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PREFACE

Since time immemorial, one of the foremost duties of the state is to protect peace and the security of its citizens. To perform this vital function, it behooves the state to define which conduct shall be deemed consistent or inconsistent with the common order of values. This means, too, that the state is entitled to enact criminal laws protecting the most essential individual and common interests from infringements. If the suspicion arises that a criminal offense might have occurred, the state is called upon to investigate the facts and, provided there is sufficient reason to believe that a certain person has trespassed against the criminal law, to bring the case before the courts.

For hundreds of years, the state investigation and adjudication of crime were cruel and degrading and largely produced ambiguous results. Abandoning those modes of procedure was one of the most important achievements of the Age of Enlightenment. Continuing this path, modern criminal procedure is guided by doctrinal accuracy and pragmatism, strictness and humanity.

Occasionally, however, drawing accurate lines between those coordinates proves to be very difficult. The court decisions and the suggestions of the Expert Committee on the Reform of Criminal Procedure and the proceedings before the Youths Courts, summarized in the recent edition of the Reports on German Criminal Justice, provide an insight into the challenges, which the judiciary and the legislation have to face in this context.

A. Court Decisions

I. German Criminal Procedure and Court Constitution

1. German Federal Court of Justice, Order of 14 April 2015 – 5 StR 9/15

The characteristic feature of negotiated agreements in criminal proceedings according to sec. 257c GCCP[1] is a reciprocal relation between a notice of the court not to exceed a certain maximum sentence and a confession of the defendant or his assertion to further the proceeding otherwise. Legal considerations between the court and the participants in a criminal proceeding concerning the further course of the proceedings, in contrast, form a subset of legal considerations on the subject of the proceeding.[2] This applies, too, if a looming delay of the proceeding resulting from a request to inspect documents by the defense gives reason to encourage an estimation of the court regarding the sentence to be expected in case of a confession on the part of the defendant.[3]

2. German Federal Court of Justice, Judgment of 17 June 2015 – 2 StR 139/14

Preliminary considerations of the court and the participants in a criminal proceeding concerning a partial discontinuation of the proceeding by court order[4] are subject to the rules of transparency and documentation laid down in sec. 243 subs. (4) and sec. 273 subs. (1a) 2nd sentence GCCP.[5] This means that the reasons for discontinuing the proceeding regarding one of two charges brought against the defendant must be recorded in the minutes of the main hearing.[6] If those reasons remain unclear to the public and to those participants in the proceeding who have not been involved in the preliminary considerations and who have not been informed accordingly, the possibility that the judgment of the trial court is based on a violation of the rules of transparency and documentation above cannot be ruled out.[7]

3. German Federal Court of Justice, Judgment of 23 July 2015 – 3 StR 470/14

The court is obliged to inform the defendant of preceding considerations related to a negotiated agreement according to sec. 257c GCCP irrespective of whether the proposal of the presiding judge was previously discussed with the other members of the responsible criminal division of the Regional Court.[8] This information duty does not change even if judges who did not participate in the preceding considerations at last are called upon to decide on the case.[9] Regarding the obligation of the court to adequately inform the defendant, it is immaterial whether the considerations related to a negotiated agreement according sec. 257c GCCP were made outside another main hearing which was later discontinued.[10] A judgment is based on a violation of the court's information duties, if the defendant would possibly have been amenable to further negotiations if the court would have informed him appropriately. This applies, in concrete terms, if the trial court fails to comply with its information duty and the defendant thus refuses to enter into a negotiated agreement according to sec. 257c GCCP under which the proceeding would have been partially discontinued by court order.[11] The standards developed by the German Federal Constitutional Court for determining whether a judgment is based on a violation of the trial court's information duties set forth in sec. 243 subs. (4) GCCP[12] are subject to considerable doubt.[13]

4. OLG Frankfurt (Main), Order of 11 February 2015 – 1 Ss 293/14

Bevor entering into a negotiated agreement according to sec. 257c GCCP, the court must disclose that in addition to a suspended custodial sentence, court

[1] Code of Criminal Procedure [Strafprozessordnung] of 1876, in the version of 7 April 1987 (Federal Law Gazette [Bundesgesetzblatt] Part I p. 1074, 1319), most recently amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette Part I p. 410). The semi-official English version of the German Code of Criminal Procedure as authorized by the Federal Ministry of Justice and Consumer Protection is here: http://www.gesetze-im-internet.de/englisch_stpo/.
[2] German Federal Court of Justice, Order of 14 April 2015 – 5 StR 9/15, marginal no. 15.
[3] *Ibid.*, at marginal no. 16 et seq.
[4] There are several options for the courts to discontinue criminal proceedings by court order, the most important of which are set forth in sec. 153 et seq. GCCP.
[5] *German Federal Court of Justice, Judgment of 17 June 2015 – 2 StR 139/14*, marginal no. 18 et seq.
[6] *Ibid.*, at marginal no. 20.
[7] *Ibid.*, at marginal no. 21 et seq.
[8] *German Federal Court of Justice, Judgment of 23 July 2015 – 3 StR 470/14*, marginal no. 12 et seq.
[9] *Ibid.*, at marginal no. 14.
[10] *Ibid.*, at marginal no. 15.
[11] *Ibid.*, at marginal no. 17 et seq.
[12] See for instance German Federal Constitutional Court, Judgment of 19 April 2013 – 2 BvR 2628, 2883/10, 2155/11 and *German Federal Court of Justice, Judgment of 23 July 2015 – 3 StR 470/14*, marginal no. 21 et seq. with further references.
[13] *Ibid.*, at marginal no. 21 et seq.

instructions and restrictions will be imposed on the defendant.[14]

5. Federal Court of Justice, Judgment of 25 March 2015 – 5 StR 82/15

In general, a negotiated agreement between the court and the participants in a criminal proceeding is consistent with the fundamental fairness doctrine only if the court previously informs the defendant of its limited binding effects according to sec. 257c subs. (5) GCCP. On these grounds, the presiding judge has to instruct the defendant that the court may no longer be bound by its agreement with the defendant if one of the situations set forth in sec. 257c subs. (4) occurs.

6. German Federal Court of Justice, Judgment of 21 July 2015 – 2 StR 75/14

The protective mechanism provided for in sec. 243 subs. (4) and sec. 273 subs. (1a) GCCP is vital in particular, if only one of several codefendants is amenable to a negotiated agreement according to sec. 257c GCCP, while the other codefendants refuse to participate in corresponding negotiations.[15]

7. German Federal Court of Justice, Order of 8 January 2015 – 2 StR 123/14

The provision of sec. 243 subs. (4) GCCP does not apply to considerations limited to the release of the defendant from detention on bail. Negotiated agreements according to sec. 257c GCCP, however, may involve the question whether the detention of the defendant is to be continued, if this aspect is interlinked with his assertion to further the proceeding.

8. German Federal Court of Justice, Judgment of 25 February 2015 – 4 StR 470/14

The scope of sec. 243 subs. (4) 1st sentence GCCP is not limited to negotiations concerning an agreement between the court and the participants in a criminal proceeding within the course of the main hearing. The provision applies, too, to corresponding negotiations outside the main hearing. If the court in the latter case fails to comply with the relevant rules of transparency and documentation, the possibility that the judgment is based on a violation of statutory law cannot be ruled out.[16]

9. German Federal Court of Justice, Order of 23 July 2015 – 1 StR 149/15

Negotiations concerning an agreement according to sec. 257c GCCP which have been conducted outside the main hearing, must be reported by the presiding judge in the course of the main hearing, if expectations of the defendant on the sentence to be imposed have been addressed in this context. Otherwise, sec. 243 subs. (4) 2nd sentence is violated, regardless of the remaining matters of negotiation.[17]

10. German Federal Court of Justice, Order of 25 June 2015 – 1 StR 579/14

In general, the rights of the defendant are not violated if negotiations concerning an agreement according to sec. 257c GCCP, which have exclusively been conducted with the codefendant, are not appropriately reported in the course of the main hearing and not appropriately recorded in the minutes.[18]

If the defendant complains that considerations concerning his interests had not been reported by the trial court as required under sec. 243 subs. (4) 2nd sentence GCCP, he is to name the subject matters of those considerations. Otherwise, the appellate court will not be in the position to estimate whether the complained conduct of the trial court is to be viewed as negotiations concerning an agreement according to sec. 257c GCCP or as a manifestation of the trial court's transparent and communicative mode of proceeding.[19]

11. German Federal Court of Justice, Judgment of 14 April 2015 – 5 StR 20/15

The protective mechanism of the rules governing negotiated agreements in criminal proceedings and the general principles of law do not hinder the trial courts and the public prosecution offices in proceedings against several codefendants to enter only into an agreement involving all codefendants. There is no individual right under which each defendant in a criminal proceeding could claim to enter into a

[14] *Ibid*., lit. a)-c).
[15] German Federal Court of Justice, Judgment of 21 July 2015 – 2 StR 75/14, marginal no. 37.
[16] German Federal Court of Justice, Judgment of 25 February 2015 – 4 StR 470/14, marginal no. 8 et seq.
[17] German Federal Court of Justice, Order of 23 July 2015 – 1 StR 149/15, marginal no. 9 et seq.
[18] German Federal Court of Justice, Order of 25 June 2015 – 1 StR 579/14, marginal no. 15 et seq.
[19] *Ibid*., at marginal no. 21 et seq.

negotiated agreement with the trial court and the other participants in the proceeding.[20]

II. National Prosecution of International Criminal Offenses

In late 2011 the Higher Regional Courts of Stuttgart and Frankfurt (Main) began the first proceedings throughout Germany concerning crimes against international law. The first instance proceedings in the so called "Rwandan genocide cases" ended in late 2015. The cases, both, may be appealed.

1. Higher Regional Court of Stuttgart, Judgment of 28 September 2015 – 3 StE 6/10

The principal defendant in the Stuttgart proceeding, *Dr. Ingnace M.*, was convicted of aiding and abetting crimes under the German Code of Crimes Against International Law of 2002 (CCAIL)[21] and of functioning as a ringleader of a terrorist organization abroad (sec. 129b GCC).[22] The codefendant, *Straton M.*, was convicted of functioning as a ringleader of a terrorist organization abroad.

Both of the defendants are Rwandan nationals. The principle defendant is the president of the *Forces Démocratiques de Liberation du Rwanda* (FDLR). He lives in Germany for 25 years. The court charged him with having commanded the armed forces acting in eastern Congo in 2009. Further, he was charged with not having inhibited the armed forces from committing atrocities especially in the village of Busurungi. The commands in discourse were given from German territory by email and telephone. The same applied mutatis mutandis to the omission of the principle defendant to prevent the said atrocities.

The German courts were called upon to hear the case under sec. 1 CCAIL. According to the 1st half sentence of the provision, the jurisdiction of the German courts is invoked for all crimes against international law designated in the Act. The felonies designated in the Act are to be tried before the national courts even if the charged offense was committed abroad and does not bear any relation to the Federal Republic of Germany (sec. 1, 2nd half sentence CCAIL).

Besides the question on what reasons the national authorities may be entitled or even be obliged to prosecute crimes against international law, the Stuttgart case presented a broad range of intricate problems in the fields of substantive law and criminal procedure, which partly conglomerated with an ambivalent political dimension. Inter alia, the courts had to determine whether the FDLR was to be estimated a terrorist organization or, as alleged by the defendants, a political party. Moreover, the courts had to decide whether the codefendant was so closely involved in the FDRL that he may be viewed to be a ringleader of the organization; and whether the principle defendant was in fact in the position to hinder the armed forces acting abroad from committing atrocities.

One of the most significant issues of the Stuttgart proceeding was the question whether the more than five years' detention of the principle defendant before and during the trial was proportionate. The defense filed several motions to renounce or alternatively to suspend the arrest warrant. All of those motions were rejected by the Higher Regional Court. In response to the rejection of the preceding motions, the defense field a complaint with the German Federal Court of Justice. This complaint was rejected as well.[23]

Considering the reasons for the continuation of the detention, the Federal Court of Justice found that there was a persisting risk of absconding. Further, the Federal Court of Justice conceded that the constitutional right to speedy trial demanded in particular in cases in which the defendant was detained that the criminal prosecution authorities and the criminal courts took all possible and reasonable actions to terminate investigations and to issue a

[20] German Federal Court of Justice, Judgment of 14 April 2015 – 5 StR 20/15, marginal no. 20 et seq.

[21] German Code of Crimes Against International Law [Völkerstrafgesetzbuch] of 26 June 2002 (Federal Law Gazette [Bundesgesetzblatt] Part I p. 2254. The German language version of the Act is available here: http://www.gesetze-im-internet.de/vstgb/. For an English unofficial translation of the provisions of the Act refer to the English translation of the Act to Introduce the Code of Crimes Against International Law edited by the International Committee of the Red Cross: https://www.icrc.org/ihl-nat/0/09889d9f415e031341256c770033e2d9/$FILE/Act%20to%20Introduce%20the%20Code%20of%20Crimes%20against%20International%20Law%20of%2026%20June%202002%20%5B1%5D.pdf.

[22] German Criminal Code [Strafgesetzbuch] of 1871 in the version promulgated on 13 November 1998, Federal Law Gazette [BGBl.] Part I p. 3322, last amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette Part I p. 3671 and with the text of Article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p 3799. The English semi-official English full-text version of the act is here: http://www.gesetze-im-internet.de/englisch_stgb/.

[23] German Federal Court of Justice, Order of 18 December 2014 – StB 25/14.

judicial decision on the charges brought against the defendant in due course of time. On the other hand, it was obvious that the facts of the case and the legal estimation of the facts were extraordinary complex. Since the Higher Regional Court of Stuttgart was one of the first courts throughout Germany to try a case concerning crimes according to the CCAIL, precedents were not available yet. Investigating the multifarious activities which the defendants exercised over a longer period of time and additionally investigating incidents which mostly occurred in the Republic of Congo, the court had to face considerable organizational challenges. Delays in the proceeding caused by the defense e.g. by examining witnesses for several days, were to be taken into consideration. It was immaterial whether those measures were to be considered reasonable or unreasonable. At least, the period of time spent in detention before and during the trial did not seem disproportionate as compared to the length of the expected sentence.[24]

2. Higher Regional Court of Frankfurt (Main), Judgment of 29 December 2015 – 4-3 StE 4/10-4-1/15

The Higher Regional Court of Frankfurt (Main) was called upon to consider the role of the defendant, *Onesphore R.*, in the so called "church site massacre of Kiziguro".

The defendant immigrated to Germany in 2002.[25] Rwanda filed a red notice with Interpol for the defendant in connection with the charges in discourse. The German authorities refrained from extradition, because it was not to be expected that the domestic judiciary could guarantee a fair trial.[26] Instead, the case was tried before the Higher Regional Court of Frankfurt.

As the court determined, at least 450 civilians of the Tutsi ethnic groups sought shelter at the church site of Kiziguro when a wave of racially motivated violence swept through Rwanda in 1994. Until 11 April 1994 hundreds of soldiers, militiamen and civilians of the Hutu ethnic group armed with machetes, hatchets, hoes and similar weapons gathered around the church site in order to attack the people who were trapped there. The order to attack the church site was given by the defendant in his capacity as a mayor of the municipality of Muvumba together with several other local persons of authority. Obeying the order, the attackers most cruelly killed most of the people at the church site with the weapons they had brought. Some of the people trapped on the church site were looted; women and girls were raped. During the massacre, the defendant drove away with his car and arranged more Hutu fighters to appear and help killing the Tutsi at the church site. Occasionally, he oversaw the transport of the corpses to a pit outside the premises. He also participated in overseeing and instructing the attackers surrounding the church site in order to prevent the Tutsi from fleeing and summoned them to terminate the killing before the approaching opponent forces arrived on site.[27]

The jurisdiction of the German courts was invoked under sec. 6 no. 1 GCC in the former version, according to which German criminal law was applicable irrespective of the *lex fori* to cases of genocide (sec. 220a GCC in the former version) even if the relevant offenses were committed abroad.[28]

In trying the case, the Higher Regional Court of Frankfurt was confronted with a series of procedural and organizational problems very similar to those of the Stuttgart proceeding.[29] One of the most controversial questions of the case was whether the defendant was to be viewed as an accessory or as an accomplice to the massacre.

In its judgement of 18 February 2014, the 5th Criminal Penal of the Higher Regional Court of Frankfurt convicted the defendant of aiding and abetting genocide according to sec. 220a GCC in the former version and sec. 27 subs. (1) GCC. Insofar, the Criminal Penal pointed to the fact that the defendant was not directly involved in the killings. He had not acted with the intent to commit genocide by his own hand but he had knowingly and intentionally aided and abetted the principle offenders in entirely or partially extinguishing the Tutsi ethnic group.[30]

The defendant as well as the Federal Attorney General and the Private Accessory Prosecution appealed the decision on points of law to the Federal Court of Justice. The Federal Attorney General and

[24] *Ibid.* at Pp. 10 et seq.
[25] Higher Regional Court of Frankfurt (Main), Judgement of 18 February 2014 – 5-3 StE 4/10-4-3/10, marginal no. 127.
[26] *Ibid.* at marginal no. 132.

[27] *Ibid.* at marginal no. 133-225 and 234-281.
[28] Ibid. at marginal no. 722 et seq.
[29] *Ibid.* at marginal no. 291 et seq.; Legal Tribune Online of 18 February 2014, OLG Frankfurt zu Kirchen-Massaker in Ruanda: Erstes deutsches Urteil zu Völkermord in Afrika, http://www.lto.de/recht/nachrichten/n/olg-frankfurt-urteil-5-3-ste-4-10-4-3-10-massenmord-ruanda-voelkermord/.
[30] *Ibid.* at marginal no. 742 et seq.

the Private Accessory Prosecution were largely successful in their appeals.[31] Deciding on the remedies, the Federal Court of Justice upheld the findings of facts of the Criminal Panel of the Higher Regional Court as far as the course of the incidents at the church site of Kiziguro was concerned. Above this the challenged decision was reversed and the case was referred back to another Criminal Panel of the Higher Regional Court of Frankfurt. The appeal of the defendant was rejected.[32]

The Federal Court of Justice in particular argued that complicity to a crime did not necessarily require that the defendant was directly involved in the acts representing the core of the incident. The gist of complicity was that a participant to a criminal offense did not only intend to support third persons in committing the *actus reus.* Instead, he must intend to contribute to a joint and collaborative action by his own hand. In doing so, he must view his own contribution as one part of the acting of the other participants and, *vice versa*, their contributions as one part of his own acting.[33] Applying those standards to the present case, the Federal Court of Justice found that the definition of complicity used by the Criminal Panel of the Higher Regional Court was limited too narrowly in range. The defendant, indeed, had committed the *actus reus* of complicity to genocide according to sec. 220a GCC in the former version and sec. 25 subs. (2) GCC.[34] Regarding the *mens rea*, the Federal Court of Justice found that the previous findings of fact were insufficient. The Criminal Panel of the Higher Regional Court of Frankfurt to which the case was referred back, had to inquire this aspect en detail.[35]

In doing so, the 4th Criminal Panel of Higher Regional Court of Frankfurt found that the defendant acted with the intent to extinguish the Tutsi trapped at the church site of Kiziguro and thus a group of people defined by ethnical characteristics. This was sufficient to constitute the *mens rea* of genocide according to sec. 220a GCC in the former version. On these grounds, the defendant was at last convicted of complicity to genocide under sec. 220a GCC in the former version and sec. 25 subs. (2) GCC.[36] The Criminal Panel further established that the guilt of the defendant amounted to an extraordinary high degree,[37] which means in particular that his early release from prison will be barred under sec. 57a subs. (1) no. 2 GCC.

III. International Cooperation in Criminal Matters

1. Higher Regional Court of Dresden, Order of 13 July 2015 – OLG Ausl 98/15

In its order of 13 July 2015 the Higher Regional Court of Dresden observed that the admissibility of an extradition on the grounds of a European Arrest Warrant did not depend on the sentence remaining to be served. Under sec. 81 no. 2 AICCM,[38] the key question was, whether under the law of the requesting Member State a custodial sentence of no less than four months was to be enforced. In this respect, sec. 81 no. 2 AICCM deviated from the provision of sec. 3 subs. (3) 2nd sentence AICCM.

Human rights deficits in the requesting state did not *a priori* preclude extradition. Thus, in the present case, extradition to Hungary was admissible provided, the requesting state assured that the searched person would in case of an extradition be detained under conditions consistent with the European Convention on Human Rights of 4 November 1950, the European Prison Rules and the United Nations Standard Minimum Rules for the Treatment of Prisoners of 12 February 1987.

2. Higher Regional Court of Munich, Order of 27 October 2015 – 1 AR 392/15

Regarding the report of the Council of Europe anti-torture Committee of 26 March 2015 the Higher Regional Court of Munich held in a similar case, that extradition to Bulgaria may be barred under sec. 73 2nd sentence AICCM in connection with Art. 6 of the Treaty on the European Union and Art. 3 of the European Convention on Human Rights.

In general, a sound assurance of the Bulgarian government might overcome this specific obstacle to extradition. The "declaration of the Bulgarian min-

[31] German Federal Court of Justice, Judgement of 21 Mai 2015 – 3 StR 575/14.
[32] *Ibid*., at marginal no. 22 et seq.
[33] *Ibid*., at marginal no. 10 et seq.
[34] *Ibid*. at marginal no. 12.
[35] *Ibid*. at marginal no. 13 et seq.
[36] See: Press release of the Higher Regional Court of Frankfurt (Main) of 29 December 2015.
[37] *Ibid*.
[38] Act on International Cooperation in Criminal Matters [Gesetz über die International Rechtshilfe in Strafsachen] of 1982 in the version promulgated on 27 June 1994 (Federal Law Gazette [BGBl.] Part I p. 1537), as amended by Article 1 of the Act of 21.7.2012 (Federal Law Gazette [BGBl.] Part I p. 1566). The English full-text version of the AICCM is available here: http://www.gesetze-im-internet.de/englisch_irg/index.html.

istry of Justice concerning the conditions for the detention of persons transferred to the Bulgarian judicial authorities by means of a European Arrest Warrant" of 13 August 2015, however, did not comply with the standards required.

As the court further observed, "accessory extradition" (*akzessorische Auslieferung*) according to sec. 3 subs. 3, 2nd sentence 2nd half sentence and sec. 4 AICCM was not restricted by the provision of sec. 81 no. 2 AICCM. This meant in the present case that extradition was admissible although the sentence to be served was only 25 days of custody and thus did not meet the standard set forth in sec. 81 no. 2 AICCM.

IV. Decisions of the European Court of Human Rights in Criminal Matters

In the case of *Cleve v. Germany*[39] the European Court of Human Rights addressed the standards to be met by the criminal courts when formulating the reasons of a judgment.

The applicant was charged with several counts of serious sexual abuse of children according to sec. 176a GCC. After a series of hearings, the trial court acquitted him from those charges on account of insufficiency of proof. Some statements made in the reasoning of the judgment, however, suggested that the trial court actually considered the applicant guilty of the offenses charged. The applicant complained that the impugned statements amounted to a finding of guilt and had violated his right to fair trial and the presumption of innocence as provided in Article 6 §§ 1 and 2 of the European Convention of Human Rights.

The European Court of Human Rights concurred: After having closed the main hearing, the trial court was not precluded by the presumption of innocence to voice *remaining suspicions* against the accused when acquitting him of the charges on account of insufficiency of proof. However, once an acquittal had become final, voicing any suspicions *of guilt*, including those expressed in the reasons for the acquittal, were incompatible with the presumption of innocence.

The operative provisions of a judgment acquitting the accused must be respected by every authority which refers, directly or indirectly, to the criminal responsibility of the person concerned.[40]

B. Legislation

The parties of the current German Government coalition made it part of their coalition contract to entrust an expert committee consisting of legal scholars and practitioners with the task to draw up proposals for a reform of the proceedings before the general criminal courts and the Youth Courts. The expert committee on the reform of criminal procedure and the proceedings before the Youths Courts submitted its report in October 2015.[41]

The committee recommended various amendments to the German Code of Criminal Procedure to enhance the transparency and the effectiveness of criminal proceedings and to improve the legal position of the defendant. Regarding the effectiveness and the practicability of proceedings under the Youths Court Act in general, the committee did not see an immediate need for reform. The existing shortcomings in this field were not grounded in the statutory basis. Deficiencies resulted from a set of well known factors such as the inadequate implementation of the Youth Court Act in legal practice; the poor equipment and human resources of the Youths Courts; the insufficient cooperation between the police, the youth welfare authorities, the public prosecution offices and the Youth Courts; and, finally, the specific skills of the professional acting in the juvenile justice system. Though, the committee suggested significant modifications regarding the contestability of Youths Court decisions.

The most notable suggestions will be summarized below:

[39] *Cleve v. Germany* (European Court of Human Rights, 5th Section, Judgement of 15 January 2015 – 48144/09).

[40] Related decisions of the European Court of Human Rights are for instance: *Rushiti v. Austria*, 3rd Section, Judgment of 21 March 2000 – 28389/95, *Vostic v. Austria*, 1st Section, Judgment of 17 October 2002 – 38549/97, October 2002; *Vassilios Stavropoulos v. Greece*, 1st Section, Judgment of 27 September 2007 – 35522/04; *Tendam v. Spain*, 3rd Section, Judgment of 13 July 2010 – 25720/05. For related decisions of the national courts of the Federal Republic of Germany refer to: Federal Concstitutional Court, 2 BvR 254/88 and 2 BvR 1343/88; order of 29 May 1990, marginal no. 33 with further references; 2 BvR 1590/89; order of 16. December 1991; 2 BvR 878/05; order of 17 November 2005; 2 BvR 1975/06, order of 14 January 2008.

[41] The full-text version of the report in German language is here: https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/Abschlussbericht_Reform_StPO_Kommission.pdf?__blob=publicationFile&v=2.

For instance, the defense lawyer should be entitled to be present and to ask questions during the police interrogation of the accused.[42] The defense lawyer should also be entitled to be present at a possible reconstruction of the crime scene and post-indictment lineup. Further rights of attendance, however, were explicitly not favored by the committee.[43] In particular, the defense lawyer should not be granted the right to be present during an expert assessment of the accused.[44]

Experts should be required by law to inform the accused person of her/his rights under sec. 136 GCCP even prior to exploration. The same should apply to the information of witnesses of their rights to refuse to give evidence.[45]

In general, the court should hear the accused before selecting an expert. An exception should apply to expert assessments investigating recurring, in substance identical subjects, such as for instance the blood alcohol concentration. Further exceptions should be admissible if a hearing of the accused would undermine the purpose of the assessment or unduly delay the proceeding.[46]

Once pre-trial investigations have begun, any person accused of a crime should be granted the right to apply for appointed counsel.[47] The investigating judge should be entrusted with the decision on the application.[48]

Sec. 148 GCCP should be amended so that preliminary meetings between an accused person and a defense lawyer which might possibly result in a mandate agreement (so called "Mandatsanbahnung") are covered by the guarantee of unrestricted communication between lawyer and client.[49]

The government should explore the possibilities to define the term "accused person" (in German "Beschuldigter") by law. In doing so, the government should adequately consider the legal position of children incapable of crime.[50]

[42] *Ibid.*, at 1.1.
[43] *Ibid.*, at 1.2.
[44] *Ibid.*, at 1.3.1.
[45] *Ibid.*, at 1.3.2.
[46] *Ibid.*, at 1.4.
[47] *Ibid.*, at 1.6.1.
[48] *Ibid.*, at 1.6.2.
[49] *Ibid.*, at 1.7.
[50] *Ibid.*, at 2.

The prerogative of the public prosecution offices to govern pre-trial investigations should be codified expressly.[51]

Witnesses should be obliged to appear before the investigating officers of the police (sec. 152 GCCA[52]) if a summons was issued by the public prosecution offices. In case of doubts concerning the capacity of the person summoned as a witness and in case of doubts concerning the rights to refuse to give information, the police should be obliged instantly to contact the public prosecution offices.[53]

Road traffic offenses should be exempt from the exclusive authority of the investigating magistrates to order the taking of blood samples. Insofar, the public prosecution offices should be competent.[54] However, there should be no further exceptions to the exclusive authority of the investigating magistrates to order certain highly invasive investigative measures.[55]

Officers of the investigative authorities conducting an interrogation of a witness or an accused person should be obliged to create an audiovisual recording of the interrogation. This should at least apply in general if the facts of the case are complex and/or if the legal estimation of the facts is difficult. Additionally, the officers conducting the interrogation should be obliged to prepare a written record in accordance with the general provisions applicable.[56]

To improve the protection of fundamental freedoms, the committee recommends an express statutory regulation of telecommunication surveillance using software which is installed on personal computers without the knowledge of the affected persons and which automatically records and delivers the contents of telecommunications to the investigative authorities before those data can be encrypted

[51] *Ibid.*, at 3.1.
[52] German Court Constitution Act [Gerichtsverfassungsgesetz] of 1877 in the version promulgated on 9 May 1975 (Federal Law Gazette [BGBl.] Part. I p. 1077 as most recently amended by Art 2 of the Act of 21 December 2015 (Federal Law Gazette [BGBl.] Part I p. 2525). The recent version of the Act in German language is available here: http://www.gesetze-im-internet.de/gvg/. A semi- official English translation including the amendment(s) to the Act by Article 1 of the Act of 2 July 2013 (Federal Law Gazette Part I p. 1938) is here: http://www.gesetze-im-internet.de/englisch_gvg/index.html.
[53] *Ibid.*, at 3.2.
[54] *Ibid.*, at 3.3.
[55] *Ibid.*, at 3.4.
[56] *Ibid.*, at 4.

(so called "source telecommunication surveillance").[57]

The list of offenses justifying the surveillance of telecommunication in sec. 100a subs. (2) GCCP should be revised on the basis of systematic criteria. In this context, the gravity and the factual circumstances of the alleged offence should be decisive.[58]

The use of undercover agents and informants should be subject to express statutory regulation.[59]

The ban against government entrapment should be codified expressly. Therefore, a definition of the term of "government entrapment" should be incorporated in the statutes. The same should apply to the procedural consequences of government actions inconsistent with the ban against entrapment.[60]

A great part of the proposed amendments is intended to improve the effectiveness and the transparency of the main hearing and the communication between the court and/or the participants in the criminal proceeding during the main hearing. So, in very large cases, the Regional Courts and the Higher Regional Courts should before scheduling the main hearing, hold a closed session to discuss the course of the proceedings with the defense lawyer and the representative of the public prosecution office and, if necessary, the representative of the joined plaintiff. The courts, however, should not be obliged to hold such preliminary sessions.[61]

The defendant or the representative of the defendant should be granted the right to make an opening statement after arraignment. The opening statement should not anticipate the closing statement. The representative of the public prosecution office should be entitled to reply to the opening statement.[62]

The trial courts should make greater use of the existing possibility to discuss the current state of the proceeding with the defendant and the representative of the public prosecution office during the main hearing, even, if those considerations do not result in a negotiated agreement (Sec. 257b GCCP). A more extensive obligation of the trial court to report the state of the proceeding at the beginning of the main hearing should not be provided for. The courts should not be obliged to evaluate particular evidences before them or the results of the entire hearing of evidences. Nor should the courts be obliged to discuss the facts of the case and the possible legal estimation of those facts with the participants in the main hearing.[63]

The notification duties of the courts under sec. 265 GCCP should be extended so as to cover situations in which the courts intent to impose supplementary sentences, measures according to sec. 11 subs. 1 no. 8 GCC or incidental legal consequences. The same should apply to situations, in which the facts determining the legal estimation of the case have changed. At least, the courts should be obliged to inform the defendant of their intent to deviate from a preliminary estimation of the facts of the case or of the evidences before them.[64]

The committee further recommends government to consider the implementation of mandatory audiovisual recordings of the main hearing in cases which are to be tried at the first instance before the Regional Courts or the Higher Regional Courts.[65] Audiovisual recordings of particular interrogations should be provided for in cases which are to be tried before the Magistrate Courts.[66]

The courts should be allowed to read out the written records of non-judicial interrogations also in cases in which the following criteria are met: First, the court must warn a defendant who is not represented by legal counsel of the consequences, which might result if he agrees that the written record may be read out in the main hearing. Subsequent to the warning of the court, the defendant must, second, expressly agree that the written record may be read out. Third, the written record may only be read out to validate a confession of the defendant.[67]

In situations, in which a witness refuses to give evidence, it should under certain provisions be admissible to present the audiovisual recording of a former interrogation in the hearing of evidences: This requires first, that the witness did not claim her/his right to refuse to give evidence until the main hearing. Second, the defendant must have

[57] *Ibid*., at 5.1.
[58] *Ibid*., at 5.2.
[59] *Ibid*., at 5.3.
[60] *Ibid*., at 6.
[61] *Ibid*., at 12.1.
[62] *Ibid*., at 12.2.
[63] *Ibid*., at 12.3.
[64] *Ibid*., at 12.4.
[65] *Ibid*., at 13.1.
[66] *Ibid*., at 13.2.
[67] *Ibid*. at 14.1.

been granted the right to confrontation in the course of the former interrogation.[68]

Where prompted to hear evidence regarding a confession of the defendant the court is entitled to read out the written record of a former judicial interrogation (sec. 254 subs. 1 GCCP). The same may occur according to sec. 254 subs. 2 GCCP, if a contradiction to the previous statements of the defendant arises during examination. This provision should be extended so as to allow the presentation of audio-visual recordings of former interrogations of the accused in the hearing of evidences.[69]

Under sec. 153a subs. (2) GCCP the court may, with the approval of the public prosecution office and of the indicted accused, provisionally discontinue the proceedings up until the end of the main hearing in which the findings of fact can last be examined. Concurrently, the court may impose certain restrictions referred to in subsection (1), 1st and 2nd sentences, on the indicted accused. Thus, the current wording of the provision implies that only the trial courts and the courts deciding on appeal on fact and law (see sec. 312 et seq. GCCP) may discontinue the proceedings according to sec. 153a GCCP. According to the committee, the scope of the provision should be extended to the courts deciding on appeal only on points of law (see sec. 333 et seq. GCCP).[70]

Regarding the contestability of Youths Court decisions, the current version of sec. 55 subs. (1) 1st sentence YCL[71] states that a decision which orders only supervisory measures or disciplinary measures, or which leaves the selection and ordering of supervisory measures to the judge responsible for family or guardianship matters, cannot be contested on the basis of the extent of the measures in discourse (1st half sentence). Nor can a decision be contested because other or farther-reaching supervisory measures or disciplinary measures ought to have been ordered or because the selection and ordering of supervisory measures has been left to the judge responsible for family or guardianship matters (2nd half sentence). Whoever has submitted an admissible appeal on fact and law may under sec. 55 subs. (2) YCL no longer submit an appeal on law only against the judgment in the first-mentioned appeal. If the defendant, the parent or guardian or the legal representative has submitted an admissible appeal on fact and law, none of the aforementioned may avail themselves of an appeal on law only as a legal remedy against the judgment in the appeal on fact and law.

The committee now recommended Government to consider whether this regulation ought to be repealed or at least amended.[72]

Reported by Philipp A. Karnowski, Ass. jur.

[68] *Ibid*. at 14.2.
[69] *Ibid*. at 14.3.
[70] *Ibid*. at 24.
[71] Youth Courts Law [JGG] of 1923 in the version promulgated on 11 December 1974, Federal Law Gazette [BGBl.] Part I p. 3427 as most recently amended by Article 3 of the Act of 6 December2011 (Federal Law Gazette Part I page 2554). The semi-official English full-text version of the act is here: http://www.gesetze-im-internet.de/englisch_jgg/.
[72] *Ibid*. at 27.

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