No. 081-14

The Permanent Mission of the United States of America to 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 requests that the attached document be conveyed to Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Mads Andenas.

The Working Group is meeting November 17 to discuss the draft principles and guidelines and will present the draft basic principles and guidelines to the Human Rights Council in September 2015. This attached document will convey the U.S. observations on the draft principles and guidelines.

The Permanent Mission of the United States avails itself of the opportunity to renew to the Secretariat of OHCHR the assurances of its highest consideration.

The Permanent Mission of the
United States of America,
Geneva, November 12, 2014.

MISSION OF THE UNITED STATES OF AMERICA
GENEVA, SWITZERLAND

OHCHR REGISTRY

13 NOV. 2014

Recipients : WGAD

DIPLOMATIC NOTE

OBSERVATIONS OF THE UNITED STATES OF AMERICA
ON PRELIMINARY DRAFT PRINCIPLES AND GUIDELINES
ON REMEDIES AND PROCEDURES ON
THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY TO BRING
PROCEEDINGS BEFORE COURT*
November 10, 2014

*As adopted by the Working Group on Arbitrary Detention at its 69th Session
(April 22-May 1, 2014, Geneva)

The United States appreciates the opportunity to offer some preliminary observations on the progress made by the Working Group on Arbitrary Detention on the development of "draft basic principles and guidelines on remedies and procedures" on the right of anyone deprived of liberty to challenge the lawfulness of detention before a court, as contemplated by Human Rights Council Resolution 20/16. These observations focus on a preliminary draft contained in the Working Group's Background Paper on State Practice on Implementation of the Right, as circulated for the Stockholders' Consultation (September 1-2, 2014, Geneva) (hereinafter "the Working Group's Background Paper"),[1] as well as several issues highlighted in the Working Group's Report to the Human Rights Council submitted pursuant to Council resolution 20/16 (hereinafter "the Working Group's Report").[2]

Preliminary Observations

The United States strongly supports the right of all individuals detained within the territory of a State and subject to its jurisdiction to challenge before a court the lawfulness of detention by that State (or a governmental authority within that State) and to obtain a judicial decision without delay. It is perhaps because of the historical underpinnings of this right, grounded in the *Magna Carta Libertatum* in 1215 and the constitutions and bills of rights of so many nations, that it found such universal support in Articles 9 and 10 of the Universal Declaration of Human Rights, as further elaborated in Article 9(4) of the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant").

For the United States, the right of *habeas corpus* is so fundamental to U.S. common law jurisprudence that it was included in the original U.S. Constitution. In codifying this universally recognized right, the ICCPR has left to each State Party and legal system to determine the specific grounds and procedures to be established by law to give effect to this right, as long as such laws are not arbitrary in nature or applied in an unlawful or arbitrary manner.

Preliminary Concerns Regarding Methodology and Scope

Before commenting on the Working Group's preliminary draft principles, we would offer the following general comments regarding certain points addressed in the Working Group's Report,

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[1] *See* http://www.ohchr.org/Documents/Issues/Detention/BPConsultation2014.pdf.
[2] *See* A/HRC.27/47 at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/27/47.

and also addressed in the Working Group's Background Paper and during the Stakeholders Consultations, September 1-2, 2014.

Methodology. The Working Group has correctly noted that Article 9, paragraph 4, of the ICCPR represents a comprehensive articulation of the scope of the right of detainees to challenge the lawfulness of detention before a court, as accepted by States Parties at the time of their ratification.[3] The Working Group's report also illustrates that legal systems vary in how individual States protect these rights. Bearing in mind that the particular means of domestic implementation has been left to the domestic law and processes of each State, the United States appreciates the high level of generality reflected in the Working Group's draft.

Recommendation: In the United States' view, it would be useful for the Working Group to provide a set of basic principles and guidelines that reflects the actual practice of States in implementing these rights domestically, where it can be established that such State practice is consistent and commonly accepted by all States. It would be less helpful, and likely counter-productive to reaching consensus among States, for the Working Group to draw upon non-binding observations, recommendations and deliberations of treaty bodies and of the Working Group itself, many of which are highlighted in the Working Group's documentation thus far.

Territorial Scope. References have been made to the application of rights related to deprivation of liberty, particularly under ICCPR Article 9, in relation to detentions occurring outside the territory of a State. The U.S. position is well-known concerning the territorial scope of ICCPR obligations, and by extension corresponding rights set forth in the Universal Declaration of Human Rights. The long-held U.S. position is that the ICCPR applies only to individuals who are *both* within the territory of a State Party *and* within that State Party's jurisdiction. Universality in the recognition of these rights should not be confused with the territorial application by States. Differing views among States Parties and within the international community will not be resolved in the context of basic principles and guidelines, and silence will only complicate drafting of each principle. *See* Observations of the United States of America on the Human Rights Committee's Draft General Comment 35, June 10, 2014 (hereinafter "U.S. Observations on Draft General Comment 35"), and previous U.S. Observations cited therein.[4]

Recommendation: The best approach to treat differing views of States Parties on the scope of the ICCPR would be to restate the agreed language contained in ICCPR Article 2(1), which refers to "all individuals within [a State's] territory and subject to its jurisdiction."

The Law of Armed Conflict. In all situations of armed conflict, the United States is deeply committed to complying with its obligations under the law of armed conflict (also referred to as international humanitarian law or the law of war), and all other applicable international and domestic law. In this regard, it is important to clarify that the United States has not stated that the Covenant ceases to apply in wartime. Indeed, a time of war does not suspend

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[3] Id. at para 10.

[4] The Human Rights Committee issued General Comment 35 on October 24. The U.S. positions on the underlying issues in that General Comment are as presented to the Committee on June 10, 2014 in its Observations on Draft General Comment 35.

the operation of the Covenant to matters within its scope of application. However, the United States does not agree with the analysis or conclusions set forth in several paragraphs of the Working Group's Report regarding the applicability of Article 9 in situations of armed conflict, for the reasons set forth in the U.S. Observations to Draft General Comment 35. In particular, although the United States acknowledges that difficult questions arise regarding the applicability of international human rights law in situations of armed conflict, the Working Group's analysis does not accord sufficient weight to the well-established principle that international humanitarian law, as the *lex specialis* of armed conflict, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.

It is noteworthy that the Working Group report refers to the Commentary of the International Committee of the Red Cross, which recognizes that Article 75, paragraph 4 of Additional Protocol I to the Geneva Conventions of 1949 reproduces most of the fair trial guarantees provided for in international human rights instruments. Although the United States is not a Party to Additional Protocol I, we have stated that Article 75 sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, and thus is important to the international legal framework. Accordingly, the United States has affirmed that we will choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual detained in an international armed conflict, and expect all other nations to adhere to these principles as well.[5] The Working Group report omits mention, however, that Article 75 does not include a right to challenge the legality of detention under the law of war. Rather, as the Commentary to paragraph 4 of Article 75 indicates, paragraph 4 is intended to ensure certain fundamental procedural guarantees to individuals in the power of a Party to the conflict who do not benefit from more favorable treatment under the 1949 Conventions or Protocol I and have been charged and convicted with a criminal offense related to the armed conflict. *See* ICRC Commentary para. 3081.

Recommendation: The Working Group should acknowledge that difficult questions arise regarding the applicability of international human rights law in situations of armed conflict, and that the well-established principle that international humanitarian law, as the *lex specialis* of armed conflict, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.

Derogation. The Working Group relies on its Deliberation No. 9 issued in 2012 stating that the prohibition against arbitrary detention and the right of anyone detained to challenge the legality of detention are non-derogable under both treaty law and customary international law, also citing the views of other human rights mechanisms, including the Human Rights Committee. The United States does not agree with this conclusion for the reasons set forth in the U.S. Observations to Draft General Comment 35. The United States shares the Working Group's objective of discouraging derogation of ICCPR rights to the extent possible, but believes that the text of ICCPR Article 4, and specifically the omission of Article 9 from the list of articles deemed non-derogable in Article 4(2), is sufficiently clear and should not be the subject of further elaboration in any basic principle or guideline on remedies and procedures, as envisioned by the Human Rights Council. Moreover, as further explained in the U.S. Observations to Draft General Comment 35, international humanitarian law provides the *lex*

[5] *See* White House Fact Sheet, March 7, 2011 at: http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy.

specialis in non-international armed conflicts as well as international armed conflicts, and as a general matter derogation would only be relevant as to action within the Covenant's scope of application. As a practical matter, the United States has never declared a public emergency within the meaning of Article 4 or availed itself of the right of derogation under its terms. It is in fact highly unlikely that the United States would ever do so. There is no authority under the U.S. Constitution to suspend any of the Constitutional rights that parallel Covenant rights, with the sole exception of the authority under Article I, Section 9, to suspend the Writ of *Habeas Corpus* "when in Cases of Rebellion or Invasion the public Safety may require it."

Recommendation: The Working Group should refrain from stating categorically that Article 9 is non-derogable and should recognize that international humanitarian law provides the *lex specialis* in non-international armed conflicts as well as international armed conflicts, and as a general matter derogation would only be relevant as to action within the Covenant's scope of application.

Preliminary United States Comments on Draft Principles

A. GENERAL PRINCIPLES

Draft Principle 1. Liberty: Everyone has the right to be free from the unlawful deprivation of liberty.

USG Comment: We recommend that this principle also reference arbitrary detention. It is not clear why this principle would only focus on the unlawful prong of Article 9(1) without also addressing arbitrary detention. Arbitrary detention is generally unlawful in most legal systems.

Draft Principle 2. Universality: All individuals in all forms of deprivation of liberty have the right to bring to proceedings before court to challenge the lawfulness of the deprivation of liberty.

USG Comment: As discussed above, the use of the term universality should not be confused with the territorial scope of these rights or expand the obligation of States in granting habeas relief beyond actions by governmental authorities. A better approach would be to say: "Any individual within a State's territory and subject to its jurisdiction who is deprived of liberty by or on behalf of a governmental authority at any level within that State has the right to bring proceedings before court to challenge the lawfulness of the deprivation of liberty." In reference to "all forms of deprivation of liberty," it is important to differentiate between conduct by state actors and non-state actors and to also bear in mind that there are inevitable differences in domestic legal frameworks, in terms of how States regulate decisions to detain, conditions of detention (such as solitary confinement or restrain devices), and alternatives to custody, such as monitoring devices. Consensus may prove difficult if such sweeping terms are used in basic principles that should be common to all States. That said, the United States generally agrees that the right under Article 9(4) to challenge the legality of detention through *habeas corpus*

proceedings before a court or through other means applies to any form of detention by official action or pursuant to official authorization with the proviso that any such detention occurs within the scope of application of the ICCPR.

Draft Principle 3. Codification: Guarantees of the right to bring to proceedings before court to challenge the unlawful deprivation of liberty should be codified in national law.

USG Comment: The United States agrees, consistent with ICCPR Article 9, that any deprivation of liberty must be on grounds established by law and in accordance with procedures established by law and that this would require the existence of laws and procedure in order to challenge the deprivation of liberty. This does not, however require codification. Rather ICCPR Article 2(2) only requires States to take the necessary steps to give effect to the rights recognized in the Covenant, where such laws or measures do not already exist. We appreciate that this draft principle is framed as a recommendation rather than a requirement. A better approach, however, would be to "encourage" States to codify these rights to the extent they do not already exist in domestic law or practice.

Draft Principle 4. Non-derogability: There should be no derogation from the right to bring to proceedings before court to challenge the lawfulness of the deprivation of liberty, as a matter of principle. In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, some procedural elements of the review may be derogated from to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with international law.

USG Comment: Derogation is not an appropriate subject for basic principles and guidelines on remedies and procedures. The arguments advanced by the Working Group for restricting a State's derogation authority with respect to Article 9 go beyond the plain text of Article 4, are not generally agreed upon, and will not be resolved through a process intended to develop basic principles commonly shared by States.

B. PRINCIPLES RELATING TO COURT PROCEEDINGS

Draft Principle 5. The 'court': The body reviewing the challenge to the lawfulness of the deprivation of liberty should be a court of law. The court must have the power to order immediate release from the unlawful detention.

USG Comment: This principle is not grounded in the text of Article 9(4), which requires that a court reach its decisions "without delay" but is silent on how quickly any ordered release must occur. It also fails to take into account practical considerations that may arise in arranging the release of an individual, including when such release may require diplomatic coordination to facilitate repatriation. It also fails to take account that detention determined to be unlawful may not continue to be unlawful where certain conditions are met, for example, a new trial correcting flaws in a prior proceeding. Such "conditional release" orders would not involve immediate release, nor would immediate release necessarily be appropriate.

Draft Principle 6. Ability to bring proceedings before the court: Anyone can bring proceedings before the court to challenge the lawfulness of the deprivation of liberty. There should be no restrictions on the detainee's ability to contact these persons.

USG Comment: The phrasing of this principle is unclear. Article 9 is explicit that the right to challenge the lawfulness of detention belongs to the person deprived of liberty. This draft appears to suggest that other persons may bring actions to challenge a detention's lawfulness as well. Although individual States, including the United States, may offer mechanisms for others to bring a challenge on behalf of a detained person who is incapacitated or otherwise unable to act on his or her own behalf, there are generally domestic law limitations on who would have standing to do so and whether any limitations on the detainee's ability to contact such individuals would be appropriate, limitations that are not governed by international law. If this is the intended focus of this principle, it would be better framed as a recommended best practice common among States and should delineate the permissible circumstances and relationship between the person bringing the action and the person detained for the consideration of other States.

Draft Principle 7. Multiple challenges: The right to bring to proceedings before court to challenge the lawfulness of the deprivation of liberty applies in principle from the moment of arrest and ends with the release or final conviction of the detainee. The court should consider the application as a matter of urgency. The detainee has the right to challenge the lawfulness of his or her detention multiple times. After the court has held that the circumstances justify the detention, an appropriate period of time may pass, depending on the nature of the relevant circumstances, before the individual is entitled to take proceedings again on similar grounds. However, there should be no substantial waiting period between each application. The initiation of the challenge multiple times does not exclude the possibility of the periodic review of the court (proprio motu).

USG Comment: This is another area that is not required by international law and best left to the individual legal systems of States to address. Not every lawful ground for deprivation of liberty requires multiple or periodic review, particularly where the circumstances have not or are unlikely to change. The United States does not agree that Article 9 would require multiple or periodic review for every type of deprivation of liberty. Entitlement to pursue a succession of *habeas* proceedings after "an appropriate period of time" finds no support in the text of Article 9(4) and would at best be a recommendation better left for domestic legal processes to address. Passage of time alone, without any change in circumstances, would not, in itself, justify re-litigation of the legal basis for detention. ICCPR Article 9 leaves to individual States Parties to decide the appropriate legal framework within their own constitutions and laws to give effect to and implement these rights.[6] This is not to say that duration limitations,

[6] For, example, a non-U.S. citizen subject to mandatory detention pending immigration removal under 8 U.S.C. 1226(c) for having committed certain criminal offenses can challenge whether he or she is properly subject to mandatory detention, but if an Immigration Judge decides that 1226(c) applies, that individual will not receive periodic re-evaluation of the justification for continuing detention. The constitutionality of such provisions on due process or other grounds may always be reviewed by the courts (in fact, there is currently active litigation in several U.S. courts with respect to 8 U.S.C. 1226(c)). It is through such process that a State Party's obligations under Article 9 are met.

individualized determinations, and reassessments over time would not be reasonable and appropriate recommendations for States Parties to consider, to the extent they are legally available and appropriate in individual circumstances. But these would be better cast as recommended best practices rather than basic principles applicable in all circumstances.

Draft Principle 8. Appearance before the court: It is mandatory to ensure the appearance of the detainee before the court, at least at the first hearing of the challenge to the lawfulness of the deprivation of liberty. The court must have the power to ensure the appearance of the person regardless of whether the detainee has asked to appear.

USG Comment: The United States does not believe that this principle is grounded in the ICCPR text insofar as it mandates that an individual be brought physically before a court. Article 9(4) does not contain such an explicit requirement. In the course of *habeas* proceedings, a court in the United States with jurisdiction may order the actual or virtual presence of the individual, where appropriate. A better approach may be to frame this principle as a recommendation rather than a legal requirement.

Draft Principle 9. Standard of review: There should be no limitation on the court's ability to review the factual basis of the lawfulness of the deprivation of liberty. However, the court may, in appropriate circumstances, limit its review to the reasonableness of a prior determination.

USG Comment: The U.S. would not agree that a court's ability to review the factual basis of the lawfulness of detention would be unconstrained, or that the only limit on such review would be based on the reasonableness of a prior determination. In the United States there are a variety of possible constraints on a court's review of the factual basis of detention, including statutory limits in the criminal context, evidentiary presumptions, and constraints imposed by the use of classified or privileged information. For example, when a detained immigrant challenges his or her detention in federal district court, that court may only review the lawfulness of present detention, not the underlying basis for the immigrant's removal order. Similarly, in the criminal context, courts do not have the unfettered ability to review the factual basis of a detained criminal's conviction.

Draft Principle 10. Decision of the court: Persons deprived of liberty are entitled not merely to take proceedings challenging the lawfulness of the deprivation of liberty, but to receive a decision, and without delay. The adjudication of the case, including time for preparation of the hearing, should take place as expeditiously as possible.

USG Comment: None

C. PRINCIPLES RELATING TO REMEDIES

Draft Principle 11. Release and compensation: If the court finds the deprivation of liberty unlawful, the court must order the unconditional release from the deprivation of liberty. Upon such a decision the person shall have an enforceable right to compensation.

> USG Comment: The United States suggests deleting "unconditional" for the reasons stated with respect to Draft Principle 5, as there may be circumstances in which some form of conditional release may be lawful and appropriate. If a court finds an unlawful deprivation of liberty, it may impose certain conditions for release, such as supervision or monitoring, or may remand the case to an administrative court for further review. This is commonly the case in immigration detention cases. Further, the United States understands the enforceable right to compensation within the scope of application of the ICCPR to mean the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

Draft Principle 12. Appeal of the decision: Where a decision upholding the lawfulness of detention may be subject to appeal, in accordance with national legislation, it should be adjudicated upon expeditiously.

> USG Comment: None

We will continue to review developments on this preliminary draft and look forward to contributing to this important work as it progresses over the next year.