



Note No. 658/2014

The Australian Government presents its compliments to the UN Working Group on Arbitrary Detention (Working Group'), and has the honour to refer to its call for comments from all interested stakeholders on the Working Group's Preliminary Draft Principles and Guidelines on Remedies and Procedures of Anyone Deprived of His or Her Liberty to Bring Proceedings Before a Court ('Draft Principles and Guidelines').

The Australian Government commends the Working Group for its initiative in developing Draft Principles and Guidelines and thanks the Working Group for the opportunity to provide comments.

Australia is a longstanding party to a number of international agreements that enshrine the right to challenge the lawfulness of detention, most notably the *International Covenant on Civil and Political Rights* ('ICCPR'), and is firmly committed to upholding its obligations under those agreements. The Australian Government recognises the significant role of the right to challenge the lawfulness of detention in protecting the liberty and security of individuals and in maintaining the rule of law.

Australia is concerned however that certain draft principles and guidelines go beyond States' current obligations under international law and do not reflect certain practices within common law countries. In order to assist the Working Group, the Australian Government makes the enclosed preliminary observations to clarify its understanding of the right to challenge the lawfulness of detention.

These preliminary observations are not exhaustive. Australia would be grateful for the opportunity to provide further comments on the Draft Principles and Guidelines, along with other stakeholders, as the draft is developed by the Working Group.

The Australian Government again thanks the Working Group for the opportunity to provide comments on the Draft Principles and Guidelines. Australia would welcome the opportunity to further consider and comment on the draft as it is developed.

The Australian Government reiterates its firm support for the work of the Working Group, and avails itself of this opportunity to renew to the Working Group the assurances of its highest consideration.



Geneva

1 October 2014

Views of the Australian Government on Preliminary Draft Principles and Guidelines on Remedies and Procedures of Anyone Deprived of His or Her Liberty to Bring Proceedings Before a Court, in Order that the Court May Decide the Lawfulness of Detention

A. GENERAL PRINCIPLES

Draft Principle 1 (Liberty)

1. The Australian Government welcomes and endorses draft principle 1, which provides that everyone has the right to be free from the unlawful deprivation of liberty.

Draft Principle 2 (Universality)

2. Australia supports the principle of universality of international human rights law ('IHRL'), but notes that in situations of armed conflicts the scope and content of rights under IHRL may be affected as a result of the application of international humanitarian law ('IHL').
3. The specific interrelationship between IHRL and IHL is not settled as a matter of international law. Australia considers that the protection of IHRL does not cease in situations of armed conflict. Human rights obligations will continue to apply in situations of armed conflict, although they may be displaced to the extent necessitated by IHL. This will depend on the particular circumstances and obligations involved.
4. Any proposal to apply the right to review the lawfulness of detention by a court to all detention occurring in the context of an armed conflict, regardless of whether it is military, security or criminal detention, would not be consistent with the established rules of IHL. There are specific IHL provisions that relate to the deprivation of liberty and the processes and procedures that are to be followed in the context of an armed conflict. Australia recommends that provisions addressing deprivation of liberty contained in Geneva Conventions III and IV, Additional Protocols I and II to those Conventions and Common Article 3 be appropriately reflected in the document.
5. Independent review of the legal basis for detention is always important, but may not always be carried out by a court in times of armed conflict. Australia refers to principle 12 of the *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, which provide that:

A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention.
6. Australia suggests that the Working Group qualify draft principle 2 (and the latter principles that refer to courts) by stating that there is a right to bring proceedings before a court or, where consistent with applicable international law, 'by an impartial and objective authority'.

Draft Principle 3 (Codification)

7. Draft principle 3 does not currently give due recognition to the margin of appreciation that States have in implementing their human rights obligations. As the Working Group is aware, the right to challenge the

lawfulness of detention has its genesis in the common law writ of *habeas corpus ad subjiciendum*.¹ In Australia, the court's jurisdiction to issue that writ is provided by the common law.² Statutes do not qualify that jurisdiction, which the court retains as an indispensable element of its constitutional function to protect fundamental rights and freedoms.³ Other common law States similarly safeguard the right to challenge the lawfulness of detention.⁴ Australia respectfully suggests that the Principles and Guidelines avoid requiring codification of this right, which would imply a legislative basis is required and therefore give preference to a singular method of implementation. Australia recommends that draft principle 3 state that guarantees of the right should be 'provided' rather than 'codified' by national law.

Draft Principle 4 (Non-Derogability)

8. The courts in Australia have made clear that the writ of *habeas corpus* persists in public emergencies as a matter of domestic law.⁵ Nonetheless, Australia does not consider that the obligation is non-derogable as a matter of international law. Australia is therefore concerned that the draft wording of principle 4 implies that certain elements of the right to challenge the lawfulness of detention are non-derogable.
9. The Working Group has previously referred to the views of various human rights committees and other joint-reports in support of that position.⁶ It considers that the non-derogability of elements of the right flows from treaty obligations, is a matter of customary international law and represents a peremptory norm of international law.⁷ Australia respectfully disagrees with that position.
10. Article 9 of the ICCPR is not included in the list of non-derogable rights in article 4(2) of that Covenant. Obligations in the Covenant should be interpreted according to accepted principles of treaty interpretation, in particular those in the *Vienna Convention on the Law of Treaties* ('VCLT'). Article 31(3) of the VCLT provides that a treaty may be interpreted taking into account context, including '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. The Working Group has not cited any evidence of any subsequent agreement or practice in the application of the ICCPR that would support the proposition that article 9 is a non-derogable right under the Covenant.⁸ Australia considers that treating article 9 as a non-derogable right under the ICCPR would be contrary to the fundamental principle of international law that States must consent to obligations in order to be bound by them. Accordingly, Australia does not accept that the ICCPR should be interpreted so that article 9 is treated as a non-derogable right, in addition to the list of non-derogable rights set out in article 4(2).

¹ Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed., 2000) 374; and Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 2005, 2nd ed) 235.

² *Antunovic v Dawson* [2010] VSC 377, 4.

³ Ibid.

⁴ Clark and McCoy, *Habeas Corpus: Australia, New Zealand and The South Pacific* (The Federation Press, 2000) 37. As stated by the Secretary of State for Lord Birkenhead in *Home Affairs v O'Brien* [1923] AC 603 at 609, '[it is] a writ antecedent to statute, and throwing its roots deep into the genius of our common law ... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement'.

⁵ *Hicks v Ruddock* [2007] FCA 299, [35] (Tamberlin J), citing *Liversidge v Anderson* [1942] AC 206, 244.

⁶ See Report of the Working Group on Arbitrary Detention, A Compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention, 30 June 2014, A/HRC/27/47, [25]-[27].

⁷ Ibid.

⁸ Ibid [25]-[27].

11. The Working Group has not cited any evidence to support the proposition that States view the right to challenge the lawfulness of detention as non-derogable under customary international law. The Human Rights Committee's ('HRC') General Comment No 29 (2001) is the critical source cited by the Working Group.⁹ The Working Group also refers to the views of Special Procedures Mandate Holders in a report on Guantanamo Bay, which in turn relies upon the HRC's views in the General Comment.¹⁰ The HRC's views do not provide evidence of the *opinio juris* of States. Other human rights committee reports referred to by the Working Group simply assert that the right is non-derogable.¹¹
12. Australia supports the retention of that part of draft principle 4 which provides that any derogation from the right is limited to times of public emergency which threaten the life of the nation and to the extent strictly required by the exigencies of the situation.

B. PRINCIPLES RELATING TO COURT PROCEEDINGS

Draft Principle 5 (The 'Court')

13. Following the comments on draft principle 2, Australia is of the view that further guidance on the powers of the impartial and objective authority may be usefully included in this paragraph. In particular, it may be useful to state that the impartial and objective authority should have access to legal advice as required.
14. Australia also notes that there may be situations that arise domestically or under domestic law where alternative review mechanisms provide adequate safeguards against arbitrary detention. In this context, Australia notes that its military justice system permits military members to be deprived of their liberty as a method of punishment. Australia is of the view that its military discipline system affords appropriate avenues of recourse for disaffected members, which encompasses review by an impartial and objective superior military officer, supported by an independent qualified legal officer. Nonetheless, Australia notes that the Courts retain the common law jurisdiction to issue a writ of *habeas corpus* in such cases.¹²

Draft Principle 6 (Ability to bring proceedings before the Court)

15. Australia supports the Working Group's view that '[a]nyone can bring proceedings before the court [or impartial and objective authority] to challenge the lawfulness of detention'. This is a particularly important safeguard against incommunicado detention, as in such situations the person detained may be unable to bring proceedings themselves or through an appointed representative.

⁹ Ibid [26].

¹⁰ Special Procedures Mandate Holders, 'Situation of detainees at Guantánamo Bay', E/CN.4/2006/120, [14]. While the Working Group also suggests that the Special Procedures Mandate Holders relied upon the jurisprudence of the International Court of Justice (ICJ), that jurisprudence was only relied upon for the proposition the ICCPR is applicable during armed conflicts. Indeed, the ICJ is cited as stating that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the [ICCPR]', *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ Reports 2004 (9 July 2004), [106].

¹¹ The Subcommittee on the Prevention of Torture simply asserted the non-derogability of the right in 'Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras', CAT/OP/HND/1, [137], as does the Committee on Enforced Disappearances in 'Concluding observations on the report submitted by Spain under article 29, paragraph 1, of the Convention', CED/C/ESP/CO/1, [26].

¹² See comments above in relation to principle 3.

16. In Australia, the courts have tended to deal with the matter of standing to bring *habeas corpus* proceedings on a liberal case-by-case basis.¹³ The High Court of Australia has accepted that ‘strangers’ have standing to seek *habeas corpus* review.¹⁴

Draft Principle 7 (Multiple Challenges)

17. Australia supports the Working Group’s view that a ‘detainee has the right to challenge the lawfulness of his or her detention multiple times’, but notes that this right should be limited to circumstances in which the challenge has reasonable grounds, is not frivolous or vexatious.

Draft Principle 8 (Appearance before the court)

18. Australia notes the importance of expeditious proceedings to determine the lawfulness of detention, as reflected in draft principle 10. The physical appearance of detainees may not always be possible within prompt timeframes, particularly when dealing with rural or remote locales. It may also be inappropriate or unnecessary when the application concerns a child or other vulnerable person. Australia therefore interprets ‘appearance’ to encompass both physical appearance and appearance by other means (for example, video link), in order to ensure detainees are brought promptly before a judge, judicial officer or impartial authority.

¹³ Clark and McCoy, *Habeas Corpus: Australia, New Zealand and The South Pacific* (The Federation Press, 2000) 146.

¹⁴ *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Ltd* (2000) 200 CLR 591, [2] (Gleeson CJ and McHugh J); cf *Clarkson v R* [1986] VR 464.