



UNITED NATIONS HUMAN RIGHTS COUNCIL

Working Group on Arbitrary Detention

**INTERNATIONAL COMMISSION OF JURISTS SUBMISSION
TO THE WORKING GROUP ON ARBITRARY DETENTION ON ITS
REVISED 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**

Submitted March 2015

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

ICJ submission to the Working Group on Arbitrary Detention on its Revised Draft Principles and Guidelines on the right to *habeas corpus*

1. From 2 to 5 February 2015, the Working Group on Arbitrary Detention (the Working Group) met to continue its elaboration of *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*. The meeting resulted in the public release of revised Draft Principles and Guidelines, in respect of which the Working Group called for input from all UN Member States and agencies, as well as from intergovernmental organizations, treaty bodies, other special procedures, national human rights institutions, non-governmental organizations and other relevant stakeholders.

2. The International Commission of Jurists (ICJ) welcomes the opportunity to make submissions in response to the Working Group's call for input. It welcomes the elaboration by the Working Group of the revised Draft Principles and Guidelines as a means of assisting States to enhance, in law and in practice, respect for the right to *habeas corpus*. It especially welcomes:

- Paragraph 72, in which applicable qualifications are set out to any derogating measures to accommodate constraints on the application of some procedural elements of the right to *habeas corpus*;
- Principle 6 and Guideline 4 which reaffirm that *habeas corpus* petitions must be heard by courts that bear all characteristics of competence, independence and impartiality (paras 23 and 73(b)) and that courts must give reasoned and particularized decisions (para 73(i));
- Guideline 7, in which it is provided that individuals are entitled to take proceedings multiple times (para 79(a) and (b)), that expediency is required, including in cases of subsequent challenges, and especially in cases alleging, among other things, torture or ill-treatment (para 79(c)) and that authorities remain obliged to ensure regular review of the continuing need for detention (para 79(d));
- Principle 9 and Guideline 8 concerning legal representation and legal aid;
- The clarifications in Principle 10 and Guideline that persons able to bring proceedings include counsel, family members or other interested parties, whether or not they have proof of the consent of the detainee (paras 33 and 82(a)) and that no restrictions may be imposed on a detainee's ability to contact such persons (para 34);
- Guideline 13 concerning disclosure and limitations applicable to any non-disclosure of information on security or other grounds;
- Guideline 14, reflecting authorities' obligation to justify the need and proportionality of detention;
- Principle 15 and Guideline 16 (on remedies), reflecting the overarching right to remedies and reparation (paras 42 and 97), the need for authorities to give immediate effect to an order for release (para 43) and the right to compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition (paras 100 and 101); and
- Principle 16 concerning the application of Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) alongside international humanitarian law (paras 45 and 51), the application of Article 9(4) to civilians in an international armed conflict (para 51), the application of *habeas* principles to prisoners of war (para 52), and the question of administrative detention or internment in the context of a non-international armed conflict (para 53).

3. The ICJ’s submissions in this document suggest means of further improving the revised Draft Principles and Guidelines and concern:

- The temporary nature of any derogating measures impacting upon the application of some procedural elements of the right to *habeas corpus*;
- The competence of courts to make orders for immediate release;
- The implementation of court orders for release;
- The public nature of judicial decisions following adjudication of *habeas corpus* petitions;
- Guarantees applicable to specialized tribunals;
- The right to be informed of the right to legal assistance;
- Confirming that the procedure must be available at all times and to all detained persons, including prisoners of war, as a remedy to protect non-derogable rights such as the prohibition against torture and other ill-treatment: and
- The inadmissibility of evidence obtained by torture.

NON-DEROGABILITY

Revised Draft Principle 4 and Guideline 3

4. The effect of Principle 4 and Guideline 3 is to confirm the non-derogability of the right to *habeas corpus*, whilst acknowledging that certain measures may be taken to accommodate practical constraints on the application of some procedural elements of the right to *habeas corpus* in times of public emergency that threatens the life of the nation. Guideline 3 sets out qualifications that are to be applicable to any such practical constraints.

5. The ICJ recommends that the following additional element be included in this list of qualifications in Guideline 3, paragraph 72:

“such measures apply temporarily, only for as long as the exigencies of the situation require, and are accompanied by mechanisms to periodically review their continued necessity and proportionality;”

6. This further element is important to ensure that measures are not only established in accordance with the requirements set out in Guideline 3(b), but that, once established, they continue to be necessary and proportionate. It also reinforces paragraph 49 of the revised Draft Principles and Guidelines.

CHARACTERISTICS OF THE COURT

Revised Draft Principles 6 and 15, and Guidelines 4 and 16

7. Principle 6 and Guideline 4 confirm that *habeas corpus* proceedings must be dealt with by a court that bears the full characteristics of a competent, independent and impartial tribunal established by law. Paragraph 73, in Guideline 4, sets out particular requirements to be complied with in order to give effect to this.

COMPETENCE TO ORDER RELEASE

8. Principle 6, paragraph 23, provides that a competent court is one that is “capable of exercising recognizable judicial powers”. Guideline 4, paragraph 73(g), clarifies that this includes the power “to order immediate release if the detention is arbitrary or unlawful”.

9. The ICJ notes that, in practice, there are instances where courts have not been provided with the authority to order immediate release upon finding that detention is arbitrary or unlawful. Since this is such a fundamental aspect of the right to *habeas corpus*, the ICJ recommends that this aspect of the competence of courts be expressly referred to not only in paragraph 73(g), but also in paragraph 23.

10. The ICJ therefore recommends that Principle 6, paragraph 23, be amended to read as follows (suggested additional text underlined):

“A court of law shall review the arbitrariness and lawfulness of the deprivation of liberty. Such a court shall bear the full characteristics of a competent, independent and impartial tribunal capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is arbitrary or unlawful, and be established by law.”

IMPLEMENTATION OF COURT ORDERS OF RELEASE

11. Paragraph 73(h) provides that “Any court order of release shall be respected and *promptly* implemented by State authorities” (emphasis added). The duty of the authorities to respect court orders for release is also reflected in Principle 15 on remedies and reparations, within the last sentence of paragraph 43, which makes it clear that authorities “shall give *immediate effect*” (emphasis added) to any such order.

12. There is therefore an inconsistency within the revised Draft Principles and Guidelines (para 73(h) referring to the ‘prompt’ implementation of court orders for release, compared to para 43 referring to ‘immediate’ implementation).

13. Reference to ‘immediate’ implementation in para 43 is consistent with other standards. For example, Human Rights Committee General Comment 35 on the right to liberty under Article 9 of the ICCPR, expresses that a judicial order of release under Article 9(4) of the ICCPR “must be complied with immediately” (UN Doc. CCPR/C/GC/35 (2014), para 41).

14. The ICJ therefore recommends that, to achieve internal consistency within the revised Draft Principles and Guidelines, and consistency with General Comment 35, paragraph 73(h) of the Working Group’s revised Principles and Guidelines be amended as follows (suggested additional text underlined):

“Any court order of release shall be respected and ~~promptly~~ immediately implemented by State authorities;”

PUBLIC NATURE OF JUDICIAL DECISIONS

15. Paragraph 73(i) speaks of the quality of a decision to be made by the court on a *habeas corpus* petition, including that such a decision be reasoned, clear, precise and complete. The ICJ notes that there are two paragraphs 73(i). In this instance, the ICJ is referring to the second of those, appearing at the top of page 14 of the revised Draft Principles and Guidelines.

16. International human rights law also requires that, in accordance with the principle of the open administration of justice, judicial decisions be made public,¹ except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

17. The ICJ therefore recommends that paragraph 73(i) (second iteration, at page 14) of the Working Group’s revised Draft Principles and Guidelines be amended to also reflect that decisions on a *habeas corpus* petition should be public, unless the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

SPECIALIZED TRIBUNALS

18. Paragraph 74 acknowledges the exceptional possibility of States establishing specialized tribunals. It provides that such tribunals “must be established by law affording *equivalent*

¹ Article 14(1) ICCPR; *Touron v Uruguay*, Human Rights Committee Communication 32/1978, UN Doc CCPR/C/OP/1 at 61 (1984), para 12; *Weisz v Uruguay*, Human Rights Committee Communication 28/1978, UN Doc CCPR/C/OP/1 at 57 (1984), para 16.

guarantees of competence, impartiality and the enjoyment of judicial independence in deciding legal matters in proceedings that are judicial in nature” (emphasis added).

19. The ICJ considers that use of the word ‘equivalent’ in this sentence may raise uncertainty as to the meaning of the word, including that this may allow for lower levels of competence, independence or impartiality.

20. The ICJ recommends that paragraph 74 be amended as follows (suggested additional text underlined):

“...must be established by law affording ~~equivalent~~all guarantees of competence, impartiality and the enjoyment of judicial independence in deciding legal matters in proceedings that are judicial in nature...”

LEGAL ASSISTANCE

Revised Draft Principle 9 and Guideline 8

21. The right to prompt and effective legal assistance is addressed in Principle 9 and Guideline 8 of the Working Group’s revised Draft Principles and Guidelines.

22. The mixture of standards set out in Principle 9, paragraphs 27 to 32, is in the ICJ’s view unclear, at times repetitive and potentially confusing. Principle 9 also fails to expressly provide that the State must inform a detainee of the right to legal counsel at the time of arrest or detention. This element is only indirectly implied within paragraph 81(f), which addresses the situation, *inter alia*, where a detained person is “not adequately informed of their right to access providers of legal assistance in a timely manner”.

23. The ICJ therefore recommends a restructuring and amendment of Principle 9 to read as follows (suggested additional text underlined):

Amend paragraph 27 to read as follows

“27. Anyone deprived of his or her liberty shall, at any time during his or her detention, including immediately after arrest or detention, have ~~prompt and regular access to an independent~~ the right to legal assistance by counsel of choice, or by independent and suitably qualified appointed counsel, and free of charge if the individual is without adequate means to pay. ~~representative of his or her choosing at any time during his or her detention, including immediately after arrest or detention.~~ Upon arrest or detention, all persons shall be promptly informed of this right.”

Delete existing paragraph 28

~~“28. If, in extraordinary circumstances, an individual does not defend himself or herself personally or engage his or her counsel of choice within the time period established by law or does not have or cannot afford to pay for counsel of choice, the individual shall be informed of his or her right to legal representation of their own choosing and immediate access shall be ensured to another independent and suitably qualified legal representative provided by the State with no costs under certain circumstances provided by law.”~~

Move and combine former paragraphs 30 and 31 to now read as paragraph 28, with amendments

~~“2830.~~ Proceedings, and legal assistance in the proceedings, shall be at no cost for a detained person, or his or her representative, without adequate means. ~~31.~~ Effective legal aid shall be provided promptly at all stages of the detention. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers ~~for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare the defence.~~”

Move former paragraph 32 to now read as paragraph 29, with amendments

~~“2932.~~ Persons deprived of liberty shall be accorded adequate time and facilities and means to prepare their defence, including through disclosure of information in accordance with Guideline 13 herein, and to freely communicate with counsel ~~of their own choosing.~~”

Move former paragraph 29 to now read as paragraph 30

~~“3029.~~ Legal representatives shall be able to carry out their functions effectively and independently, free from fear of reprisals, interference, intimidation, hindrance or harassment. Authorities shall respect the privacy and confidentiality of legal representative-detainee communications.”

REVIEW OF DETENTION OF PRISONERS OF WAR **Revised Draft Principle 16**

24. As mentioned, the ICJ especially welcomes the elaboration of Principle 16, including as it concerns the application of *habeas* principles to prisoners of war (para 52). Paragraph 52 speaks of the entitlement of prisoners of war to bring proceedings not only to challenge the arbitrariness and lawfulness of the deprivation of liberty, but also to “receive appropriate remedy”.

25. In keeping with the established principle that the right to *habeas corpus* is an essential remedy to protect non-derogable rights and is thus applicable at all times,² the ICJ recommends that paragraph 52 be supplemented to make it clear that prisoners of war should also be entitled to bring proceedings before a court and receive an appropriate remedy to protect non-derogable rights, such as in cases of alleged torture or other ill-treatment.

26. The ICJ therefore recommends that paragraph 52 be amended to read as follows (suggested additional text underlined):

“Prisoners of war should be entitled to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and receive appropriate remedy where the detainee: (a) challenges his or her status as a prisoner of war; (b) claims to be entitled to repatriation or transfer to a neutral State if seriously injured or seriously sick; ~~or~~ (c) claims not to have been released or repatriated without delay following the cessation of active hostilities; or (d) alleges a violation of a non-derogable right, such as his or her torture or ill-treatment.”

INADMISSIBILITY OF EVIDENCE OBTAINED BY TORTURE **Revised Draft Guideline 12**

27. The ICJ welcomes the inclusion in Guideline 12 of the prohibition against the use of evidence obtained by torture, but regrets that this has been limited only to information obtained by torture and not also to information obtained by other forms of cruel, inhuman or degrading treatment.

² See, for example: Human Rights Committee General Comment No. 29, para 16; American Convention on Human Rights, Article 27(2); Inter-American Court Advisory Opinion OC-8/87 (1987), para 42; Inter-American Court Advisory Opinion OC-9-87 (1987), para 41(1); Inter-American Convention on Forced Disappearance, Article X; Arab Charter on Human Rights, Article 4(2); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section M(5)(e); Commission on Human Rights resolution 1992/35, para 2; Joint Study on global practices in relation to secret detention in the context of countering terrorism, UN Doc A/HRC/13/42 (2010), paras 46-47; Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/7/4 (2008), paras 67 and 82(a); and Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, UN Doc CAT/OP/HND/1 (2010), para 282(a)-(b).

28. The Human Rights Committee has confirmed, in its General Comment 20 of 1992, that “the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment” (paragraph 12). It further clarified, in its General Comment 32 of 2007, that because article 7 is non-derogable in its entirety, “no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14...” (paragraph 6).

29. The ICJ recommends that revised Draft Guideline 12 be amended to read as follows (suggested additional text underlined):

“Guideline 12. Admissibility of evidence obtained by torture or other prohibited treatment

“85. Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment shall not be invoked as evidence in any proceedings, except against a person accused of torture or other prohibited treatment as evidence that the statement was made.”
