



Note No. 23/2015

The Permanent Mission of Australia to the United Nations and other international organisations in Geneva presents its compliments the Office of the United Nations High Commissioner for Human Rights and the United Nations Working Group on Arbitrary Detention and has the honour refer to the updated 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 the lawfulness of his or her detention and order his or her release if the detention is not lawful, as adopted by the Working Group at its meeting, 2-4 February 2015, Geneva.

The Australian Government has the honour to refer to the Working Group's call for comments from all interested stakeholders on the Working Group's updated Draft Principles and Guidelines on Remedies and Procedures of Anyone Deprived of His or Her Liberty to Bring Proceedings Before a Court.

The Australian Government commends the Working Group for its work in updating the Draft Principles and Guidelines and thanks the Working Group for the opportunity to provide comments on the updated draft.

The Australian Government previously provided comments to the Working Group on its preliminary Draft Principles and Guidelines (adopted at the Working Group's 69th session, 22 April – 1 May 2014, Geneva) on 1 October 2014. The Australian Government reiterates its views on the obligations of States under international law expressed to the Working Group in its earlier comments (see Annex 1).

Australia remains concerned that certain draft principles and guidelines go beyond States' current obligations under international law and in certain respects are unworkable in practice. In order to assist the Working Group, the Australian Government makes the following supplementary observations to clarify its understanding of the right to challenge the lawfulness of detention.

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These supplementary 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 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 Permanent Mission avails itself of the opportunity to renew to the United Nations Working Group on Arbitrary Detention and the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.



Geneva
17 March 2015

A. GENERAL OBSERVATIONS

1. The Australian Government recalls the distinction drawn in international law between the progressive development of international law and its codification. The progressive development of international law involves the preparation of guidance on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. By contrast, codification involves the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.
2. The Australian Government observes that the Draft Principles and Guidelines are, for the most part, an effort at progressive development of international law and do not reflect the current obligations of States under international law. The Australian Government is therefore concerned that the language adopted by the Working Group throughout the document, particularly the occurrence of the words 'shall' and 'must', may give the mistaken impression that the document embodies existing rules of international law.
3. The Australian Government invites the Working Group to clarify that its Draft Principles and Guidelines are an effort at progressive development of international law and to clearly identify any draft principle or guideline (or aspect of a principle or guideline) that it considers represents existing law.

B. PRINCIPLES

Application in situations of armed conflict

4. The Australian Government has previously indicated that while it supports the principle of universality of international human rights law ('IHRL'), 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').¹
5. The Working Group's current draft principle 16 indicates that all detained persons in situations of armed conflict are guaranteed the right to bring proceedings before a court. It also indicates that a 'State which detains a person in a situation of armed conflict ... by definition has that person within its effective control, and thus within its jurisdiction, has the duty under international law to guarantee the exercise of the right of the detainee to bring proceedings before a court without delay'.
6. The Australian Government disagrees that the abovementioned aspects of draft principle 16 form part of existing international law and refers to its previous comments at Annex 1, paragraphs [9]-[11]. The extent of the obligations that a State may owe under international human rights law where it is operating extraterritorially will be informed by

¹ See Annex 1, para [7].

the particular circumstances. Relevant factors include the degree of authority and control that a State exercises, and what would amount to reasonable and appropriate measures in those circumstances. It will also depend on the applicable rules of IHL that apply as a matter of *lex specialis derogat legi generali*.

7. The Working Group has also indicated in draft principle 16 that a prisoner of war ought to be able to bring proceedings without delay before a court where he or she '(a) challenges his or her status as a prisoner of war; (b) claims to be entitled to reparation 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'.
8. The Australian Government does not consider that the Working Group should formulate detailed rules for prisoners of war in its Principles and Guidelines, such as those that presently appear in draft principle 16. There are specific IHL provisions that govern processes and procedures that are to be followed in relation to the detention of a prisoner of war, as well as in relation to civilians interned in international armed conflicts.² Australia refers, in particular, to Geneva Convention III, which, for instance, makes clear that, '[s]hould any doubt arise as to whether persons [fall within prisoner of war categories] ..., such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a *competent tribunal*' (emphasis added).³ Australia also notes that IHL provides review mechanisms for protected persons by 'an appropriate court or *administrative board* as designated by the Detaining Power' (emphasis added).⁴
9. The Australian Government has also previously referred the Working Group to the *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, which reflect Australia's views regarding applicable principles for handling detainees in the context of non-international armed conflicts and peace operations, including in relation to review of the legal basis for detention (see Annex 1, paragraph [10]). That document was developed in consultation with 24 States, including Australia. The Australian Government further notes that States are presently considering protections for persons detained in non-international armed conflicts in accordance with the first Resolution of the 31st International Conference of the Red Cross and Red Crescent Movement.⁵

² It should also be noted that Australia holds concerns in relation to the Working Group's guidance to States in draft Guideline 4, where it is stated that military tribunals 'are not competent to review the lawfulness of the detention of civilians as military judges and military prosecutors cannot meet the fundamental requirements of independence and impartiality'. Australia recommends that the Working Group have reference to applicable rules of international humanitarian law as articulated in paragraph [12] and [13] of Australia's comments.

³ Article 5, Geneva Convention III.

⁴ Article 43, Geneva Convention IV, applying to protected persons interned within the territory of a State party to the Convention. See also Article 78 which deals with obligations owed by an Occupying Power.

⁵ See <www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm> (accessed March 2015).

Other observations on draft principles

10. In relation to:

- (a) *Principle 2*, and in particular the requirement to introduce specific legislation and regulations, Australia refers to its previous comments at Annex 1, para [12].
- (b) *Principle 3*, Australia refers to its previous comments in paragraph [9]-[15] above.
- (c) *Principle 4*, Australia refers to its previous comments at Annex 1, paras [13]-[17].
- (d) *Principle 6*, Australia refers to its previous comments at Annex 1, paras [9]-[11] and [18]-[19].
- (e) *Principle 9*, Australia observes that States are not, as a matter of international law, under an obligation to make provision for legal assistance to detainees as articulated in draft principle 9.
- (f) *Principle 10*, Australia observes that a detainee's communication may be restricted to an extent that is lawful and reasonable in the circumstances of the particular case.
- (g) *Principle 11*, Australia refers to its previous comments at Annex 1, para [23].

C. GUIDELINES

11. The concerns expressed above and in Annex 1 below also apply to the Working Group's current draft Guidelines.

12. The Australian Government again thanks the Working Group for the opportunity to provide further comments on the Draft Principles and Guidelines. Australia would welcome the opportunity to further consider and comment on the draft as it is developed.
13. 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.

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 (adopted by the Working Group on Arbitrary Detention at its 69th session, 22 April – 1 May 2014, Geneva)

1. The Australian Government presents its compliments to the United Nations 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').
2. 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.
3. 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.
4. 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 following preliminary observations to clarify its understanding of the right to challenge the lawfulness of detention.
5. 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.

D. GENERAL PRINCIPLES

Draft Principle 1 (Liberty)

6. 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)

7. 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').
8. 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.
9. 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.
10. 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.
11. 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)

12. 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*.⁶ In Australia, the court's jurisdiction to issue

⁶ 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.

that writ is provided by the common law.⁷ Statutes do not qualify that jurisdiction, which the court retains as an indispensable element of its constitutional function to protect fundamental rights and freedoms.⁸ Other common law States similarly safeguard the right to challenge the lawfulness of detention.⁹ 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)

13. The courts in Australia have made clear that the writ of *habeas corpus* persists in public emergencies as a matter of domestic law.¹⁰ 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.
14. The Working Group has previously referred to the views of various human rights committees and other joint-reports in support of that position.¹¹ 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.¹² Australia respectfully disagrees with that position.
15. 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.¹³ Australia considers that treating article 9 as a non-derogable right under the ICCPR would be contrary to the fundamental principle of

⁷ *Antunovic v Dawson* [2010] VSC 377, 4.

⁸ *Ibid.*

⁹ 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’.

¹⁰ *Hicks v Ruddock* [2007] FCA 299, [35] (Tamberlin J), citing *Liversidge v Anderson* [1942] AC 206, 244.

¹¹ 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].

¹² *Ibid.*

¹³ *Ibid* [25]-[27].

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).

16. 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.¹⁴ 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.¹⁵ 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.¹⁶
17. 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.

E. PRINCIPLES RELATING TO COURT PROCEEDINGS

Draft Principle 5 (The 'Court')

18. 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.
19. 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

¹⁴ Ibid [26].

¹⁵ 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].

¹⁶ 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].

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.¹⁷

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

20. 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.
21. 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.¹⁸ The High Court of Australia has accepted that 'strangers' have standing to seek *habeas corpus* review.¹⁹

Draft Principle 7 (Multiple Challenges)

22. 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)

23. 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.

¹⁷ See comments above in relation to principle 3.

¹⁸ Clark and McCoy, *Habeas Corpus: Australia, New Zealand and The South Pacific* (The Federation Press, 2000) 146.

¹⁹ *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.