World Organisation against Torture (OMCT)

Rue du Vieux Billard 8, CP 21, 1211 Geneva 8
Tel: 0041 22 809 4939, Fax: 0041 22 809 4929
Email: omct@omct.org, Internet: www.omct.org

Submission by the World Organisation against Torture (OMCT) to the Working Group on Arbitrary Detention on Draft Basic Principles and Guidelines on Remedies and Procedures of the Right of Anyone Deprived of his or her Liberty to Bring Proceedings before Court.

We welcome the Human Rights Council's resolution requesting the Working Group on Arbitrary Detention to prepare draft basic principles and guidelines on remedies and procedures of the right of anyone deprived of his or her liberty to bring proceedings before court. Such guidelines and principles are very important as they can considerably contribute to the prevention of torture and other forms ill-treatment. In the following, we provide comments to some of the draft principles presented at the occasion of the Stakeholders' Consultation in Geneva on 1 and 2 September 2014.

Draft Principle 1

"Arbitrary" instead of "unlawful"

Principle 1 puts emphasis on the lawfulness of detention by stating that "everyone has the right to be free from the unlawful deprivation of liberty". "Unlawful" as opposed to "arbitrary" is, however, too narrow a concept. It should rather be the arbitrariness that is challengeable through court review.

Already the Third Committee of the UN General Assembly that drafted the Universal Declaration of Human Right in 1948 considered that "arbitrary" would be broader than "lawful" and provide maximum protection of the right of personal liberty. Hence the word arbitrary was introduced in the draft universal declaration.[1] In the drafting process of Article 9 of the ICCPR, delegates noted that arbitrariness introduced the concepts of justice and reasonableness.[2] In this context, the Chinese delegate noted that arbitrary "meant unjust, unfair, inconsiderate of others". Article 9 should contain a "general exhortation of a moral character and should set a goal of justice and respect for the rights of others which the peoples of the world must strive to attain."[3] Applying Article 9 of the ICCPR, the Human

[1] For the drafting history see Laurent Marcoux, 'Protection from Arbitrary Arrest and Detention Under International Law' (1982) 5 Int'l & Comp. L. Rev. 345, 355.
[2] General Assembly, Thirteenth Session, Summary Record of the 865th Meeting, 13 U.N. GAOR C.3, at 148, U.N. Doc. AlC.3/SR.863 (1958).
[3] Commission on Human Rights, Sixth Session, Summary Record of the 146th Meeting, U.N. Doc. ElCN.4ISR.146, at 12 (1950).

Rights Committee reasoned that arbitrariness must "be interpreted more broadly to include such elements as inappropriateness and injustice."[4]

We therefore propose to align the wording of Principle 1 to Article 9 of the Universal Declaration of Human Rights and to reformulate it to: "No one shall be subject to arbitrary deprivation of liberty".

Ill-treatment should be considered as a factor for arbitrary detention

OMCT's experience shows that arbitrary detention goes frequently hand in hand with torture, cruel, inhuman or degrading treatment. In fact, the lack of a legitimate ground or legal basis for detention does often not appear in isolation.

Especially where detention falls outside of the law (such as secret detention, prolonged incommunicado detention), or where it is imposed to silence social, political or other forms of dissent, including human rights defenders, we do witness that the deprivation of liberty is associated with the deliberate imposition of conditions of detention or treatment in violation of the absolute prohibition of torture, cruel and inhuman or degrading treatment. In the worst scenario the taking of liberty is done in a way to destroy a person's dignity and personality. In these situations the arbitrariness derives from both the deprivation of liberty and the type of detention being imposed. Within our defenders work as part of the Observatory for the Protection of Human Rights Defenders (joint program of the OMCT and FIDH) we continue to be confronted with a good number of such cases.[5]

Cases in which detention and ill-treatment are both elements of arbitrariness have also been before international human rights bodies. The Human Rights Committee, for instance, found a violation of the prohibition of arbitrary detention and torture in the case of *Aboufaied v. Libya*. Aboufaied was a human rights activist and the founder of the National Union for Reform, the opposition party of the time. After being a refugee in Switzerland for 16 years, he returned to Libya following Colonel Gaddafi's promise not to prosecute political opponents who return. Despite this assurance, Aboufaied was arbitrarily detained shortly after his arrival. While in prison, his health severely deteriorated so that a doctor was called. He was diagnosed with symptoms of poisoning and intense fatigue. It was also confirmed that he had been torture. Aboufaied was not only kept incommunicado, but was also held in isolation and was not able to contact his family or legal counsel. He was eventually transferred to a psychiatric hospital and released thereafter. When he wanted to return to Switzerland, the Libyan authorities refused to return his passport. Also in Aboufaied's case, arbitrary detention and severe ill-treatment have been applied in order to punish, intimidate and break Mr. Aboufaied.[6]

This case illustrates well how ill-treatment and arbitrary detention form part of a strategy to intimidate and silence human rights defenders and political opponents. The commentary to

[4] See e.g. HRC, *A. v. Australia*, Comm. No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993,30 April 1997, para. 9.2.

[5] See e.g. http://www.omct.org/human-rights-defenders/urgent-interventions/azerbaijan/2014/09/d22820/; http://www.omct.org/human-rights-defenders/urgent-interventions/azerbaijan/2014/08/d22789/.

[6] HRC, *Aboufaied v. Libya,* Comm. No. 1782/2008, UN Doc. CCPR/C/104/D/1782/2008, 19 June 2012.

the guidelines and principles should therefore reflect this reality. We suggest recognizing that torture and other forms of ill-treatment can be an element of arbitrariness where it forms a deliberate part of the deprivation of liberty.

Draft Principle 8

The burden of proof

The draft guidelines and principles are mute about the burden of proof. We, however, think that it is important to stress that the burden of proof to establish the lawfulness of detention has to lie with the authorities. It is upon the authorities to establish the legal basis as well as the reasonableness, necessity and proportionality of a detention. Since liberty should be considered the rule and detention the exception, it is upon the government to proof that detention is required. It is thus well established in international law that the principle of equality of arms and the fairness of procedures place the burden of proof with the government. This was for instance the finding of the Human Rights Committee in the case of *Bousroual v. Algeria*. The author alleged that he was arbitrarily arrested and detained and not granted *habeas corpus*. In finding a violation of Articles 6, 7 and 9 of the ICCPR, the Committee *inter alia* reasoned "that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information".[7] A similar argument has been put forward by the Working Group on Arbitrary Detention. In the case of *Azharul Islam et al. v. Bangladesh*, the Working Group found that the authors of have been detained arbitrarily because the burden of proof lied with the authors and not as required by Article 9 of the ICCPR with the prosecutor.[8] The European Court of Human Rights also repeatedly found a violation of Article 5 Paragraph 4 of the Convention when applicants, as opposed to governmental authorities, had to show that their continued detention did not satisfy the conditions of lawfulness.[9]

We therefore propose to amend Draft Principle 8 and add the following: The burden of proof to establish the lawfulness of detention lies with the authorities.

Draft Principle 9

Standard of review needs to extend to conditions of detention

The rationale behind *habeas corpus* goes beyond challenging one's detention. It in fact aims at protecting personal liberty, personal security and as such intends to prevent ill-treatment. The Working Group on Arbitrary Detention urges states to enact *habeas corpus* rules that also provide for safeguards against torture or cruel, inhuman or degrading treatment or

[7] *Bousroual v. Algeria*, Comm. No. 992/2001, U.N. Doc. CCPR/C/86/D/922/2001, 30 March 2005, para. 9.4.

[8] *Azharul Islam et al. v. Bangladesh*, Working Group on Arbitrary Detention, Opinion No. 66/2012, U.N. Doc. A/HRC/WGAD/2012/66 7 August 2013, paras. 52–58.

[9] See e.g. *Hutchinson Reid v. the United Kingdom,* Appl. No. 50272/99, Judgment (Third Section), 20 February 2003, para. 74; *Ilijkov v. Bulgaria,* Appl. No. 33977/96, Judgment (Fourth Section), 26 July 2001.

punishment.[10] The Special Rapporteur on Torture, Inhuman or Degrading Treatment or Punishment has stated that "judges should make full use of the possibilities provided for in the law regarding the proceedings of habeas corpus (procedimiento de amparo). They should, in particular, seek access to the detainee and verify his/her physical condition. Negligence on their part on this issue should be the subject of disciplinary sanctions."[11] Similar considerations are reflected in the European Court of Human Rights' jurisprudence. In the case of *Kurt v. Turkey*, a case dealing with forced disappearance, the European Court reasoned:

> Prompt judicial intervention [in the context of Article 5] may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 [right to life] and 3 [prohibition of torture] of the Convention. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.[12]

The Inter-American Court of Human Rights made similar considerations and defined *habeas corpus* as a "judicial remedy designed to protect personal freedom of physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge".[13] The Court went on by explaining that "the immediate aim of this remedy is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. The importance of this remedy cannot be overstated, considering that the right to humane treatment recognized in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances."[14]

Based on these considerations, it is also widely acknowledged that *habeas corpus* is non-derogable. The Human Rights Committee in its General Comment on Article 4 reasoned that torture, a non-derogable right, can only be effectively prevented if also its procedural protection mechanisms, such as *habeas corpus*, are non-derogable. Otherwise, the non-derogability of torture can be circumvented through derogation from the procedural safeguards against torture.[15] The Working Group on Arbitrary Detention has also repeatedly held that under treaty law and customary international law the right to challenge the lawfulness of detention is non-derogable.[16]

Hence, the standard of review in Draft Principle 9 needs to extend to an effective control of human rights that are related to a detainee's liberty and personal security. In particular, a

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[10] Working Group on Arbitrary Detention, Annual Report, A/HRC/19/57, 26 December 2011, para. 64.
[11] Report of the Special Rapporteur on Torture on his visit to Chile, UN Doc. E/CN.4/1996/35/Add.2, 4 January 1996, para. 76.
[12] ECtHR, *Kurt v. Turkey,* Appl. No. 24276/94, Judgment (Chamber), 25 Mai 1998, para. 123.
[13] IACtHR, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, 30 January 1987, Series A, No. 8, para. 33.
[14] Ibid, para. 12.
[15] HRC, General Comment No. 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/ Add.11, 31 August 2002, paras. 15 and 16.
[16] Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/22/44, 24 December 2012, para. 47; Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/C/19/57, 26 December 2001, para. 63.

court has to review whether the detained person has been ill-treated. We therefore propose to reformulate Draft Principle 8 as follows: "there should be no limitation on the court's ability to review the deprivation of liberty". By deleting "the factual basis of the lawfulness [of the deprivation of liberty]", Draft Principle 8 allows for a broader standard of review that extends to the conditions of detention.

Draft Principle 11

Reparations need to be broader than compensation

Draft Principle 11 refers to compensation as reparation for unlawful detention. There are, however, violations of the right to liberty and security for which compensation is only one form of reparation but too narrow to satisfy the general concept of the right to remedy and reparation as recognized by universal human rights bodies. In particular, arbitrary detention that is practiced systematically and as part of forced disappearance or as prolonged incommunicado detention cannot be remedied by only compensating the victim. Hence, various human rights bodies have developed other forms of reparations. In cases in which arbitrary detention was found, human rights bodies not only required a state to compensate the victims, but also to prosecute those responsible,[17] to issue a public apology,[18] to reveal the truth,[19] or to ensure non-repetition.[20] The guidelines should therefore not only refer to compensation but explicitly mention restitution, satisfaction, guarantee of non-repetition, and accountability as possible remedies for arbitrary detention. We thus propose to add the following sentence to Draft Principle 11: "Where appropriate, the court should also provide for restitution, satisfaction, guarantee of non-repetition, and accountability."

New Draft Principle: Judicial proceedings involving children

We would like to encourage the Working Group to include a reference to the best interest of the child as stipulated in Article 3 of the Convention on the Rights of the Child. The best interest of the child must be the primary consideration when depriving children of their liberty. In addition, judicial remedies taken by children should be in compliance with the Bejing Rules,[21] the Riyadh Guidelines[22] and the UN Rules for the Protection of Juveniles

[17] HRC, *Celis Laureano v. Peru,* Comm. No. 540/1993, CCPR/C/56/D/540/1993, 25 March 1996, para. 10; IAtCHR, *Trujillo Oroza v. Bolovia* (Reparations), Judgment Ser. C No. 92, 27 February 2002, paras. 99–111; *Aksoy v. Turkey,* App. No. 21987/93, Judgment (Chamber), 18 December 1996, Reports 1996-VI, para. 98.

[18] IACtHR, *Cantoral-Benavides v. Peru*, Judgment (Ser. C) No. 88, 81, 3 December 2001, para. 81

[19] HRC, *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2, 21 July 1983, para. 16; ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, Appl. No. 39630/09, Judgment (Grand Chamber), 13 December 2012.

[20] HRC, *José Antonio Coronel et al. v. Colombia*, Comm. No. 778/1997, U.N. Doc. CCPR/C/76/D/778/1997, 29 September 1996, para. 10.

[21] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules"), U.N. Doc. A/RES/40/33, 29 November 1985.

[22] United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"), U.N. Doc. 14 December 1990.

Deprived of Liberty.[23] This essentially means that judicial proceedings have to be in a language that they can understand, that children need to have access to free legal aid and the presence of an adult they can trust during the entire proceeding.

Furthermore, safeguards must be in place to protect children deprived of liberty, their families and the staff working in juvenile detention centres that challenge the detention or the conditions of detention against possible intimidation and reprisals. Judges and law enforcement officers must be especially attentive to any signs that might indicate that the child has been subject to violence or is being threatened to suffer violence within the context of detention. Lastly, girls, smaller children and children with disability should have their enhanced vulnerability also taken into account when addressing the legality of their detention.

[23] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, U.N. Doc. A/RES/45/113, 14 December 1990.