the suspect, accused or sentenced person is always able

100 Source: Bundesministerium des Inneren/Bundesministerium der Justiz 2008. The report also explains particular statistical problems and risks with regard to counting foreign suspects.

101 About one-third of all offences committed by foreigners are committed by members of this group; Pfeiffer et al 2005, p. 18.

102 Pfeiffer et al 2005, p. 22.

103 Jehle 1995.

104 For juvenile prisons, see Dünkel/Walter, 2005.

to understand at least the charges, requests and all formal decisions made by the public prosecutor and the court (§ 187 pp. GVG, §§ 35a, 259 CCP). The interpreter has to be appointed and paid for by the State. Other regulations provide for the notification of the consulate if the foreign suspect requests so. The suspect has to be informed of this right. According to some administrative regulations by the Ministries of Justice, it is also necessary for the prosecutor to inform the competent authorities (usually the local authorities are responsible for aliens) if a foreigner has been arrested, charged and detained.
If a foreigner has been arrested and the ground for arrest was only the risk of absconding, the police and/or the prosecutor can refrain from requesting an arrest warrant, provided that in the concrete case a custodial sentence is not to be expected, the suspect does not have a fixed abode in Germany,[105] and a security is deposited covering the cost of the proceedings and a possible fine (§ 127a CCP). This deposit can be paid by third parties. This possibility is frequently used – at least in court districts close to the border – for petty offences such as shop lifting. The use is pragmatic: It is e.g. possible that the suspect authorises an official from the investigating authorities to use his address as the necessary contact address for official delivery of documents.

Another modification of the grounds for arrest/detention already mentioned above is also important with regard to foreigners: In the expedited procedure, detention of up to one week is possible on conditions that are less restrictive than the usual ones (§ 127b CCP). This measure was intended, *inter alia*, to be able to prosecute "travelling criminals" quickly and efficiently. It is usually evaluated as an unpopular form of procedure, because often the preconditions are not met; it restricts the manoeuvring space for all parties concerned. Some critics also argue that it is potentially discriminatory against foreigners. But even if this is true, at least some reports show that this measure is frequently used by some judges, in particular with regard to foreign suspects.[106]

Other measures especially designed for foreigners can be taken by the public prosecution agency against foreign suspects or – in its capacity as the enforcement agency ("Vollstreckungsbehörde") – against foreign convicts. § 154b CCP opens up the possibility to refrain from prosecution, and § 456a CCP to refrain from execution in cases of extradition or expulsion. It is important to note that the decision to refrain from prosecution or execution is at the agencies' discretion. § 17 of the Code on the Execution of Punishment ("Strafvollstreckungsordnung") prescribes some criteria that the agency must consider, e.g. no waiver of prosecution/execution is possible when "the personality of the convict or the nature of the crime do not allow" this. For the sake of completeness, it should be added that the CCP (§ 295) also provides for the possibility to grant "safe conduct" ("sicheres Geleit") for suspects. In such cases, pre-trial detention is excluded, but the provision gives the courts the possibility to motivate absent (foreign) suspects to participate in the proceedings and thus to proceed further (as trials in absentia are not possible according to the German law and doctrine).

Finally, the German Regulations for the Enforcement of Pre-trial Detention in general do not provide for different treatment of foreigners compared to German nationals, except that rules for food and religion that may be important to foreign prisoners must be taken into consideration. However, for foreign prisoners as well as for prison administrations, difficulties and specific problems more frequently arise from practical issues than from legal provisions.

8.4 Alleged terrorists

Up to now, Germany has no special regulations for pre-trial detention with regard to alleged terrorists. The only provisions to be found relate to a total isolation of suspects under certain circumstances ("Kontaktsperre", §§ 31 pp. of the Introductory Statute of the Courts Act, EGGVG), originating from the year 1977. They thus stem from a period of terrorist activity within Germany and were only a few times used (in 1977).[107]As mentioned above, however, membership of a terrorist organisation is one of the serious offences that can justify pre-trial detention according to § 112 (3) CCP; for details, see above.

105 Although the wording of the provision can be misunderstood, it is clear from the context that it is not meant for homeless persons but exclusively for foreigners.

106 The procedure was advocated as an effective means to deter "travelling criminals" in border areas by a judge during a symposium (see Ruppert 2000) – he raised many critical voices (see, e.g. Artkämper 2000).

107 Meyer-Goßner 2008, Anhang 2 vor § 31, ref. 2.

In the aftermath of the terrorist attacks of 11 September 2001, in Germany, too, new strategies were discussed,[108] but none of these led as far as promoting new measures such as preventive detention for potential terrorists outside the CCP or creating other (more severe) legal provisions with regard to the ordering and enforcement of pre-trial detention within the CCP. It should be mentioned again that (most of) the Police Acts of the sixteen Federal States traditionally allow for short-term preventive detention for up to fourteen days (see above). These measures can, under conditions prescribed by law, be used against everybody, also against alleged terrorists. However, more importance might be gained by the relatively new possibility of § 58a Residence Act ("Aufenthaltsgesetz") of 2005, which allows for the immediate expulsion of foreigners under certain conditions: The authorities may expel a foreign citizen (following a "prognosis based on facts"), if he poses a threat to the security of Germany or in cases of terrorist hazard, without a prior expulsion order (and the necessary formal proceedings) A judge may then order detention pending expulsion for up to six months, under certain circumstances extendable to up to 12 months.[109]

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