



HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS  
PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND

www.ohchr.org • TEL: +41 22 917 9159 • FAX: +41 22 917 9008 • E-MAIL: wgad@ohchr.org

**Working Group on Arbitrary Detention**

**Stakeholders' Consultation**

Geneva 1 and 2 September 2014

**The right of anyone deprived of his or her liberty to bring  
proceedings before court, in order that the court may decide  
without delay on the lawfulness of his or her detention**

Background Paper on  
**STATE PRACTICE ON IMPLEMENTATION OF THE RIGHT**  
*Chair Rapporteur: Mads Andenas*

**Contents**

|   | <i>Paragraphs</i> | <i>Page</i> |
|---|-------------------|-------------|
| I. Introduction .....   | 1-5               | p. 2        |
| II. Scope, content and terminology.....   | 6-12              | p. 3        |
| III. State practice: substantive obligations.....   | 13-41             | p. 5        |
| (i) Codification.....   | 14-16             | p. 6        |
| (ii) Non-derogability .....   | 17-19             | p. 7        |
| (iii) Universality.....   | 20-29             | p. 7        |
| (iv) Reviewing body .....   | 30-32             | p. 10       |
| (v) Remedy .....  | 33-41             | p. 11       |
| IV. State practice: procedural obligations .....  | 42-82             | p. 13       |
| (vi) Accessibility.....   | 43-58             | p. 14       |
| (vii) Equality of arms.....   | 59-71             | p. 19       |
| (viii) Personal appearance before court .....   | 72-74             | p. 21       |
| (ix) Scope of review.....   | 75-79             | p. 21       |
| (x) Multiple challenges.....  | 80-82             | p. 23       |
| V. Recommendations.....   | 83-85             | p. 24       |
| VI. Preliminary Draft Principles And Guidelines on the Right Of Anyone Deprived Of His Or Her Liberty To Bring Proceedings Before Court, In Order That The Court May Decide Without Delay On The Lawfulness Of His Or Her Detention ..... |                   | p. 25       |
| ANNEX Questionnaire of the Working Group on Arbitrary Detention to Member States.....   |                   | p. 28       |

## I. Introduction

1. This background paper provides a concise overview of State practice aimed at implementing the right of anyone deprived of his or her liberty to bring proceedings before court, 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 State practice under review is limited to the responses received by the United Nations Working Group on Arbitrary Detention to its questionnaire from 44 States. Submission of the existence of the right court review of detention in relevant frameworks and issues encountered in their implementation was also submitted by 20 national human rights institutions, 1 international organization, 3 regional entities, 8 non-governmental organizations, 5 special procedures mandate holders, one of the treaty bodies and a submission from academia.<sup>1</sup> The Working Group notes that the responding States include those from a range of geographical regions and legal systems. In the Working Group's view, the ensemble of jurisdictions provide a reasonable approximation of the practice of the international community.

2. The objective of this paper is not to draw any conclusions on the effectiveness of States' implementation of the right to court review of detention, but to establish general practice accepted as law that constitute customary international law, and to develop an appreciation of the uniformity and divergence in State practice, identifying the gaps and best practice in the protection of persons deprived of their liberty with regards to their ability to effectively challenge the lawfulness of their detention before court and receive an appropriate remedy. This assessment has informed the Working Group's preliminary draft principles and guidelines on remedies and procedures of the right to court review of detention, prepared in view of assisting States comply with the respective international standards, as mandated by the United Nations Human Rights Council.<sup>2</sup>

3. The right of anyone deprived of his or her liberty to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and receive appropriate remedy upon a successful challenge, is widely recognized in international and regional human rights instruments,<sup>3</sup> the jurisprudence of the International Court of Justice and international human rights mechanisms, including treaty bodies and special procedure mandate holders, regional human rights mechanisms, in the domestic law

---

<sup>1</sup> As notified, all responses are posted in their entirety at:  
<http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx>.

<sup>2</sup> A/HRC/RES/20/16, para. 10.

<sup>3</sup> Articles 8, 9 of the Universal Declaration of Human Rights; Article 9(4), International Convention on Civil and Political Rights; Article 37(b, d); Article 14 of the Convention on the Rights of Persons with Disabilities; Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 17(2)(f) of the International Convention for the Protection of all Persons from Enforced Disappearances; Articles 16, 32(2) of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; Principles 4, 11, 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Rules 7.1, 10.2, 13 of the United Nations Rules for the Protection of Juvenile Deprived of Their Liberty; Guideline 7 of the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention; Article 7(1)(a) of the African Charter on Human and People's Rights; Article 5(h) of the Guidelines on Conditions of Police Custody and Pre-Trial Detention in Africa (2014); Sections M, S of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); Article XXV of the American Declaration of the Rights and Duties of Man (1948); Article 7(6) of the American Convention on Human Rights; Principles V, VII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008); Article 14(6, 7) of the Arab Charter on Human Rights; and, Article 5(4, 9) of the European Convention on Human Rights.

of States and the jurisprudence of national courts.<sup>4</sup> It is recognized as an essential component of due process rights necessary to protect the right to liberty and security of the person in all situations of deprivation of liberty and to prevent arbitrary arrest, detention or exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment. Its critical importance is demonstrated by States' obligations to provide the exercise of the right to court review of detention even in times of armed conflict, states of emergency and in the application of counterterrorism measures.<sup>5</sup>

4. It is a premise of this paper that while existing legal frameworks cover many aspects of relevance to persons deprived of their liberty to bring proceedings before court to challenge the lawfulness of detention, areas remain in which the law fails to provide sufficient protection to them. These failures can be grouped in to two principal categories: first, an area of insufficient coverage results from gaps in the implementation of the substantive obligations of States. Namely to ensure that all persons in all situations of deprivation of liberty, without exception, are entitled to bring proceedings before a court without delay and receive appropriate remedy. The second area of insufficient protection results from the lack of clarity and, as a consequence, uniformity of the State's obligations to provide the requisite procedural guarantees to ensure the effective and real exercise of the right to court review of detention.

5. In both cases, a general norm of the right to court review of detention exists. However, its explicit framework, scope and content has not been articulated in one international instrument that would ensure implementation of the specific guarantees of the general norm. Instead, this is currently dispersed in numerous international standards. In order to strengthen the protection of all persons deprived of their liberty, it is therefore necessary to collate and restate general principles of protection in more specific detail and to address clear protection gaps through the development of draft principles and guidelines on remedies and procedures on the right to challenge the lawfulness of detention before court and receive appropriate remedy.

## II. Scope, content and terminology

6. The Human Rights Council requested the Working Group on Arbitrary Detention to prepare and present to it before the end of 2015, draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or

---

<sup>4</sup> Report of the Working Group on Arbitrary Detention: A compilation of national, regional and international law, regulations and practice on the right to challenge the lawfulness of detention before court (A/HRC/27/47).

<sup>5</sup> ICRC Commentaries to Protocol II, paras. 4427, 4429, referring to Resolution 2675 (XXV) of the United Nations General Assembly; Resolution 2675 (XXV); ICRC Commentaries to Protocol I, paras. 2928, 3092; Decision of the International Court of Justice on 'The Legality of the Threat or Use of Nuclear Weapons' (8 July 1996); Human Rights Committee general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (CCPR/C/21/Rev.1/Add.13, para. 11) and general comment No. 29 (2001) on states of emergency (article 4) (CCPR/C/21/Rev.1/Add.11, paras. 11, 14, 67); Reports of the Working Group on Arbitrary Detention (A/HRC/22/44, para. 47; A/HRC/16/47, paras. 39-54; A/HRC/10/21, paras. 52-54, A/HRC/7/4, para. 64; E/CN.4/2005/6, para. 61; E/CN.4/2004/3, paras. 84, 85; E/CN.4/1995/31, para. 25(d)); Subcommittee on Prevention of Torture (CAT/OP/HND/1, para. 137); Committee on Enforced Disappearance (CED/C/ESP/CO/1, para. 26); Joint report on the Situation of detainees at Guantanamo Bay issued by a group of Special Procedures mandate holders (E/CN.4/2006/120, para. 26); Joint study on global practices in relation to secret detention in the context of countering terrorism by a group of Special Procedures mandate holders (A/HRC/13/42, para. 292(b)).

detention to bring proceedings before court, 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.<sup>6</sup> The Working Group was directed to seek the views of States, United Nations agencies, intergovernmental organizations, treaty bodies, in particular, the Human Rights Committee, other special procedures, national human rights institutions, non-governmental organizations and other relevant stakeholders. In 2013, the Working Group distributed a questionnaire to the aforementioned group of stakeholders requesting details on the treatment of the right to challenge the lawfulness of detention before court in the respective legal frameworks. On 1 and 2 September 2014, the Working Group will convene a global consultation in Geneva, Switzerland to bring together thematic and regional experts to elaborate on the scope and content of the right to court review of detention and allow stakeholders to contribute to the development of the draft principles and guidelines.

7. The Working Group submitted a thematic report to the 27<sup>th</sup> session of the Human Rights Council comprising of a compilation of the international, regional and national legal frameworks treating the right to challenge the lawfulness of detention before court, as based on the information submitted by stakeholders and additional research.<sup>7</sup>

8. This background paper draws from the abovementioned Council report (A/HRC/27/47) and the international standards therein to set out the substantive and procedural obligations on States to ensure the meaningful exercise of the right to challenge the lawfulness of detention before court in practice. The background paper thereafter gives an overview of current State practice in implementing each of the obligations, highlighting several examples of good practice. The observations on State practice are based on the responses provided by the 44 States to the Working Group's questionnaire, and other stakeholder submissions. The latter source further assists in identifying protection gaps and in proposing good practices to ensure effective coverage for persons deprived of their liberty to effectively exercise this procedural safeguard. It is of note that the 44 responding States represent all global regions and diverse legal traditions.

9. On a terminological note, the Working Group interprets "detention" to include all forms of deprivation of liberty, including pre-trial and post-trial detention.<sup>8</sup> This also includes placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance as this may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty.<sup>9</sup> The Working Group has confirmed this in its previous deliberations on house arrest, rehabilitation through labour, retention in non-recognized centres for migrants or asylum seekers, psychiatric facilities and international or transit zones in ports or international airports, gathering centres or hospitals.<sup>10</sup>

10. The term "unlawful detention" is used to refer to both detention that violates domestic law and detention that is incompatible with international human rights law.<sup>11</sup> It also includes detention that may have been lawful at its inception but has become unlawful

---

<sup>6</sup> A/HRC/RES/20/16, para. 10.

<sup>7</sup> *Supra* at note 4.

<sup>8</sup> Working Group on Arbitrary Detention Deliberation no. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, para. 57 (A/HRC/22/44), citing E/CN.4/1997/4, para. 66.

<sup>9</sup> *Supra*, para. 58.

<sup>10</sup> *Supra*, para. 59.

<sup>11</sup> Human Rights Committee communication Nos.1255/2004 et al., *Shams et al. v. Australia*, para. 7.3; 1460/2006, *Yklymova v. Turkmenistan*, para. 7.4; 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, para. 7.6.

because the individual has completed serving a sentence of imprisonment or because the circumstances that justify the detention have changed.<sup>12</sup>

11. The term “customary international law” is used in line with the proposed draft conclusions on the identification of customary international law set out by the Special Rapporteur of the International Law Commission, Sir Michael Wood.<sup>13</sup> In the Rapporteur’s view, “customary international law” means those rules of international law that derive from and reflect a general practice accepted as law. To determine the existence of a rule of customary international law and its content, the Rapporteur has proposed that it is necessary to ascertain whether there is a general practice accepted as law. The requirement of a general practice means that it is primarily the practice of States that contributes to the creation or expression of rules of customary international law. State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, but need not be universal. Provided that the practice is sufficiently general and consistent, no particular duration is required. The Rapporteur emphasizes that the requirement that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation. He clarifies that acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.

12. In its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law<sup>14</sup>, the Working Group restated its constant jurisprudence on the prohibition of all forms of arbitrary deprivation of liberty, and demonstrated that it is general practice accepted as law, constituting customary international law and a peremptory norm (*jus cogens*). In its 2013 annual report to the Human Rights Council<sup>15</sup> the Working Group restated that the prohibition of arbitrariness in the deprivation of liberty requires a strict review of the lawfulness, necessity and proportionality of any measure depriving anyone of their liberty, which can arise at any stage of legal proceedings. In the interactive dialogue at the twenty-second session of the Human Rights Council, States gave general support for the conclusions of the deliberation. Deliberation No. 9 has been cited as one source on the approach to identification of customary international law by Sir Michael Wood in his first<sup>16</sup> and second<sup>17</sup> reports on formation and evidence of customary international law submitted to the International Law Commission.

### III. State practice: substantive obligations

13. The right to challenge the lawfulness of detention before court is a self-standing human right, the absence of which constitutes a human rights violation *per se*. It is a judicial remedy designed to protect personal freedom and physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered. It is also a means of

---

<sup>12</sup> Human Rights Committee communication No.1090/2002, *Rameka v. New Zealand*, paras. 7.3-7.4.

<sup>13</sup> Annex of the *Second report on identification of customary international law* by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/672)

<sup>14</sup> *Supra* at note 8.

<sup>15</sup> Report of the Working Group on Arbitrary Detention (A/HRC/27/48), para. 83.

<sup>16</sup> *First report on formation and evidence of customary international law* by Michael Wood, Special Rapporteur, International Law Commission (A/CN.4/663), para. 53.

<sup>17</sup> *Supra* at note 13, paras 41.8 and 76.6.

determining the whereabouts or state of health of such a person and identifying the authority ordering or carrying out the deprivation of liberty. Ensuring that the detainee is not exclusively at the mercy of the detaining authority, the exercise of the right to court review of detention acts as a fundamental safeguard against detention, torture or other cruel, inhuman or degrading treatment or punishment and plays an important role in clarifying the situation of involuntary or enforced disappearances. The protection is among those judicial remedies that are essential to preserve legality in a democratic society.

**(i) Codification**

14. The State obligation to ensure that persons deprived of their liberty within their jurisdiction are able to challenge the lawfulness of their detention before court and receive an appropriate remedy upon a successful challenge is well-established in international law.<sup>18</sup> The effective exercise of this fundamental safeguard of personal liberty in all situations of deprivation of liberty, without delay and without exception, resulting in an entitlement to unconditional release and the provision of an enforceable right to compensation upon a successful challenge, must necessarily be guaranteed by the State in law and in practice.

15. A review of State practice demonstrates universal acceptance to be bound by the obligation to ensure the right to court review of detention through its codification in national law. A majority of States have enshrined the protection in their respective Constitutions or Codes of Criminal Procedure, and often times, both.<sup>19</sup> Half the responding States demonstrated the right to court review of detention also features in a diversity of other legislative acts, including human rights acts, administrative offence codes, and civil law procedural codes, among others. A very small number of States demonstrated the existence of the procedural safeguard in laws exclusively regulating the detention of particular vulnerable groups, including laws relating to child detainees, to detained migrants, including asylum seekers, and to persons detained involuntarily on health grounds. An equally small number of States have specialized laws uniquely dealing with the right to challenge the lawfulness of detention before court.<sup>20</sup>

16. On the basis of the foregoing, the necessity to codify the right to court review of detention in national law appears to be sufficiently widespread and representative in the practice of States. However, the scope and content of the applicable legal provisions vary greatly in their comprehensiveness between States. In this regard it is recommended that legal provisions regulating the right to challenge the lawfulness of detention have a sufficient degree of precision, be drafted in clear and unambiguous language, be realistically accessible, and ensure that the exact meaning of the relevant provisions and the consequences of its application should be foreseeable to a degree reasonable for the circumstances.<sup>21</sup>

---

<sup>18</sup> Supra at note 4.

<sup>19</sup> For example, Article 46 of the Constitution of Guatemala articulates the supremacy of international treaties and conventions over national legislation. Also see: Article 30 of the Constitution of Colombia and its Law 1095 of 2006; Articles 23 and 27 of the Constitution of Venezuela; and Article 1 of the Constitution of Mexico.

<sup>20</sup> For specialized laws see, for example, Guatemala's Amparo, Habeas Corpus and Constitutionality Law Decree 1-86 (Ley de Amparo, Exhibición Personal y de Constitucionalidad, Decreto número 1-86, *entro en vigencia el 14 de enero de 1986*); and, Mexico's Amparo Law (Ley de Amparo) and Ley General de la Víctimas de 2013; Republic of Korea: Habeas Corpus Act (2007, amended in 2008). Article 80, 492 and 507 of Mexico's Military Code (CJM) incorporates article 9 of the ICCPR by protecting the ability to challenge the lawfulness of detention..

<sup>21</sup> Submission of the International Organization for Migration (25 February 2014), p. 10.

**(ii) Non-derogability**

17. The prohibition of arbitrary deprivation of liberty and the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the lawfulness of the detention are non-derogable under both treaty law and customary international law.<sup>22</sup> In situations of armed conflict, States are obligated to ensure that the norms of the international human rights instruments and customary international law protecting individuals against arbitrary detention shall be complied with.<sup>23</sup> The right to challenge the lawfulness of detention must not be suspended, rendered impracticable, restricted, or abolished under any circumstances, even when a state of emergency or siege has been declared. Domestic legislative frameworks should not allow for any exceptions from the right to challenge the lawfulness of detention, including to persons detained under charges of terrorist activities. The necessity to establish in law and practice that national security concerns do not present a valid reason to restrict the right to a remedy against unlawful detention has been highlighted by stakeholders.<sup>24</sup>

18. The majority of States that responded to the Working Group's questionnaire were silent on this issue. Few specified in law that the exercise of the procedural guarantee may be suspended for reasons of national security or other urgent measure taken to prevent harm. Few specified in law that the right to court review of detention may not be derogated from even in times of emergency.<sup>25</sup>

19. A stakeholder submission comprising of a comparative study of relevant domestic law governing detention across 21 jurisdictions as well as the jurisprudence of the European Court of Human Rights, has identified a very strong trend toward requiring that persons administratively detained for counter-terrorism, national security, or intelligence-gathering purposes be entitled to appeal their detention to, or have their detention reviewed by, a judicial body.<sup>26</sup>

**(iii) Universality**

20. It is well settled in international law that the right to challenge the lawfulness of detention before court is of universal application. It extends to all situations of deprivation of liberty, including detention for purposes of criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, wholly groundless arrests, house arrest, solitary confinement, administrative detention, detention for vagrancy or drug addiction, detention

<sup>22</sup> *Supra* at note 8, para. 47.

<sup>23</sup> Report of the Working Group on Arbitrary Detention (A/HRC/16/47), para. 51.

<sup>24</sup> *Supra* at note 21, p. 10.

<sup>25</sup> For example, Article 43 of the National Constitution of Argentina provides that a challenge to the lawfulness of detention may be brought before a judge by the detainee, or by anyone on his behalf, and such petition will be resolved immediately, even during times of emergency. However, a stakeholder submission notes that even where the right to court review may be guaranteed in law, it may in practice be derogated from (Submission of the National Centre for Human Rights of Jordan (24 November 2013), p. 2, referencing the Crime Prevention Law of 1954).

<sup>26</sup> Submission from Oxford Pro Bono Publico, University of Oxford, "Remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court: a comparative and analytical review of State practice" (April 2014), p. 96. The report focuses on the legal frameworks governing the following types of detention: administrative detention for counter-terrorism, national security or intelligence-gathering purposes; immigration detention; detention of persons with a mental illness; military detention; police detention (particularly in crowd-control situations or following arrest without warrant); and preventive detention (particularly detention imposed alongside or subsequent to a sentence of imprisonment).

of children for educational purposes and other forms of administrative detention. The requirement that detention not be left to the sole discretion of the State agents responsible for carrying it out is so fundamental that it cannot be overlooked in any context, and the procedural guarantee is not susceptible to abrogation. Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority. This obligation requires States to consider and provide the additional safeguards necessary to ensure the right to court review of detention may be availed of by vulnerable groups of detainees, including, but not limited to, child detainees, detained asylum-seekers and migrants in an irregular situation, and persons with a disability detained involuntarily.

21. In regard to child detainees, States are required, under international law, to establish an independent, child-sensitive and accessible complaint system for children, within the administration of juvenile justice context. Every child deprived of his or her liberty must be guaranteed the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. The latter is defined as any person or institution in the broadest sense of the term, including community boards or police authorities having the power to release an arrested person, in cases where the deprivation of liberty is an administrative decision. Basic procedural safeguards must be guaranteed at all stages of the proceedings including the right to appeal to a higher authority. Each case from the outset must be handled expeditiously, without any unnecessary delay. A decision must be rendered as soon as possible, within or not later than two weeks after the challenge is made.

22. Pursuant to the principles of international law, the right to court review of the lawfulness of detention is not limited to citizens but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the State's jurisdiction. States are obligated to guarantee detained asylum-seekers and migrants free access to the courts of law. They must be guaranteed the ability to submit evidence to clear themselves, and to appeal to and be represented for the purpose before competent authority or person(s) specifically designated by the competent authority. The migrant detainee's right to, either personally or through a representative, challenge the lawfulness of detention before a court of law at any time, must be respected.

23. States are required to ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law. Disability is not a legitimate ground under international law to deprive persons of their liberty. Deprivation of liberty solely on the basis of disability is contrary to and violates international law. Involuntary committal or institutionalization on grounds of disability, or perceived disability, particularly on the basis of psycho-social or intellectual disability or perceived psycho-social or intellectual disability, is not in compliance with international law. States parties must ensure that all mental health services are provided based on the free and informed consent of the person. The denial of legal capacity of persons with disabilities and detention in institutions against their will, without their consent or with the consent of a substitute decision-maker, constitutes arbitrary deprivation of liberty in violation of international law.

24. All persons deprived of their liberty on health grounds must have judicial means of challenging the lawfulness of their detention. This includes anyone confined by a court order, administrative decision or otherwise in a psychiatric hospital or similar institution on account of his mental disorder, including persons which have been declared exempt from criminal responsibility. If persons with disabilities are deprived of their liberty through any

process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law, necessarily including the right to liberty and security of the person. States must establish a mechanism, replete with due process of law guarantees, to review cases of placement in a residential setting without specific consent.

25. The large majority of States which responded to the Working Group's questionnaire reported that the right to challenge the lawfulness of detention may be exercised by all persons deprived of their liberty.<sup>27</sup> However, in most cases legislative provisions and examples of the application of the right outside the criminal justice context were not provided. A third of States demonstrated legislative provisions ensuring the ability of persons deprived of their liberty on health grounds to challenge the lawfulness of their detention before court.<sup>28</sup> Less than a quarter of States demonstrated the existence of legislative provisions guaranteeing the same right to persons deprived of their liberty on migration-related grounds.<sup>29</sup> Exceptionally, a very small number of States illustrated the specific legislative provisions guaranteeing the procedural safeguard to the detention of minors or to individuals detained for reasons of extradition, vagrancy or drug addiction.

26. Hence, although the practice of States appears to be sufficiently widespread and representative that the right to court review of the lawfulness of detention should be universally available to all persons deprived of their liberty, in practice there is an absence of correlative guarantees in law. Indeed, the view was expressed that the procedural safeguard is often understood by States to be relevant only to situations of detention for criminal acts, and not in terms of administrative detention.<sup>30</sup> In this regard, it has been

---

<sup>27</sup> For example, in Uganda, the mechanism applies to various forms of detention including: preventive arrest and detention (regulated by the Police Act), the detention of persons reasonably suspected to be of unsound mind or addicted to drugs or alcohol (regulated by the Mental Treatment Act Cap 279 Laws of Uganda 2000), the detention of a minor for purposes of his or her welfare, the removal to hospital of persons infected with infectious diseases (regulated by the Public Health Act Cap 281 Laws of Uganda 2000), and the arrest of persons suspected of contravening the Uganda Citizenship and Control of Immigration Act Cap 66 Laws of Uganda as amended. Another example the Federal Constitution of Switzerland (Articles 31 (3, 4), 18 April 1999 (Cst., Recueil systématique RS 101)) which specifies that any person in pre-trial detention has the right to be brought before a court without delay. The court decides whether the person must remain in detention or be released. Any person in pre-trial detention has the right to have their case decided within a reasonable time. Any person who has been deprived of their liberty by a body other than a court has the right to have recourse to a court at any time. The court shall decide as quickly as possible on the legality of their detention. A further example is Article 125 of the Constitution of Bolivia which empowers any person illegally or improperly detained with the right to challenge the lawfulness of his or her detention before a court of criminal law.

<sup>28</sup> For example, Article 111 of the Kazakhstan Code of Criminal Procedure provides for the ability to challenge the compulsory placement of a suspect or accused person in a medical institution for forensic medical assessments. Another example includes the Habeas Corpus Act of the Republic of Korea which allows the filing of a petition for habeas corpus with a court, in regard to confinement in any medical, welfare, or protective facility. It is noted that a stakeholder submission on the review of State practice observed a very strong trend toward guaranteeing a right of challenge in relation to involuntary detention on mental health grounds to a court of law (supra at note 26, p. 97).

<sup>29</sup> For example, the Administrative Litigation Act of the Republic of Korea allows persons under internment in immigration detention centres to institute a revocation litigation to the court, or to raise an objection to the Minister of Justice, or to file revocation litigation against any dismissal of the objection. It is noted that a stakeholder submission on the review of State practice observed a strong trend in the practice of States toward guaranteeing the right to challenge the lawfulness of migration-related detention (supra at note 26, p. 97).

<sup>30</sup> Submission from the Special Rapporteur on the human rights of migrants, François Crepeau, (13 November 2013), p. 1.

noted that over the years, criminal legal systems have developed a very wide reaching set of guarantees and rights, which when properly applied, can comprehensively protect the rights of persons allegedly detained for criminal offenses. However, in numerous States administrative law has not yet adopted the same rights and guarantees as criminal law. It is reported that detention under administrative or other investigatory procedures, outside of the criminal justice context are used by States to avoid the requirement to ensure access to courts to challenge the lawfulness of detention.<sup>31</sup>

27. An example of the use of administrative detention for such purposes is its reported increasingly popularity as a tool to “fight” irregular migration without the need to provide the guarantees of criminal law. This applies to all individuals detained in places of immigration detention, including refugees, asylum-seekers, rejected asylum-seekers, stateless persons, trafficked persons, migrant workers, regular migrants who have breached their conditions of stay, and undocumented migrants, among others.<sup>32</sup> Although irregular migration is often depicted as a crime, and is sometimes in fact prescribed as such by national legislation, for the most part, irregular migrants are largely detained using tools under administrative law.<sup>33</sup>

28. It is submitted that the right to challenge the lawfulness of detention in the immigration detention context is frequently bypassed and there remain serious systemic challenges to upholding this fundamental right with regard to all individuals in immigration detention.<sup>34</sup> In part, this is due to cultural or linguistic barriers, however more often it is due to a denial of fundamental procedural safeguards, and many States continue to treat administrative detention as outside the fundamental human rights protections. For example, some of these administrative laws enable the use of unlimited detention. Further, ways of challenging detention are often not prescribed by administrative law, thus leaving migrants at higher risk of being arbitrarily detained.

29. In this respect stakeholders have reiterated the importance of ensuring the procedural safeguards and guarantees established by international human rights law, specifically the right to court review of the lawfulness of detention, are implemented in national legislation and applied to any type of deprivation or restriction to liberty of both a criminal and administrative nature, irrespective of the place of detention or the legal terminology used in the legislation.<sup>35</sup> Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary. Stakeholders have identified an urgent need to clarify the scope of the right to court review of the lawfulness of detention in regards to its application to administrative detention.

**(iv) Reviewing body**

30. Judicial intervention during the period of confinement, by an impartial and different authority from the one ordering and implementing the detention, is a recognized necessary element of due process. States are obligated to ensure that anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a court or a body established by law affording equivalent guarantees of competence, impartiality and the enjoyment of judicial independence in deciding legal matters in proceedings that are judicial in nature. The adjudication of the case should take place as expeditiously as

---

<sup>31</sup> Submission from Freedom Now (15 October 2013), p. 2.

<sup>32</sup> Submission of the International Detention Coalition (13 December 2013), p. 6.

<sup>33</sup> Supra at note 30, p. 1.

<sup>34</sup> Supra at note 32, p. 5.

<sup>35</sup> Supra at note 21, p. 9; Supra at note 32, p. 15.

possible and the court must render a decision without delay on the lawfulness of detention. It must have the power to release the detainee where the detention is found unlawful.

31. State responses to the Working Group's questionnaire demonstrate the general practice of States to guarantee in law the right to bring a challenge to the lawfulness of criminal-related detention before a court of law, tribunal or judge.<sup>36</sup> However, there are a number of instances outside of the criminal justice context where the claim is to be filed initially with an administrative authority and may thereafter be appealed to a court of law.

32. Stakeholders have reinforced that the use of courts to review the decision to detain not only establishes a system of independent and non-partisan oversight of the State's power, but also ensures transparency. Furthermore, it ensures the reasons for any decision to detain have been well established by the decision maker and that the individual facing detention has an opportunity to raise his or her own concerns regarding the decision.<sup>37</sup> An example of a reviewing body that fails to meet these standards, it is submitted, are immigration detention tribunals managed entirely within the government department responsible for enforcing immigration regulations and/or immigration detention facilities. Such tribunals implicate serious concerns of impartiality as State security considerations and increasing "border control" targets will frequently conflict with due process and protection functions.

#### (v) Remedy

33. Under international law States are required to ensure that everyone is guaranteed the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or law. States must ensure that victims of unlawful arrest or detention be immediately released from any on-going unlawful detention and be guaranteed an enforceable right to compensation before the competent domestic authority.

34. The great majority of responding States to the Working Group's questionnaire report the existence of specific legal provisions empowering the reviewing body to order the immediate release of the detainee upon a successful challenge to the lawfulness of detention.<sup>38</sup> There appears to be a sufficiently widespread and representative practice amongst States to guarantee in law an enforceable right to compensation for any damages suffered during the course of the unlawful detention.<sup>39</sup> Few States demonstrated the

---

<sup>36</sup> It is noted that a stakeholder submission on a review of State practice determined that in relation to all types of detention governed by civilian (as opposed to military) justice systems, there appears to be a very strong trend toward guaranteeing the right of a detainee to challenge the lawfulness of their detention before a judicial body (supra at note 26, p. 100). It further identified a very strong trend toward requiring that all members of the military detained as a disciplinary measure be guaranteed the right to challenge their detention, although the nature and scope of the right to court review differs (supra, p. 97).

<sup>37</sup> Supra at note 32, p. 21.

<sup>38</sup> However, it is reported that even where remedies have been accorded to the detainee, they have not been effected in practice, including, for example, where the detainee has not been released following a successful challenge (supra at note 21, p. 10).

<sup>39</sup> The consistent trend toward guaranteeing the right of persons whose detention is found to have been unlawful to obtain monetary compensation was also identified by a stakeholder submission (supra at note 26, p. 100). It further identified a strong trend toward making compensation available to an individual found to be unlawfully held in preventive detention and a strong trend toward requiring that monetary compensation be available to persons whose administrative detention for counter-terrorism, national security, or intelligence-gathering purposes is found to have been unlawful as well as to all members of the military whose detention under the military justice system is found to have

existence of legislative provisions imposing some form of punishment, fine or imprisonment, of the State authorities found responsible for the unlawful detention.

35. Some States have reported on their highly comprehensive legislation regulating the enforceable right to receive compensation for anyone determined to have been unlawfully detained<sup>40</sup> and for any harm suffered by a person as a result of unlawful arrest, detention, house arrest, temporary suspension, placement in a specialized medical institution, conviction or the application of compulsory medical treatment measures, irrespective of whether the criminal prosecution services were responsible for such harm.<sup>41</sup> This includes guarantees that the right to compensation for harm caused by the unlawful actions of the criminal prosecution services also be made available to persons wrongly subjected to criminal charges that were subsequently dropped.<sup>42</sup>

36. Compensation for material damage suffered by such a victim may cover the following: earnings, pensions, social benefits and other monies lost as a result of the criminal prosecution; any property of the victim that was seized or otherwise appropriated by the State on the basis of a conviction or court ruling; fines and trial costs that the person had to bear as a result of the enforcement of the conviction; the victim's legal costs; and other costs.<sup>43</sup> It may also extend to reparation for moral harm and to the reinstatement of labour, pension, housing and other rights. If a court sentence has been passed to remove honorary, military, special or other titles, service grades, diplomatic ranks, higher qualifications or State honours, these are reinstated.<sup>44</sup> Further, a court of law or criminal prosecution services must take all the measures prescribed by law to ensure the rehabilitation of a person acquitted by the courts and their compensation for harm caused by the unlawful actions of the criminal prosecution services.<sup>45</sup>

37. Compensation may also be granted under the Civil Code, regarding any harm caused to the detainee as a result of remand in custody, which must be compensated out of the public treasury of the State, federal entity or municipality.<sup>46</sup> The prosecutorial authority is required to make an official apology to the victim on behalf of the State for the harm inflicted.<sup>47</sup>

38. If an individual was subjected to unlawful criminal prosecution, and information on the institution of criminal proceedings, arrest, detention, temporary suspension, committal to a medical institution, conviction or any other action subsequently declared unlawful was published in the press or disseminated by radio, television or other news media, then at the request of the individual or, in the event of his or her death, of the next of kin or the criminal prosecution services, the news media concerned are required, within one month, to

---

been unlawful (supra, p. 97-98). A weaker, but nonetheless significant, trend has been identified in the practice of States towards persons detained for migration-related reasons and persons detained for mental health reasons ensuring they be awarded compensation where their detention is found unlawful (supra, p. 99).

<sup>40</sup> Article 133(3), Code of Criminal Procedure of the Russian Federation.

<sup>41</sup> Article 39, Code of Criminal Procedure of Kazakhstan.

<sup>42</sup> Article 40, Code of Criminal Procedure of Kazakhstan.

<sup>43</sup> Article 135, Code of Criminal Procedure of the Russian Federation; Article 43, Code of Criminal Procedure of Kazakhstan.

<sup>44</sup> Article 41, Code of Criminal Procedure of Kazakhstan.

<sup>45</sup> Article 39, Code of Criminal Procedure of Kazakhstan.

<sup>46</sup> Article 1070(1), Code of Criminal Procedure of the Russian Federation.

<sup>47</sup> Article 136 of the Code of Criminal Procedure of the Russian Federation; Article 44 of the Code of Criminal Procedure of Kazakhstan; Articles 677–682, Code of Administrative Offences of Kazakhstan.

publish a retraction<sup>48</sup> or to publish a notice regarding the restoration and compensation for the victim.<sup>49</sup> At the request of an acquitted person, the criminal prosecution services are obliged to send written notice of the reversal of their unlawful decision to the person's place of employment, study or residence within two weeks.<sup>50</sup>

39. Where an individual held in administrative detention has successfully challenged the lawfulness of his or her detention, harm caused through the unlawful acts of officials including unlawful administrative detention is subject to compensation in accordance with the regulations established through legislation.<sup>51</sup> A judge or authority or other official empowered to consider cases involving administrative offences must take all the steps laid down by law for the rehabilitation of the individual and the compensation of the harm caused as a result of an unlawful act by a judge or authority empowered to consider cases involving administrative offences.

40. Once it has adopted a decision on full or partial rehabilitation of a person, the authority empowered to consider cases involving administrative offences must recognize his or her right to compensation for harm. A copy of the ruling to drop charges or to overturn or revise an unlawful decision is transmitted to the person concerned, with notification of the procedures for obtaining compensation. These persons have the right to full compensation for material harm, elimination of the consequences of material harm and restoration of all rights that were either denied or infringed.<sup>52</sup> In the event of a person's death, the right to compensation in line with established procedures falls to his or her heirs.

41. Stakeholders have recommended that the judicial procedure be made available both to bring the violation to an immediate end and to obtain reparation, the elements of which include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>53</sup> Compensation should be provided for economically assessable damage resulting from gross violations of international human rights law and serious violations of international humanitarian law, including: physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>54</sup>

#### **IV. State practice: procedural obligations**

42. The international and regional legal frameworks have set out the multiple procedural requirements that States are required to ensure in order to guarantee the right to challenge the lawfulness of detention before court may be effectively realized. The first element of a State's obligation in this regard is to ensure the detainee has been notified of the reasons for the arrest and of the availability to bring a challenge to the lawfulness of the detention. No barriers must exist in bringing forth the challenge before court, including choice of representative and the requirement for interpretation. The proceedings must comply with the fundamental rules of procedural fairness, and include the right of the detainee to appear

---

<sup>48</sup> Article 44 of the Code of Criminal Procedure of Kazakhstan; Articles 677–682, Code of Administrative Offences of Kazakhstan.

<sup>49</sup> Article 136, Code of Criminal Procedure of the Russian Federation.

<sup>50</sup> Articles 677–682, Code of Administrative Offences of Kazakhstan; Article 44 of the Code of Criminal Procedure of Kazakhstan.

<sup>51</sup> Article 633(7), Code of Administrative Offences of Kazakhstan.

<sup>52</sup> Articles 677–682, Code of Administrative Offences of Kazakhstan.

<sup>53</sup> Submission from the International Commission of Jurists (11 November 2013), p.1.

<sup>54</sup> Submission from the International Commission of Jurists (3 April 2014), p. 11.

personally before the court. The scope of the court's review must necessarily extend to consideration of the lawfulness of the detention. A detained person is entitled to multiple reviews of the lawfulness of his or her detention.

**(vi) Accessibility**

43. International standards require States to ensure that all persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights. States must guarantee that proceedings may be commenced before a court by either the detainee or his or her representative or counsel, or any persons with a legitimate interest or concern in the well-being, safety or security of a person deprived of his or her liberty, such as his or her relatives. Legal counsel is mandatory in cases of minors, internment in psychiatric centers, and in cases concerning discretionary life sentences. The proceedings shall be simple and expeditious and at no cost for detained persons without adequate means. They are entitled to have cost-free assistance to an interpreter if they cannot understand or speak the language used in the proceedings. States must ensure that migrant workers and members of their families are not expelled while their claim is being considered.

44. The responses of States to the Working Group's questionnaire show near universal practice in guaranteeing the detainee the right to initiate proceedings to challenge the lawfulness of detention, him or herself, or to be represented by counsel of choice.<sup>55</sup> A number of States have empowered a wider group of individuals to initiate such proceedings, including a legal guardian, a state authority such as the prosecutor or state-appointed health professional, the ombudsman or national human rights institution<sup>56</sup>, a non-

---

<sup>55</sup> It is noted that in regard to preventive detention proceedings, a stakeholder submission on State practice has identified a very strong trend toward guaranteeing the right to be heard and to legal representation (*supra* at note 26, p. 97). It also identifies a significant trend in the practice of States toward guaranteeing the right to information and to legal representation to a person with a mental illness during detention proceedings (*supra*, p. 99).

<sup>56</sup> For example, in the Republic of Korea, the National Human Rights Commission may visit the place of confinement even where no complaint is filed, and may recommend appropriate remedies if it is confirmed that the confinement is unlawful. The Human Rights Ombudsman of Russian, pursuant to Article 29(1.3) of Federal Constitutional Act No. 1-FKZ of 26 February 1997 on the Human Rights Ombudsman (as amended on 28 December 2010), may apply to a court or Prosecutor's office to review any decision or verdict of a court, or any sentence, ruling or other judicial decision that has become enforceable. Article 10 of the Law of the Jordan National Centre for Human Rights no. (51) for the year 2006, grants the NHRI the authority to visit places of detention, juveniles care centers and any other public place in which human rights violations occur. The Jordan NHRI is entitled to conduct on-spot visits once information is received that a violation has occurred and follow-up on the complaints to remedy the situation and remove its effects by following this up with the concerned parties such as the courts and the administrative authorities. The Jordan NHRI also monitors human rights violations through its regular visits to detention centers and follows up the rights of the detainees. There is a hotline and the receiving of personal complaints by people coming to the Jordan NHRI. The intervention of the Jordan NHRI can take place anytime beginning with the moment of the arrest, through the stages of investigation, interrogation, trials and sentencing so that the rights of the individuals are respected and meet the relevant international standards and the applicable legal instrument and the standards of fair trial guarantees (24 November 2013, p. 2). The Kosovo Ombudsperson Institution within its constitutional and legal mandate is allowed to inspect all places where persons deprived of their liberty are held. Such competence is also set out in the Criminal Code of Kosovo (5 November 2013, p. 1). The National Committee for Human Rights of Qatar is also empowered to provide legal advice and litigation assistance to detainees (24 October 2013, p. 1). The Office of the Ombudsman of Ukraine is empowered with functions of the national preventive

governmental organization, or the employer or co-workers. Fewer than a third of State responses articulate in their legislation a declaration on the absence of any legal formalities to the process of bringing forth a challenge. Although only one of the State responses provides in its legislation that the challenge is to be cost-free, the Working Group observes that the majority of States support an informal, cost-free and simplified process to bringing a claim challenging the legality of detention before court, offering even the ability to dispense with any requirement for the challenge to be submitted in writing.<sup>57</sup> A guaranteed right to receive free legal advice and representation has been reported by a few States. A quarter of States have specified in law the speed at which a hearing or examination of the challenge is to take place. Few States have specified in law the speed at which the court must render its decision on the challenge brought before it.

#### Notification

45. International standards require States to ensure all individuals deprived of their liberty are informed, in a language they understand, in writing, of the reasons for their detention and of their right to take proceedings for a decision on the lawfulness of their detention and be afforded prompt and regular access to counsel.

46. Even where the right to challenge the lawfulness of detention exists in law, stakeholders have been reported that detainees are frequently unable to exercise the right to court review due to the obstacles faced in bringing forth such a claim. Such obstacles are exacerbated for persons detained outside of the criminal justice context, and often under administrative detention, as the regulatory framework is observed to be less developed, offering fewer procedural guarantees for detainees to initiate such a challenge.<sup>58</sup>

47. The first of such obstacles encountered is the failure to notify the detainee that he or she can apply to the court in order to verify legality of his or her detention.<sup>59</sup> The detainee may be unable to access any source of information on commencing the procedure as a result of several barriers such as language, mental or physical capacity, and physical isolation, including incommunicado detention.

48. For some categories of vulnerable individuals, directly informing them is insufficient to meet the requirement of notice. This heightened vulnerability will require additional safeguards to prevent violations of the right to notice. Children and persons with a mental disability may require guardianship arrangements, for example. Refugees, asylum-seekers and stateless persons will require immediate access to United Nations High Commissioner for Refugees or other protection agencies. Torture and trauma survivors may require the provision of emotional or psychological counselling. Trafficking victims may require holistic shelter and case management services. Without such additional

---

mechanism and therefore carries out monitoring visits to places of detention. During the visits particular attention is paid to, among other things, the ability of detainees to exercise their right to challenge the lawfulness of their detention (25 October 2013, p. 1). Article 89 of the Constitution of Ecuador enables the Defensoria del Pueblo to bring an action of habeas corpus on behalf of an individual it believes is being unlawfully detained (15 January 2014, p. 2). In Guatemala, the Procurador de los Derechos Humanos may initiate the challenge to the lawfulness of detention, pursuant to article 25 of the Law of Amparo, Habeas Corpus and Constitutionality (Decree 1-86 of the National Constituent Assembly) (17 January 2014, p. 1).

<sup>57</sup> For example, article 125 of the Constitution of Bolivia provides that the challenge to the lawfulness of detention may be initiated by the detainee, him or herself, or by his or her representative through an oral or written submission.

<sup>58</sup> *Supra* at note 30, p. 1.

<sup>59</sup> Submission of the Office of the Ombudsman of Ukraine (25 October 2013), p. 2.

safeguards, the right to notice is likely to be ineffective.<sup>60</sup> There should be recognition in law and practice that persons with special needs require special assistance to bring a challenge to the lawfulness of their detention.<sup>61</sup>

49. A second reported obstacle is the failure to inform the detainee of the reasons for his or her detention. Without this knowledge the ability to challenge the lawfulness of the detention is frustrated.<sup>62</sup> However, even where sufficiently clear and detailed reasons for arrest are provided to detainees, it is reported that they are infrequently provided in the native language of the arrested individual, particularly in the case of refugees, asylum-seekers and migrants.<sup>63</sup> Often, detainees are forced to rely on interpretation provided by other detained individuals. Furthermore, refugees, asylum-seekers and migrants are likely to be unaware of the specific immigration policies of the countries where they are arrested or detained, and it is reported that many persons in immigration detention have never appeared before a court or afforded independent legal counsel before a decision to detain was made.

50. Migrants in detention may be considered a special category of vulnerable persons, who are often doubly jeopardized by their ‘foreigner status’ and the lack of guarantees afforded to them under administrative law.<sup>64</sup> Thus, they may not speak the language and therefore understand why they have been detained. They may also be unfamiliar with the legal system and otherwise unaware of ways to challenge the legality of their detention. Some migrants inherently fear the imagined power of the authorities and refrain from engaging in procedures that could help their case for fear of retaliation. It is reported that most detention centres do not have the appropriate understandings of or resources for the protection of migrants’ rights and thus do not ensure their access to justice. The majority of detention centre officials do not inform migrants of their rights during interviews. In many cases, when migrants do claim their rights before immigration authorities, the authorities at the detention centre lack the resources to connect the migrants to public defenders, present them before the courts, or facilitate presentation of a written claim from the detention centre. Additionally, courts may not, or do not, accept claims made by undocumented or irregular migrants. It is recommended that procedural safeguards should apply without derogatory regimes on all territories under state jurisdiction, including overseas territories.<sup>65</sup>

51. It is recommended that States enact legal provisions to ensure detainees are guaranteed the right to be informed orally and in writing of the reason(s) for detention<sup>66</sup>, and on the rights of persons in detention, including the right to challenge detention, in a language the person detained understands. This will frequently require the provision of

---

<sup>60</sup> Supra at note 32, p. 17.

<sup>61</sup> Submission of Medical Justice (20 January 2014), para. 13.

<sup>62</sup> Supra at note 21, p. 10; Supra at note 32, p. 9. It is reported that in the case of immigration detention on the basis of irregular entry, for example, the factual specifics may be based on a discriminatory assumption on the part of the arresting official. There is also an increasing trend among State parties to invoke overly broad substantive grounds for arrest and detention, which leave refugees, asylum-seekers and migrants guessing at the legal basis of the arrest. “National security” grounds have been reported as especially troubling, as state parties are often not legally obligated in their domestic legislation to provide the factual specifics of the arrest at all, leaving legal counsel unable to challenge the factual basis of their clients’ detention.

<sup>63</sup> Supra, p. 9.

<sup>64</sup> Supra at note 30, p. 1.

<sup>65</sup> Supra at note 32, p. 4.

<sup>66</sup> Supra at note 21, p. 12; Supra at note 32, p. 17.

information through qualified interpreters and translators.<sup>67</sup> A good practice observed in some countries is that such information is posted in writing in places of detention.

#### Physical isolation

52. The wide range of types of detention facilities used for individuals outside the criminal justice context is another important factor that can contribute to the ability of such detainees to bring their case before a court.<sup>68</sup> For example, it is reported that detained migrants are often held in facilities which are located far from urban centres, making access difficult for family, interpreters, lawyers and NGOs, which in turn limits the right of the migrant to effective communication. It is recommended that detained migrants be guaranteed the right to contact, and be contacted by any interested parties as these various organizations might be able to provide them with relevant information or legal assistance.<sup>69</sup> Also noted is the increasing use of privately run migrant detention centres. Such centres pose particular difficulties in terms of the right to bring proceedings before court as the management of such centres is often focused primarily on financial or commercial incentives, without the necessary basis and training of detention centre staff in fundamental principles of international human rights law.<sup>70</sup> It is further recommended that monitoring and public reporting should be allowed to ensure that access to legal provisions for procedural guarantees is effective.<sup>71</sup>

#### Representation

53. It is reported that even where a detainee is presented before a judicial authority within the proscribed period of time, States may undermine the full realization of the right to challenge the lawfulness of detention before court by limiting access to legal counsel.<sup>72</sup> In all regions there exists a reported lack of access by legal aid providers to detainees, and notably to places of immigration detention.<sup>73</sup> A common problem encountered by individuals deprived of their liberty in bringing proceedings before court is the unaffordable cost of legal representation.<sup>74</sup> It is therefore recommended that free legal assistance be provided to detainees by independent and qualified legal counsel and with the aid of interpreters if they do not understand or speak the language used before the court.<sup>75</sup>

54. Stakeholders recommend that prompt access to an independent lawyer of his or her choosing be provided, both in law and practice, to the person deprived of liberty, including immediately after arrest or detention.<sup>76</sup> Key aspects of this right include: the ability of the

---

<sup>67</sup> Supra at note 32, p. 16.

<sup>68</sup> Supra at note 30, p. 3.

<sup>69</sup> Supra at note 21, p. 14.

<sup>70</sup> Supra at note 30, p. 3.

<sup>71</sup> Supra at note 32, p. 4.

<sup>72</sup> Supra at note 31, p. 2; Submission from the Global Detention Project (January 2014), p. 3; Submission from the National Center for Human Rights of Jordan (24 November 2013), p. 1, reports that Articles 63(2) and 64 of the Code of Criminal Procedure allows prosecutors, on an exceptional basis, as in the case of emergency, to interrogate detainees without the presence of their lawyers.

<sup>73</sup> Supra at note 32, p. 9.

<sup>74</sup> Submission of the Rwanda National Commission for Human Rights (19 November 2013), p. 5; Submission of the National Human Rights Commission of India (30 October 2013), p. 6.

<sup>75</sup> Supra at note 32, p. 16; supra at note 21, p. 12; supra at note 72, page 3. For example, in Guatemala the Institute of Public Criminal Defence was created to provide timely support to detainees through their attendance at hearings to ensure the procedural guarantees of due process are upheld (Titulo I de la Ley des Servicio Public de Defensa Penal Decreto 129-97 del Congreso de la Republica de Guatemala).

<sup>76</sup> Supra at note 53, p. 4-5.

lawyer to carry out his or her functions free from fear of reprisals or interference; respect for the privacy and confidentiality of lawyer-detainee communications; ensuring the lawyer has timely access to materials within the possession of the authorities that are relevant to challenging the lawfulness of detention; and if, in extraordinary circumstances, a person is not granted immediate access to counsel of choice, immediate access must be ensured to another independent and competent lawyer.

55. The needs of specific groups of vulnerable detainees have been brought to the attention of the Working Group. It has been recommended that in cases of indefinite and protracted detention, legal assistance should be offered on an on-going basis because of the increased needs of the detainee due to diminished mental capacity.<sup>77</sup> Regarding child participation in judicial proceedings, children should have access to child-sensitive information about their rights and relevant procedures, including for free legal assistance and including exercise of their right to be heard and listened to.<sup>78</sup> The right to have legal representation in immigration detention proceedings has been identified as especially crucial for refugees, asylum-seekers and migrants because they are most often unfamiliar with the legal proceedings in the host country and may not speak the language of the host country.<sup>79</sup>

56. Proceedings to challenge the lawfulness of detention must be capable of being initiated not only personally by the detainee, but also by his or her legal counsel, family members, and other interested parties, whether or not they have proof of the consent of the individual detainee.<sup>80</sup> Ensuring the broadest possible scope for such persons to bring proceedings to challenge the detention is essential for the right to challenge to be practical and effective. This is especially relevant in cases of incommunicado detention, as well as forced disappearance or other forms of secret detention as these are the kinds of cases in which detainees are at most risk of prolonged arbitrary detention, torture and other cruel, inhuman or degrading treatment or punishment, and extrajudicial execution, and in which ensuring every possibility for prompt judicial intervention may be of the utmost importance.<sup>81</sup>

#### Deportation of migrants prior to determination of lawfulness of detention

57. The collective expulsion and expedited return procedures in a number of regions, leading to deportation and refoulement without the necessary due process protections, have been raised in stakeholder submissions.<sup>82</sup> Reports indicate that despite recognition of detained migrants' right to access justice through the courts in national and regional law, migrants may be deported before they are able to realize their right to access the courts. Further, compensation is rarely afforded mainly due to expulsion from the territory before proceedings can be initiated or completed.<sup>83</sup> Immigration authorities may have legal deadlines to deport or expulse an irregular migrant, and thus do not have the ability to hold a migrant in detention while a decision is being made in his or her case.<sup>84</sup> Moreover, the procedure before the court against a measure of deprivation of liberty may not have a

---

<sup>77</sup> Supra at note 61, para. 13.

<sup>78</sup> Submission of the Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid (11 November 2013), para. 4.

<sup>79</sup> Supra at note 32, p. 21.

<sup>80</sup> Supra at note 54, p. 3.

<sup>81</sup> Ibid.

<sup>82</sup> Supra at note 32, p. 9.

<sup>83</sup> Ibid.

<sup>84</sup> Supra at note 21, p. 2.

suspensive effect against the removal order.<sup>85</sup> Although legal remedies to suspend the forced return may be accessible, they are reported to in practice rarely efficient in practice. In case of a failed forced removal attempt the pending proceedings against the measure of deprivation of liberty may be considered by the court as no longer relevant because the object of the case (the old decision of deprivation of liberty) will no longer exist. The migrant will be detained on the basis of a new decision and will need to restart the appeal procedure against this new measure of deprivation of liberty *de novo*.

58. It is recommended that proceedings to challenges of immigration detention decisions must be suspensive to avoid expulsion prior to the case-by-case examination of migrants under administrative detention.<sup>86</sup> Further, training and capacity building for the authorities responsible for establishing and enforcing the relevant procedures, as well as of the judiciary, is identified as crucial to ensure that the procedures exist and are actually applied, including to non-nationals.<sup>87</sup>

### (vii) Equality of arms

59. States have an obligation to ensure the proceedings regarding a challenge to the lawfulness of detention before court comply with the fundamental rules of procedural fairness, including an opportunity to present evidence and to know and meet the claims of the opposing party. The procedure is to be guided by the adversarial principle and equality of arms.

60. On the basis of the responses provided by to the Working Group's questionnaire, only a few States reported domestic legislative provisions detailing what should constitute fair proceedings before the authorities and fair disclosure of the offence in regard to initiating a challenge to the lawfulness of detention before court.<sup>88</sup>

61. It is recommended that in order to ensure that the proceedings are fair and effective in practice, the proceedings must, among other things, respect the right to equality before the courts and the principle of equality of arms, including the requirement that the same procedural rights be provided to all parties, subject only to any distinctions that are based on the law and can be justified on objective reasonable grounds not entailing actual disadvantage or other unfairness to the detained person.<sup>89</sup>

62. One such element is that the person deprived of liberty must, as a rule, have the opportunity to contest all the arguments and evidence adduced by the authorities to justify the detention. Individuals and their legal counsel should have full and complete access to their legal files. The right of a detainee to challenge detention will be of little practical

---

<sup>85</sup> Submission of the Belgian Centre for Equal Opportunities and Opposition to Racism (12 November 2013), p. 3. Reference to the procedure for applying for a stay of execution under the extremely urgent procedure before the Aliens Litigation Council or summary judgment procedure before the President of the judicial Court.

<sup>86</sup> *Supra* at note 32, page 4.

<sup>87</sup> *Supra* at note 21, p. 10.

<sup>88</sup> For example, in Colombia, article 5 of the Law 1437 of 2011, states that all individuals when dealing with the authorities have the right to ask for information on the details of their detention. Pursuant to article 13 of the Colombian Constitution, persons with disabilities, children, juveniles, pregnant women, or other vulnerable groups have the right to receive specialized assistance. In Guatemala, articles 82 to 113 of the Ley de Amparo, Exhibición Personal y de Constitucionalidad, (Decreto número 1-86, entro en vigencia el 14 de enero de 1986) requires a court, once it has received a report of unlawful deprivation of liberty, to take action immediately and ask the authority responsible for the detention to provide detailed information about the persons responsible for and the reasons for the detention.

<sup>89</sup> *Supra* at note 54, p. 6.

meaning, and persons deprived of liberty are unlikely to have confidence in the fairness or effectiveness of the proceedings, if the basis for the detention is not disclosed to the detainee and his or her legal counsel.<sup>90</sup>

63. Disclosure of information is also essential more generally for the effectiveness of judicial oversight over any form of detention. The ability of the judge to evaluate the detention will be fundamentally compromised if relevant information is withheld by the executive from the judge. Even where information is disclosed to the judge but withheld from the detainee and his or her lawyer, the judge will be deprived of the benefit of possible explanations the detainee and his or her lawyer could provide, as well as being unaware of potential challenges to the reliability of the information that might depend on knowledge of the detainee or his or her lawyer and that would not necessarily be apparent to the judge. By definition, neither the judge nor any other person can be confident that no such explanations or challenges to reliability of government information exist or are likely to exist, if the detainee and his or her lawyer of choice are deprived of access to the information.<sup>91</sup>

64. By analogy with the right to disclosure of information in the preparation of a person's case, the State has an obligation to disclose any material in its possession, or to which it may gain access, relating to the reasons for a person's arrest or detention. Disclosure must include exculpatory information, which includes not only information that establishes an accused's innocence, but also other information that could assist the detainee, e.g. in arguing that his or her detention is not lawful or that the reasons for his or her detention no longer apply.<sup>92</sup>

65. In principle, some restrictions on disclosure of information may be justified, at least as regards non-disclosure of information that the government does not intend to rely on in the proceedings. However, a restriction can be acceptable if at all, only when where the court hearing the challenge to detention concludes, based on specific evidence, that all of the following requirements are satisfied. Firstly, the proposed restriction is necessary to pursue a legitimate aim such as: (a) protecting national security; (b) preserving the fundamental rights of another individual, such as the protection of witnesses who are at risk of reprisals; or (c) safeguarding an important public interest, such as allowing police to keep secret their methods of investigating crimes.

66. Secondly, the proposed restriction must be proportionate. An assessment of proportionality requires a balance to be struck between how well the non-disclosure protects the legitimate aims being pursued and the negative impact this has on the ability of the person to respond to the case or to pursue a habeas corpus petition. This means that if a less restrictive measure can achieve the legitimate aim (such as providing redacted summaries of information, for example) then that measure should be applied.

67. Thirdly, any difficulties caused to a party in the proceedings will be "sufficiently counterbalanced" by the judicial authorities in a way that ensures that the person is able effectively to respond to the case or to pursue a habeas corpus petition. This might involve, for example, an *ex parte* evaluation by the trial judge of whether all or part of the information may be withheld and whether a redacted summary of the information should be provided.

68. Lastly, if the impacts of the proposed restriction on disclosure cannot be sufficiently counterbalanced by other means, and the authorities still refuse to make the disclosure (and

---

<sup>90</sup> Ibid.

<sup>91</sup> *Supra*, p. 7.

<sup>92</sup> *Supra*, p. 8.

the Court does not have the authority to compel such disclosure), then the Court must order the person released. The Court cannot participate in the arbitrary or otherwise unlawful deprivation of liberty that would result from continuing to detain the person while denying them an effective opportunity to challenge the lawfulness of detention.<sup>93</sup>

69. The application of the above requirements when the government not only seeks to withhold information but also intends to rely on the information in the proceedings to justify the deprivation of liberty, is highly controversial as it means that the individual faces the possibility of detention or imprisonment on the basis of secret evidence.<sup>94</sup>

70. Seeking to satisfy the “counter-balancing” requirement, a few countries have implemented systems of “special advocates” (a pool of legal counsel who are pre-approved by the executive government to view security- classified information), including to allow the government to rely on secret evidence in seeking to justify deprivations of liberty. The ‘special advocates’ are allowed to see information that the individual and his or her lawyer of choice are not permitted to see, and to make arguments about that evidence in hearings from which the individual and his or her lawyer are excluded. However, this unusual practice remains highly controversial.<sup>95</sup>

71. The right to disclosure of information applies equally to criminal and non- criminal proceedings, as a fundamental aspect of the principle of equality of arms.<sup>96</sup>

#### **(viii) Personal appearance before court**

72. It is accepted in international law that the detainee has the right to appear in person before the court when challenging the lawfulness of his or her detention. The court must also have the power to order the detainee brought before it. The detaining authority has the obligation to produce without unreasonable delay the detained person before the court.

73. In response to the Working Group’s questionnaire, only a few States reported on the implementation of this principle in their domestic legislation.

74. Stakeholders have reiterated the importance of the right of the detainee to be physically present before the court as a means to ensure the effectiveness and fairness of the proceedings, as well as to reinforce the protection of the detainee from other violations such as torture or other ill-treatment.<sup>97</sup>

#### **(ix) Scope of the review**

75. Pursuant to international standards, the review before the court should necessarily extend to the lawfulness of detention, that is, the grounds justifying the detention, and not merely to its reasonableness or other lower standards of review. The burden of proof to establish the lawfulness for the detention lies on the authorities in question and requires

---

<sup>93</sup> Supra, p. 9.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid. It is noted that the High Commissioner for Human Rights has emphasized the problematic nature of limitations on the ability of special advocates to fully discharge their functions and act as a sufficient counterbalance to non-disclosure of information, particularly when these advocates are not able to communicate with non-security cleared persons after the disclosure of evidence (including to receive relevant instructions from the detainee or the detainee’s lawyer of choice). Indeed, Special Advocates, for instance in the United Kingdom, themselves have concluded that such circumstances, under which they have operated, “are inherently unfair; they do not ‘work effectively’, nor do they deliver real procedural fairness.”

<sup>96</sup> Supra, p. 8.

<sup>97</sup> Supra at note 53, p. 4.

that such authorities establish the legal basis for the detention and justify it according to the principles of necessity, reasonableness and proportionality, showing that less intrusive means of achieving the same objectives have been considered in the individual case.

76. In the particular case of migrant workers, the scope of the judicial review cannot be confined to a formal assessment of whether the migrant worker concerned entered the State without a valid entry permit, without the possibility of release if the detention is not established by law. The burden of proof rests on the detaining authorities to demonstrate that the presumption in favour of liberty should be displaced.

77. In the responses provided to the Working Group's questionnaire, States did not elaborate on the scope of review to be applied to the proceedings, that is, whether the hearing body can review both the procedural and substantive grounds of the arrest and detention.<sup>98</sup>

78. Stakeholders have submitted examples of State practice where the scope of judicial review of the detention is limited to an examination of whether it is in conformity with, and therefore lawful under, national law.<sup>99</sup> Hence, the necessity or proportionality of the detention cannot be challenged through court review of detention.<sup>100</sup> The result of this is that the question of whether such detention is arbitrary in any individual case (and therefore unlawful under international human rights law) cannot be separately adjudicated.<sup>101</sup> Examples of a limited review include where immigration legislation provides for detention on certain grounds and where review of detention is available before an independent tribunal, however the tribunal cannot review the legal validity of the decision to detain, only other factors.<sup>102</sup> It is further reported that there are circumstances where detained

---

<sup>98</sup> It is observed from the responses provided by States that a distinction is often not made in practice between the review of the lawfulness of detention before court from an application for an automatic bail hearing.

<sup>99</sup> Submission from the Australian Human Rights Commission (8 November 2013), para. 20. In Australia, there are statutory schemes which provide for restrictions on liberty, sometimes for prolonged periods, in circumstances such as immigration detention and pursuant to control orders and preventative detention orders contained in counter-terrorism and national security legislation. Detention that is in conformity with this legislation, and therefore lawful under domestic law, will not be able to be successfully challenged through habeas corpus. This has the effect of reducing the practical scope of the remedy.

<sup>100</sup> *Supra*, para. 6. Australia's High Court has upheld the constitutional validity of laws which allow for indefinite immigration detention.

<sup>101</sup> *Supra*, paras. 39-40. A key concern with Australia's system of mandatory detention is that the detention of an unlawful non-citizen is not based on an individual assessment that the particular person needs to be detained. It is an a priori rule which applies to an entire class of people regardless of their circumstances and is not subject to judicial review. Mandatory detention impacts significantly on two classes of asylum seekers who are not entitled to a visa but who also cannot be removed from Australia consistently with Australia's international obligations. For these classes of people, the relevant conditions for release from detention under s 196 of the Migration Act cannot be fulfilled and they face the prospect of indefinite detention without effective judicial review of the reasonableness or necessity of their detention. Also see Submission of the Belgian Centre for Equal Opportunities and Opposition to Racism (12 November 2013), p. 3.

<sup>102</sup> Submission from the Canadian Council for Refugees (21 January 2014), pp. 2, 4, and 5. For example: (i) One of the grounds on which an immigration officer can detain a foreign national is that she is not satisfied as to the foreigner's identity. However, the law does not allow the Immigration Division to review whether the immigration officer was reasonable in concluding that the identity of the detainee was not established. Rather, the law requires rather that the adjudicator focus on the status of the Minister's investigations. Hence, the legislation thus fails to offer judicial oversight of the decision to detain based on identity. (ii) An immigration officer may detain a person where he or she has "reasonable grounds to suspect" that the person is inadmissible on grounds of security,

migrants are granted the right to appeal expulsion or disqualification of entry decisions, but are unable to appeal the actual decision to detain.<sup>103</sup>

79. Stakeholders reiterate the importance of the court's ability to examine and act on the elements of inappropriateness, injustice, law of predictability, and due process of law, as well as basic principles of reasonableness, proportionality and necessity, when reviewing the lawfulness of the detention.<sup>104</sup> Furthermore, in reviewing detention, the judge or other officer authorized by law to exercise judicial power must consider whether detention remains justified in all the changing circumstances of the detained individual's case, including health, family life, protection claims, or other attempts to regularize one's status. When assessing whether the measures taken are in compliance with international standards, the vulnerable position of persons affected by (alleged) illness must be taken into consideration as the unlawfulness of detention may include the unsuitability of detention for persons with special needs.<sup>105</sup>

**(x) Multiple challenges**

80. Under international law, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. The right to challenge the lawfulness of detention before court applies from the moment of arrest, and there should be no substantial waiting before bringing a first challenge. A detained person or his counsel shall be entitled at any time to take proceedings. A judicial or other authority shall be empowered to review as appropriate the continuance of detention. In cases of migration-related detention, further reviews of the continued necessity and lawfulness of the detention should be carried out automatically at regular intervals by a judge or other officer authorized by law to exercise judicial power. In regards to persons detained involuntarily in a psychiatric institution, the necessity whether to hold the patient further shall be reviewed regularly at reasonable intervals by a court or a competent independent and impartial organ, and the person released if the grounds for his detention do not exist any longer.

81. A third of all responding States to the Working Group's questionnaire have specified in their legislation there is no deadline to bring a challenge to the lawfulness of detention before court. However, an equal number of States provide for a deadline in law. A few States legislatively regulate the automatic renewal of the right to a new proceeding to challenge the lawfulness of detention.<sup>106</sup> Although there is no obligation for States to provide for a right to appeal under international law, a quarter of responding States demonstrated legal provisions guaranteeing the right of appeal of an unsuccessful challenge to the lawfulness of the detention.<sup>107</sup>

---

violating human or international rights, serious criminality, criminality or organized criminality". The Immigration Division is required by the Act to consider not how reasonable the suspicion is, but whether the Minister is "taking necessary steps" to inquire into the suspicion. (iii) The Minister of Public Safety now has broad discretionary power to designate a group of individuals. The actual basis for the detention – the designation by the Minister of the group is not subject to review.

<sup>103</sup> Supra at note 21, p. 10.

<sup>104</sup> Supra at note 53, p. 2.

<sup>105</sup> Supra at note 61, para. 16.

<sup>106</sup> For example, Section 185 of the Criminal Procedure Act of Norway guarantees the person in custody the right to a new proceeding before the court every fourth week.

<sup>107</sup> It is noted that a stakeholder submission observed a very strong trend in the practice of States toward guaranteeing the right to appeal to a higher court against the order of preventive detention (supra at note 26, p. 97). In relation to preventive detention and detention of persons with a mental illness – regimes which are unique in being based on personal characteristics (such as

82. It is reported that in the context of the right to challenge the legality of detention there is infrequently an opportunity for periodic review of the initial decision to detain.<sup>108</sup> In the view of stakeholders, detention must be periodically reviewed in order to remain lawful<sup>109</sup> and decisions regarding detention should be regulated through automatic, prompt and regular independent judicial review. This is of particular importance where States do not provide any maximum limit for the duration of the detention.<sup>110</sup> Moreover, as migrants who are detained may not always be aware of their right to request review of their detention, sometimes due to language barriers or lack of access to a lawyer, the periodic review of detention should be automatically reviewed periodically to ensure that continued detention is justified. If detention is not justified or is found to be unlawful, the person must be released.<sup>111</sup>

## V. Recommendations

83. This report has restated international law standards on the obligation of States to provide both substantive and procedural guarantees to all persons in all situations of deprivation of liberty.<sup>112</sup> It thereafter presented the results of a survey of State practice in regards to the implementation of each of these obligations, thereby illustrating general practice accepted as law that constitute customary international law, and revealing the uniformity and divergences of domestic approaches to ensuring exercise of the right in practice. The analysis was complemented by a review of submissions made by a diversity of stakeholders, including special procedure mandate holders, non-governmental organizations, national human rights institutions and regional and international entities. The submissions focused on the identification of good practices, the highlighting of protection gaps and recommendations on how to provide effective coverage.

84. The Working Group on Arbitrary Detention, in uncovering the obstacles faced by all persons detained in all situations of deprivation of liberty to challenge the lawfulness of their detention before court and receive remedy, and in drawing from good examples of State practice and the recommendations of stakeholders, has developed preliminary draft principles on procedures and remedies to challenge the lawfulness of detention before court with the aim of assisting States in fulfilling their obligations under international law.<sup>113</sup> It will further develop guidelines to ensure a contextual understanding of the principles.

85. The elaboration of the preliminary draft basic principles and guidelines ensures that the complex set of substantive and procedural obligations of States that are necessary to ensure the right to court review of detention may effectively be exercised in practice, are clarified and concisely articulated, thereby facilitating their widespread implementation.

---

‘dangerousness’) which are liable to change over time – there appears to be a trend toward requiring automatic periodic review of detention with a view to release if the basis for detention is no longer present (supra, p. 99).

<sup>108</sup> Supra at note 32, p. 10.

<sup>109</sup> Supra, p. 21.

<sup>110</sup> Supra at note 30, p. 3.

<sup>111</sup> Supra at note 21, p. 11.

<sup>112</sup> Supra at note 4. The international and regional legal frameworks are set out exhaustively in the Working Group’s report to the Human Rights Council (A/HRC/27/47).

## VI. PRELIMINARY DRAFT PRINCIPLES AND GUIDELINES

### ON REMEDIES AND PROCEDURES OF

THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY TO BRING PROCEEDINGS BEFORE COURT, IN ORDER THAT THE COURT MAY DECIDE WITHOUT DELAY ON THE LAWFULNESS OF HIS OR HER DETENTION\*

*\*as adopted by the Working Group on Arbitrary Detention at its 69<sup>th</sup> session (22 April – 1 May 2014, Geneva)*

#### A. General Principles

1. Liberty
2. Universality
3. Codification
4. Non-derogability

#### B. Principles Relating to Court Proceedings

5. The ‘court’
6. Ability to bring proceedings before the court
7. Multiple challenges
8. Appearance before the court
9. Standard of review
10. Decision of the court

#### C. Principles Relating to Remedies

10. Release and compensation
11. Appeal of the decision

#### A. GENERAL PRINCIPLES

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

**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.

---

<sup>113</sup> It is noted that these Principles and Guidelines are only at a preliminary stage and is not intended to be exhaustive.

**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.

**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.

## **B. PRINCIPLES RELATING TO COURT PROCEEDINGS**

**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.

**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.

**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*).

**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.

**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.

**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.

### **C. PRINCIPLES RELATING TO REMEDIES**

**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.

**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.

## ANNEX

### QUESTIONNAIRE RELATED TO

THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR DETENTION TO BRING PROCEEDINGS BEFORE COURT, 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

1)

a) If your State is a party to the International Covenant on Civil and Political Rights, how is Article 9 (4) of the Covenant incorporated into your domestic legislation? Please provide reference to the specific provisions, including their wording and date of adoption

b) If your State is not a party to the International Covenant on Civil and Political Rights, is the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention incorporated into your country's domestic legislation?

Yes

No

If yes, please provide the legislation, their wording and year of adoption.

2) Does this mechanism apply to all forms of deprivation of liberty, such as administrative detention, including detention for security reasons, involuntary hospitalisation, immigration detention, or any other reason?

Yes

No

If yes, please provide the list of the forms of detention to which the mechanism is applicable.

3) Is the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court available for individuals subjected to preventive detention measures?

Yes

No

If not, please explain in which case(s) your country's laws do not provide remedies and cite relevant legislation.

4) Does this mechanism provide for any particular remedies? In particular, does the mechanism provide for release and compensation for unlawful detention?

Yes

No

If yes, please state and explain the relevant remedies.

5) Are there persons other than the detainee who can initiate the procedure on behalf of the detainee under your country's domestic law?

Yes

No

If yes, please state who?

6) What are the formal requirements and procedures for a detainee to invoke the right to bring proceedings before court, in order that the court may decide without delay on the lawfulness of the detention? Please cite relevant domestic legislation.

7) Does the legislation provide for a time limit for submitting such application to the court? If so, please indicate what is the maximum time in the number of:

Days (How many?)

Months (How many?)

Years (How many?)

8) Are there any major decisions of your country's Constitutional or Supreme Courts concerning the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court?

Yes

No

If yes, please provide the date and number of the decision(s) and, if possible, a copy of the decision(s).