

Germany's comments on the "Draft Principles and Guidelines on remedies and procedures on: The right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court without delay, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful"

General remarks

The Draft Principles and Guidelines seem to encompass a far broader array of procedures than those set out in the title. Especially the parts of the text dealing with the detention of non-nationals seem to go beyond accepted international standards. While Germany supports the draft in general and certainly applauds the spirit in which it is written, we would remind the Working group of the substantial differences between the systems of criminal procedure and other procedures of detention in the world and the need to focus on basic principles. Many of the guidelines formulate desirable ideas in terms of binding standards. That is in our view neither appropriate nor acceptable.

In our view, it would also be more appropriate to formulate guidelines in a less imperative way. They are not binding international public law and therefore should not be drafted in terms like "states must".

Detailed remarks:

Principle 9:

The following addition to No. 30 is proposed:

"In criminal proceedings, this shall be without prejudice to any obligation of a convicted person provided by law to bear the costs of the proceedings insofar as they were caused by the trial for an offence of which he has been convicted."

Principle 10 (33, 34), Guideline 9 (82a):

No. 33 appears to be far too general. A right to bring proceedings for other persons than the detainee himself is only necessary in cases of minors, persons under guardianship or in cases where the authorities prevent the detainee exercising his rights for himself.

No. 34 could be reformulated to read as follows: "No restrictions may be imposed on the detainee's ability to contact his or her legal representative. Restrictions on the detainee's ability

to contact his or her family members or other interested parties in cases of pre-trial detention may only be imposed if there are concrete indications to the effect that the contacts will be used to plan the accused's flight or to tamper with evidence."

Principle 11 (35), Guideline 4 (73 f i. V. m. 73 a):

- No. 35 and 73f: lit a of the guideline is not accepted international standard. It is one of the examples where national procedures may differ and still deliver acceptable standards. It is therefore not acceptable to use the word "must" (see our general remarks).

Principle 18 (56):

No.56 lacks legal clarity. The concept of "ability" to challenge does not fit into legal categories. What is possibly meant is the existence of a legal remedy. That would explain the following "accessible". Equally, the concepts of "priorisation" and "multidisciplinary" do not fit into the concepts of legal challenges. The difference between "age-appropriate" und "responsive to the specific ... needs of children" is not explained. The text is altogether more sociological than legal.

Guideline 4 (73d), Guideline 7 (80e):

No. 73d, 80e: Specified deadlines may be useful. They are certainly not always necessary to achieve the speedy procedure that the draft aims at. It is therefore inappropriate to use the word "must" – see our general remarks.

Guideline 18 (107, 108):

The Guideline aims to protect "every child". We question whether girls in detention are really that much more at risk and whether it is therefore necessary to have them mentioned specifically. No. 108 should be reformulated as it is almost unreadable.

Guideline 18 (109b, 109c, 109h):

In No.109 (b) the words "who are deprived of their liberty" should be added after "children".

Similarly, in No.109(c) it should read "interview such a child". There should also be an addition setting out possible exceptions necessary for the well-being of the child or to prevent obstacles to the investigation.

In No. 109(h) the words "particular in the media," should be deleted and replaced by "by the competent authorities".

Guideline 21

Guideline 21 makes no difference between penal detention and detention pending deportation. Some of the requirements listed go far beyond the standards of the Return Directive 2008/115/EC. The ideas developed in the guidelines should not be worded so as to give the impression that they are binding standards.