



## **Working Group on Arbitrary Detention**

In cooperation with the  
Office of the United Nations High Commissioner for Human Rights

# **Global Consultation on the Right to Challenge the Lawfulness of Detention Before Court**

1 – 2 September 2014, Room XIX Palais des Nations  
Geneva, Switzerland

## **CONCEPT NOTE**

---

### **I. Overview**

The Working Group on Arbitrary Detention in cooperation with the Office of the United Nations High Commissioner for Human Rights will convene a Global Consultation from 1 to 2 September 2014 in Geneva, Switzerland. The aim of the meeting is to seek input on the development of draft basic 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 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.

### **II. Context**

The Working Group has consistently<sup>1</sup> emphasized that habeas corpus is, in itself, a human right, as may be inferred from a careful reading of articles 8, 9 and 10 of the Universal Declaration of Human Rights, and more explicitly, article 9, paragraph 4, of the International Covenant on Civil and Political Rights. The latter provides that: “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” The Human Rights Committee has clarified the universal application of the right to challenge the lawfulness of detention before court, which extends to all situations of deprivation of liberty, including detention for the purposes of criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, wholly groundless arrests, house arrest, solitary confinement,

---

<sup>1</sup> E/CN.4/1993/24; A/HRC/19/57

administrative detention, detention for vagrancy or drug addiction, detention of children for educational purposes, and other forms of administrative detention.<sup>2</sup>

The relevance of habeas corpus to situations of detention for non-criminal acts has increasingly attracted attention. For example, the Working Group has observed that, as part of the so-called “war against terrorism”, instances of arbitrariness and unacceptable limitations on the exercise of the human right of habeas corpus have been committed against political opponents, religious dissenters, and other persons exercising their freedoms of opinion, expression, conscience and religion<sup>3</sup>. The Special Rapporteur on the human rights of migrants has observed that irregular migrants are at higher risk of being arbitrarily detained as they are largely detained using tools under administrative law which very often do not establish a right of detainees to access to legal services, including the ability to challenge their detention. It is in this context that the Human Rights Council has mandated the Working Group to undertake an analysis of the existing international, regional and national legal frameworks addressing the right and to provide guidance, following broad consultation, on how the gaps may effectively be addressed.

### **III. Background**

By resolution 1991/42 the former Commission on Human Rights established the Working Group on Arbitrary Detention with the mandate to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant legal instruments accepted by States concerned.

The right to challenge the lawfulness of detention has received increasing attention in recent years at the international level. Most recently, the United Nations Human Rights Council, in its resolution 20/16 encouraged all States “[to] respect and promote 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, in accordance with their international obligations”<sup>4</sup>.

To support States in fulfilling this duty, the Council requested the Working Group to prepare draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to bring proceedings before court, as stated above.<sup>5</sup>

In 2013, the Working Group, through the means of a questionnaire, sought the views of States, relevant United Nations agencies, intergovernmental organizations, United Nations treaty bodies, in particular, the Human Rights Committee, other special procedures, national human rights institutions, non-governmental organizations and other relevant stakeholders to identify gaps, challenges and best practices in ensuring access to and exercise of the right.

---

<sup>2</sup> Communications No. R.1/4, *Torres Ramírez v. Uruguay*, para. 18; and No. 1449/2006, *Umarov v. Uzbekistan*, para. 8.6

<sup>3</sup> E/CN.4/2005/6, para. 63

<sup>4</sup> A/HRC/RES/20/16 (17 July 2012), para. 6 (d).

<sup>5</sup> *Ibid.* at para. 10.

Based on the information submitted by stakeholders and the result of further review, the Working Group submitted a thematic report to the 27<sup>th</sup> session of the Human Rights Council comprising of a compilation of the international, regional and national legal frameworks treating the right to challenge the lawfulness of detention before court.<sup>6</sup> This report clarified State obligations in ensuring the effectiveness of the right under international and regional law.

On the basis of these standards, the Working Group undertook an assessment of State responses to its questionnaire on implementation of the right in the domestic legal frameworks. The objective of the exercise was not to draw any conclusions on the effectiveness of States' implementation of the right, but rather to develop an appreciation of the uniformity and divergence in State practice, thereby demonstrating the *opinio juris* of States as well as identifying the gaps in the protection of persons deprived of their liberty with regard to their ability to effectively challenge the lawfulness of their detention before court and receive an appropriate remedy. The results of the assessment can be found in the Background Paper produced for the consultation.

The responses illustrate the uniform adoption of the right in the domestic legal frameworks and, yet, reveal gaps in the scope of its application to all persons in all situations of deprivation of liberty. It is with such foresight that the Human Rights Council mandated the Working Group to undertake a study to, firstly, identify gaps in the coverage provided by existing legal frameworks to persons deprived of their liberty in respect of their ability to challenge the lawfulness of their detention. And, secondly, to propose, through draft principles and guidelines, the components necessary to ensure that the right may be exercised universally.

The Working Group thus convenes the current consultation to bring together all relevant stakeholders in order to solicit their viewpoints on identifying the gaps in the implementation of the right in law and practice. The consultation will equally focus on proposing solutions to meeting the challenges of ensuring universal coverage of the right.

As requested by the Human Rights Council, a Final Report comprising the outcome of the stakeholders consultation and the draft basic principles and guidelines will be submitted to the Council in September 2015.

#### **IV. Participants**

The Consultation will bring together Member State representatives, representatives of United Nations agencies, intergovernmental organizations, United Nations treaty bodies, other special procedures of the Human Rights Council, national human rights institutions, non-governmental organizations and other relevant stakeholders.

Twelve experts were invited to the consultation, comprising of the Chair and the Rapporteur of the Human Rights Committee and ten regional experts. The cross-regional and cross-sectorial selection of experts include representatives from United Nations agencies, international organizations, national human rights institutions, non-governmental organizations, academia and the judiciary.

---

<sup>6</sup> A/HRC/27/47

## **V. Objectives**

The Human Rights Council directed the Working Group to seek the views of relevant stakeholders, in preparation of the first draft of the principles and guidelines on the right to challenge the lawfulness of detention before court. To this effect the present consultation aims to bring together a diversity of stakeholders with the following objectives:

1. To exchange views on the scope and application of the standards set by the universal and regional human rights systems that are particularly relevant to the right to challenge the lawfulness of detention before court;
2. To share experiences on obstacles encountered in ensuring the effective exercise of the right in practice and to share good practices on addressing these challenges..

## **VI. Expected Outcomes**

The expected outcomes of the consultation include:

- Increased awareness among State representatives, NGOs, NHRIs and regional mechanisms of the content and scope of the right, and specifically the substantive and procedural obligations of States in ensuring its effective exercise in practice.
- An enhanced understanding of both the obstacles to enjoying the exercise of the right to challenge the lawfulness of detention before court for all persons in all situations of deprivation of liberty, as well as good practices in overcoming these obstacles, The Working Group can draw upon this information in shaping the draft principles and guidelines on remedies and procedures of the right to be presented to the Human Rights Council in September 2015. The aim of which is to assist States in the formulation, adoption and implementation of normative frameworks and policy that will provide all detained persons with improved access to a fair judicial process, and provide adequate and appropriate remedies.
- A stronger global collaboration among the various actors working to protect the rights of all persons in all situations of deprivation of liberty.

## **VII. Modalities**

The global consultation on the right to challenge the lawfulness of detention before court is conceived as a platform for discussion and experience-sharing among the participants and with the Working Group. The consultation will be structured in a two-day meeting.

Each of the topics identified above will be discussed in sessions during which a panel of experts and practitioners will expose their views and analyses. The panelists' presentations will represent national, regional and international perspectives. They will give incentives to the participants to engage in an interactive dialogue and to provide valuable insights, for which half of the time slot for each panel is, in principle, reserved.

Emphasis will be placed on outstanding issues and aspects that have thus far received inadequate attention in ensuring implementation of the right, both in law and practice. It is also envisaged that discussions will examine the respective roles of different actors in strengthening access to judicial oversight of detention for all persons deprived of their liberty.

A closing session will be held to take stock of the good practices shared and the challenges encountered, and to propose how these may be taken into account in the design of the draft principles and guidelines on the right.

The languages of the consultation will be English, French, and Spanish.

### **VIII. Content**

The first day of the consultation will focus on a general discussion outlining the substantive and procedural obligations of States in ensuring the exercise of the right to challenge the lawfulness of detention before court and receive appropriate remedy. This includes a guarantee in law and practice that this fundamental safeguard of personal liberty may be exercised in all situations of deprivation of liberty, without delay and without exception, resulting in an entitlement to unconditional release and the provision of an enforceable right to compensation upon a successful challenge.

To achieve this objective, States are required to ensure multiple procedural safeguards exist including notification of the reasons for the arrest and of the availability to bring a challenge to the lawfulness of the detention. No barriers must exist in bringing forth the challenge before court, including choice of representative and the requirement for interpretation. The proceedings must comply with the fundamental rules of procedural fairness, and include the right of the detainee to appear personally before the court. The scope of the court's review must extend to consideration of the lawfulness of the detention. A detained person is entitled to multiple reviews of the lawfulness of his or her detention.

The remainder of the consultation will be dedicated to focused discussion on the obstacles encountered in ensuring the effective exercise of the right in practice and the sharing of good practices on addressing these challenges in regards to the following situations of deprivation of liberty:

- Detention on the basis of criminal charges of both adults and children;
- Immigration-related detention, including refugees, asylum-seekers, rejected asylum-seekers, stateless persons, trafficked persons, labour migrants, regular migrants who have breached their conditions of stay, and undocumented migrants, among others;
- Preventive detention, including the involuntary detention of persons with disabilities;
- Protective detention, including the detention of children for educational purposes;
- Security-related detention, including detention for counter-terrorism, national security or intelligence gathering purposes; and,
- Detention in armed conflict, including military detention.