

No. 041-15

The Permanent Mission of the United States of America to the Office of the United Nations and other international organizations in Geneva presents its compliments to the Secretariat of the United Nations, Office of the High Commissioner for Human Rights and has the honor to transmit the attached document to be conveyed to Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Mads Andenas.

The Permanent Mission of the United States avails itself of the opportunity to renew to the Secretariat of the United Nations, Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Enclosure:

As stated.

The Permanent Mission of the
United States of America,
Geneva, April 21, 2015



DIPLOMATIC NOTE

OBSERVATIONS OF THE UNITED STATES OF AMERICA

ON THE FIRST DRAFT OF THE WORKING GROUP ON ARBITRARY DETENTION OF BASIC PRINCIPLES AND GUIDELINES ON REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY TO BRING PROCEEDINGS BEFORE A COURT

The United States appreciates the opportunity to comment on the Working Group's first complete draft of "Basic Principles and Guidelines" that it is developing in response to Human Rights Council resolution 20/16. The United States also appreciates the Working Group's consideration in posting to its website observations that the United States provided on November 12, 2014, in response to an earlier preliminary draft, and on March 16, 2015, upon learning of the Working Group's more extensive first draft. The United States commends the Working Group for its efforts to engage governments and stakeholders in this important endeavor, especially the September 2014 stakeholders' consultation.

The Working Group's first complete draft, comprising 21 proposed principles and 22 separately proposed guidelines, raises serious and complicated issues that could have widespread and unintended implications if not more carefully reviewed and revised than time allows before the Working Group's session this week. A rush to adoption now would only complicate further consideration and action by States.

The following observations, which supplement the United States' preliminary comments of November 12, 2014, are not exhaustive but reflect our most serious concerns.

First, the United States reiterates its strong disagreement with the Working Group's conclusions on non-derogability with respect to arbitrary detention and the right to judicial relief, both with reference to relevant obligations under the International Covenant on Civil and Political Rights (ICCPR) as well as assertions regarding customary international law. Provisions of the current Working Group draft in this regard, notably in draft Principle 4, are incorrect as a matter of international law. The Working Group could include a basic principle discouraging derogation or stating that any derogation of a State's obligation to respect and ensure to an individual the right to take proceedings before a court must conform strictly to that State's obligations under applicable international law.

Second, as previously observed, there are differing legal views regarding the territorial scope of human rights law, including with respect to an individual's right to challenge the lawfulness of detention in court. The United States' position on the scope of a State's responsibility in this regard is based on explicit language in Article 2(1) of the ICCPR. A State's ICCPR obligations apply only with respect to individuals who are *both* within the territory of a State Party *and*

within that State Party's jurisdiction.¹ This understanding of the territorial scope of the Covenant is also reflected in Principle 5 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted in 1988 by the General Assembly in its resolution 43/173. This is an issue of particular relevance when addressing the jurisdiction and authority of domestic courts to review and grant relief from unlawful detention, as court jurisdiction in many States, including the United States, is generally geographically limited.

With this fundamental consideration in mind, the United States supports the basic principle that anyone detained within the territory of a given State has the right to challenge the legal basis for that detention in a court and to obtain court-ordered release if determined unlawful, as set forth in ICCPR Article 9(4). This right extends to any form of detention by or on behalf of a government authority and whenever the individual detained is located in the State and subject to the jurisdiction of that State. State obligations under Article 9 do not apply extraterritorially.

Third, the United States urges the Working Group to refrain from specifically addressing situations of armed conflict, which fall beyond the scope of this project and the competence of the Working Group. The applicability of international human rights obligations in situations of armed conflict raises difficult questions regarding the role of international humanitarian law (IHL) as the *lex specialis* with respect to the conduct of hostilities and the protection of war victims, which are not adequately accounted for in the current draft Principles and Guidelines. For example, Principle 16 cites the International Court of Justice's (ICJ) opinion in the Nuclear Weapons case affirming the applicability of the ICCPR in armed conflict, absent derogation, as support for the proposition that the "right and corresponding procedural guarantees" set forth in Principle 16 "complement and mutually reinforce the rules of international humanitarian law." In that same case, however, the ICJ recognized that the law of armed conflict provides the *lex specialis* in situations of armed conflict, which the draft Principles and Guidelines fail to do, and defined the scope and content of the ICCPR right at issue with reference to the applicable IHL rule.

Instead, Principle 16 states a broad rule indicating that all detained persons in a situation of armed conflict are guaranteed the right to bring proceedings before a court of law to challenge the lawfulness of their detention. Principle 16 goes on to specify that prisoners of war should be entitled to bring proceedings before a court in certain circumstances, and Guideline 17 specifies further procedures with respect to civilian internees. The draft Principles and Guidelines do not point to any clear basis in law for many of these proposed requirements and recommendations, and the United States disagrees that these provisions, as broadly drafted, reflect existing international obligations. Indeed, rather than reinforce IHL, as claimed, they are in tension with the detailed protections and procedures required by the Geneva Conventions with respect to

¹ See Observations of the United States of America on the Human Rights Committee's Draft General Comment 35, June 10, 2014 and previous U.S. Observations cited therein. The United States does not agree with contrary views of the Human Rights Committee, including as expressed in its final General Comment 35.

prisoners of war in international armed conflicts, as well as with respect to civilian internees. The United States refers the Working Group to Article 5 of the Third Geneva Convention of 1949, as well as Articles 43 and 78 of the Fourth Geneva Convention of 1949. The United States also refers the Working Group to The Copenhagen Process on the Handling of Detainees in International Military Operations, which was a State-led process to develop non-binding guidelines to help ensure respect for international law in the handling of persons detained in international military operations, including internationalized non-international armed conflicts, peacekeeping operations, and law enforcement operations. The Copenhagen Process: Principles and Guidelines reflect the United States' views regarding best practices for detention operations in such international military operations, and cover a wide range of issues, including the humane treatment of detainees and periodic review of the reasons for detention. The United States notes, in particular, the principle set forth in Principle 12, which calls for prompt initial review and periodic reconsideration "by an impartial and objective authority that is authorized to determine the lawfulness and appropriateness of continued detention." The United States is also engaged in further discussions regarding appropriate protections for persons detained in non-international armed conflicts pursuant to Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent.

Finally, as a more general matter, the United States encourages the Working Group to scale back the draft, maintain a high level of generality, and differentiate more clearly between basic principles that reflect existing international law obligations, and guidelines that provide concrete *recommendations* to States regarding ways to avoid and redress arbitrary detention. As currently drafted, the methodology employed by the Working Group for differentiating between principles and guidelines is unclear. The document might more usefully be structured by topic, eliminating redundancies and combining a basic legal principle under each topic together with relevant guidelines for States to consider in applying each basic legal principle.

We also encourage the Working Group to avoid using imperative terminology for recommendations intended to advance the progressive development of the law, including when advancing non-binding recommendations of treaty bodies and other UN or regional mechanisms, on subjects neither regulated by international law nor sufficiently standardized in State practice to constitute customary international law. At the very least, the draft needs to identify clearly, when it makes statements that purport to represent progressive development of the law in practice, that it is not characterizing the law as it currently exists. Use of imperative terms like "shall" and "must" are to be avoided in relation to these non-binding recommendations and goals. Although the Working Group has proposed a number of laudable recommendations that would improve the implementation of relevant rights in particular contexts, they may not have equal merit or practical application in all detention contexts or in different legal systems and likewise should not be expressed in mandatory terms.

The United States is grateful to the Working Group for the opportunity to review and comment on the Draft Principles and Guidelines as it progresses. The United States also looks forward to review and comment on the next draft the Working Group prepares based on further input from governments and stakeholders.