



QUESTIONNAIRE RELATED TO

THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR
DETENTION TO BRING PROCEEDINGS BEFORE COURT, 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

Country: Germany

1)

a) If your State *is* a party to the International Covenant on Civil and Political Rights, how is Article 9 (4) of the Covenant incorporated into your domestic legislation?¹ Please provide reference to the specific provisions, including their wording and date of adoption.

b) If your State *is not* a party to the International Covenant on Civil and Political Rights, is the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention² incorporated into your country's domestic legislation?

Yes

No

¹ Article 9 (4) ICCPR reads: "4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

² Human Rights Council resolution, A/HRC/RES/20/16 (17 July 2012), para. 6 (d).

If yes, please provide the legislation, their wording and year of adoption.

A person arrested on the suspicion that he committed a criminal offence must be brought before a judge without undue delay, at the latest on the day after his apprehension (cf. sections 114b, 115 and 115a of the German Code of Criminal Procedure (Strafprozessordnung, StPO)).

If there are strong grounds to assume that someone has committed an unlawful act while lacking criminal responsibility or in a state of diminished responsibility and that his committal to a psychiatric hospital or to an institution for withdrawal treatment will be ordered, he can be provisionally committed to one of these institutions and must be brought before a judge without undue delay, at the latest on the day after his apprehension (cf. section 126 (2) and (3) StPO).

The judge decides on the lawfulness of the detention or provisional committal and orders the release if the preconditions for detention or provisional committal are not met (cf. sections 115 (4), 115a (2) and (3), 126 (3) StPO).

Section 114b StPO:

“(1) The arrested suspect shall be instructed as to his rights without delay and in writing in a language he understands. If written instruction is clearly insufficient, oral instruction shall also be given. The same procedure shall apply mutatis mutandis if it is not possible to give instruction in writing; written instruction shall, however, be given subsequently insofar as this can reasonably be done. The suspect shall confirm in writing that he was given instruction; if he refuses, this shall be documented.

(2) In the instruction pursuant to subsection (1) the suspect shall be advised that he

1. shall, without delay, at the latest on the day after his apprehension, be brought before the court that is to examine him and decide on his further detention; [...]“

Section 115 StPO:

“(1) If the suspect is apprehended on the basis of the arrest warrant, he shall be brought before the competent court without delay.

(2) The court shall examine the suspect concerning the subject of the accusation without delay following the arrest and not later than on the following day.

3) During the examination, the incriminating circumstances shall be pointed out to the suspect and he shall be informed of his right to reply to the accusation or to remain silent. He shall be given an opportunity to remove grounds for suspicion and arrest and to present those facts which speak in his favour.

(4) If remand detention is continued, the suspect shall be informed of the right of complaint as well as of other appellate remedies (Section 117 subsections (1) and (2), Section 118 subsections (1) and (2), Section 119 subsection (5), Section 119a subsection (1)). Section 304 subsections (4) and (5) shall remain unaffected.”

Section 115a StPO:

“(1) If the suspect cannot be brought before the competent court at the latest on the day after his apprehension, he shall be brought before the nearest Local Court without delay, not later than the day following his apprehension.

(2) Once the suspect has been brought before it, the court shall examine him without delay, no later than the following day. At this examination, to the extent possible, Section 115 subsection (3) shall be applied. If the examination shows that the arrest warrant has been revoked, that an application for its revocation has

been made by the public prosecution office (Section 120 subsection (3)), or that the person apprehended is not the person designated in the arrest warrant, the apprehended person shall be released. If he raises other objections to the warrant of arrest or its execution which are not manifestly unfounded, or if the court has doubts regarding the continuation of detention, it shall inform the competent court and the competent public prosecution office accordingly without delay, using the fastest means available in the circumstances; the competent court shall review without delay whether the arrest warrant is to be revoked or its execution suspended.

(3) If the suspect is not released, he shall, at his request, be brought before the competent court for examination in accordance with Section 115. The suspect shall be informed of this right and shall be instructed pursuant to Section 115 subsection (4)."

Section 126a StPO:

"(1) If there are strong grounds to assume that while lacking criminal responsibility or in a state of diminished responsibility (sections 20 and 21 of the Criminal Code) someone has committed an unlawful act and that his committal to a psychiatric hospital or to an institution for withdrawal treatment will be ordered, the court may, in a committal order, direct that he be provisionally committed to one of these institutions, if public security so requires.

(2) Sections 114 to 115a, 116 subsections (3) and (4), Sections 117 to 119a, 123, 125 and 126 shall apply mutatis mutandis with respect to provisional committal. Sections 121 and 122 shall apply mutatis mutandis subject to the proviso that the Higher Regional Court shall review whether the requirements for provisional committal continue to apply.

(3) The committal order shall be revoked if the conditions for provisional committal no longer exist or if the court does not order committal to a psychiatric hospital or to an institution for withdrawal treatment in its judgment. The release shall not be delayed by the fact that appellate remedies have been sought. Section 120 subsection (3) shall apply mutatis mutandis. [...]"

2) Does this mechanism apply to all forms of deprivation of liberty, such as administrative detention, including detention for security reasons, involuntary hospitalisation, immigration detention, or any other reason?

Yes

No

If yes, please provide the list of the forms of detention to which the mechanism is applicable.

In all cases of deprivation of liberty, the detainee has the possibility of bringing about a court ruling on the legality of the detention. The mechanisms vary according to the area of law concerned (e.g. asylum law, laws on the treatment of psychiatric conditions) but they all provide for judicial determination of the case. This is guaranteed by Art. 104 para. 2 of the German constitution, the Basic Law (Grundgesetz, GG): "Only a judge may rule on the permissibility or continuation of any deprivation of liberty. 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 law."

3) Is the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court available for individuals subjected to preventive detention measures?

Yes

No

If not, please explain in which case(s) your country's laws do not-provide remedies and cite relevant legislation.

4) Does this mechanism provide for any particular remedies? In particular, does the mechanism provide for release and compensation for unlawful detention?

Yes

No

If yes, please state and explain the relevant remedies.

The right to release in the case of unlawful detention follows directly from the Basic Law (cited above).

In the Federal Republic of Germany, compensation for criminal prosecution measures including "unlawful detention" is regulated under the Act on Compensation for Criminal Prosecution Measures (*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*, StrEG) of 8 March 1971 (Federal Law Gazette I p. 157) which was most recently amended by Article 22 of the Act of 8 December 2010 (Federal Law Gazette I p. 1864).

The basic procedure is regulated in sections 1 to 6 and 8 to 9, which provide for compensation in the case of the execution of detention or other provisional criminal prosecution measures. Section 2 (2) StrEG contains an exhaustive list of these "other criminal prosecution measures" that justify compensation under the StrEG. In the area of liberty deprivation, these are as follows:

1. Provisional committal or committal for observation pursuant to the provisions of the StPO and the Youth Courts Act (*Jugendgerichtsgesetz*, JGG),
2. Provisional arrest pursuant to section 127 (2) StPO,

3. Measures ordered by the judge who suspends the execution of the arrest warrant (section 116 StPO).

Compensation requires the reversal or mitigation in criminal proceedings of an already final and binding criminal conviction in a reopened case (section 1), or that proceedings have been discontinued or the opening of the main hearing denied (section 2). Equitable compensation is possible, in particular, in cases where the discontinuation of the proceedings is contingent upon the discretion of the court or the public prosecution office (section 3), or in the event of a conviction whereby the preceding prosecution measures were more severe than the sentence ordered in the conviction before the criminal court (section 4). Those who brought the criminal prosecution measures upon themselves are not eligible to receive compensation (sections 5, 6).

As a special case of compensation for infringement of the rights of the individual by public authorities, the right to compensation under the StrEG is governed by the general rules governing the law on compensation of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), which are modified by the provisions of section 7 StrEG.

Pursuant to section 7 StrEG, the pecuniary damage incurred as a result of the criminal prosecution measure is to be compensated. This means every loss that can be valued in monetary terms of assets or other legally protected goods incurred by the person entitled to compensation. Typical losses suffered as a result of criminal prosecution measures include loss of income, lost holiday, losses relating to social security, the cost of restoring health impaired during a period of detention, the costs of defence against the criminal prosecution measures, loss of employment and reduced income owing to profession or employment.

Compensation for a deprivation of liberty suffered also includes compensation for non-pecuniary damages in the form of a lump sum payment. The Second Act to Amend the StrEG of 30 July 2009 (Federal Law Gazette I p. 2478) more than doubled this lump sum. As of 5 August 2009, this is now EUR 25 for each day of detention begun.

In principle, the criminal court decides on the State Treasury's obligation to compensate (sections 8, 9). The amount of compensation is determined by the justice administration authority (sections 10 et seqq.). Legal recourse is available to the ordinary courts against the justice administration's decision (section 13).

The act personally applies to everyone, as long as German criminal jurisdiction is established and exercised. The act does not differentiate between Germans, foreign citizens and stateless persons.

In addition to claims under the StrEG, claims may also arise from a breach of official duties in connection with the conduct of investigation proceedings. The preconditions and purposes of both claims are different; the StrEG is applicable in cases where the criminal prosecution measures were executed in accordance with official duties but where the final judicial decision was taken in favour of the person concerned. Unlawful criminal prosecution measures based on the culpable violation of official duties on part of the acting civil servant, however, fall under the principle of official liability laid down in Article 34 of the Basic Law in conjunction with section 839 BGB. As a rule, the state or the entity in whose service the official is employed are liable.

5) Are there persons other than the detainee who can initiate the procedure on behalf of the detainee under your country's domestic law?

Yes

No

If yes, please state who?

In pre-trial custody cases, the defence attorney can initiate proceedings on behalf of the detainee. In cases concerning immigration detention (only relevant with regard to detention pending deportation), the detainee's lawyer may bring proceedings.

In cases concerning involuntary hospitalisation, the court is obliged to review any deprivation of liberty at regular intervals on its own motion. In addition, the detainee, his lawyer, his legal guardian or custodian, close relatives and the authorities running the relevant institution are entitled to initiate proceedings.

- 6) What are the formal requirements and procedures for a detainee to invoke the right to bring proceedings before court, in order that the court may decide without delay on the lawfulness of the detention? Please cite relevant domestic legislation.

In cases of pre-trial custody, the decision on the lawfulness of the detention is taken by a judge shortly after the arrest (cf. answer to question 1). During pre-trial detention, the suspect may at any time apply for a court hearing to review whether the arrest warrant is to be revoked or its execution suspended (cf. section 117 StPO). The application can be made in writing or orally to the registry of the local court of the district in which the suspect is detained (cf. section 299 StPO). The court has to schedule an oral hearing on the application within two weeks (cf. section 118 StPO).

Section 117 StPO

(1) As long as the suspect is in remand detention, he may at any time apply for a court hearing as to whether the arrest warrant is to be revoked or its execution suspended in accordance with Section 116 (review of detention).

(2) A complaint shall be inadmissible where an application has been made for a review of detention. The right of complaint against the decision following the application shall remain unaffected.

(3) The judge may order specific investigations which may be important for the subsequent decision concerning continuation of remand detention, and he may conduct a further review after completion of such investigations.

Section 118 StPO

(1) In the case of review of detention, a decision shall be given after an oral hearing upon application by the suspect, or at the court's discretion proprio motu.

(2) Where a complaint has been lodged against the arrest warrant, then upon application by the suspect or on the court's own motion, a decision may also be given in the complaint proceedings after an oral hearing.

(3) Where following an oral hearing remand detention has been maintained, the accused shall have a right to further oral hearing only if remand detention has continued for at least three months and at least two months of remand detention have elapsed since the last oral hearing.

(4) A right to an oral hearing shall not exist as long as the main hearing is in process, or after a judgment has been pronounced which imposes imprisonment or a custodial measure of reform and prevention.

(5) The oral hearing shall be held without delay; unless the suspect consents otherwise, it may not be scheduled more than 2 weeks after receipt of the application.

Section 299 StPO

(1) A suspect who is not at liberty may make oral statements relating to appellate remedies to be recorded by the registry of the Local Court in whose district the institution where he is detained upon official order is located.

(2) For observance of a time limit it shall be sufficient for the record to be made within the time limit.

7) Does the legislation provide for a time limit for submitting such application to the court? If so, please indicate what is the maximum time in the number of:

- Days (How many?)
- Months (How many?)
- Years (How many?)

There are no such time limits.

8) Are there any major decisions of your country's Constitutional or Supreme Courts concerning the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court?

- Yes
- No

If yes, please provide the date and number of the decision(s) and, if possible, a copy of the decision(s).

In Germany, the rights of anyone deprived of his or her liberty by arrest or detention are set forth in Art. 2, Art. 19 para. 4 and Art. 104 GG. Since the late 1950's, the German Constitutional Court (*Bundesverfassungsgericht*) has rendered a number of major decisions on various aspects of the individual rights of detained or arrested persons to bring proceedings before court. These decisions are listed in chronological order in the attached overview. Please also find attached copies of the listed decisions (in German).