



Note No. 23/2015

The Permanent Mission of Australia to the United Nations and other international organisations in Geneva presents its compliments the Office of the United Nations High Commissioner for Human Rights and the United Nations Working Group on Arbitrary Detention and has the honour refer to the updated Draft Principles and Guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court without delay, in order that the court may decide the lawfulness of his or her detention and order his or her release if the detention is not lawful, as adopted by the Working Group at its meeting, 2-4 February 2015, Geneva.

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

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

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

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

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These supplementary observations are not exhaustive. Australia would be grateful for the opportunity to provide further comments on the Draft Principles and Guidelines, along with other stakeholders, as the draft is developed by the Working Group.

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

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



Geneva  
17 March 2015

## **A. GENERAL OBSERVATIONS**

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

## **B. PRINCIPLES**

### **Application in situations of armed conflict**

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

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<sup>1</sup> See Annex 1, para [7].

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

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

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

<sup>3</sup> Article 5, Geneva Convention III.

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

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

## **Other observations on draft principles**

10. In relation to:

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

## **C. GUIDELINES**

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

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12. The Australian Government again thanks the Working Group for the opportunity to provide further comments on the Draft Principles and Guidelines. Australia would welcome the opportunity to further consider and comment on the draft as it is developed.
13. The Australian Government reiterates its firm support for the work of the Working Group, and avails itself of this opportunity to renew to the Working Group the assurances of its highest consideration.

**Views of the Australian Government on Preliminary Draft Principles and Guidelines on Remedies and Procedures of Anyone Deprived of His or Her Liberty to Bring Proceedings Before a Court, in Order that the Court May Decide the Lawfulness of Detention (adopted by the Working Group on Arbitrary Detention at its 69<sup>th</sup> session, 22 April – 1 May 2014, Geneva)**

1. The Australian Government presents its compliments to the United Nations Working Group on Arbitrary Detention ('Working Group'), and has the honour to refer to its call for comments from all interested stakeholders on the Working Group's Preliminary Draft Principles and Guidelines on Remedies and Procedures of Anyone Deprived of His or Her Liberty to Bring Proceedings Before a Court ('Draft Principles and Guidelines').
2. The Australian Government commends the Working Group for its initiative in developing Draft Principles and Guidelines and thanks the Working Group for the opportunity to provide comments.
3. Australia is a longstanding party to a number of international agreements that enshrine the right to challenge the lawfulness of detention, most notably the *International Covenant on Civil and Political Rights* ('ICCPR'), and is firmly committed to upholding its obligations under those agreements. The Australian Government recognises the significant role of the right to challenge the lawfulness of detention in protecting the liberty and security of individuals and in maintaining the rule of law.
4. Australia is concerned however that certain draft principles and guidelines go beyond States' current obligations under international law and do not reflect certain practices within common law countries. In order to assist the Working Group, the Australian Government makes the following preliminary observations to clarify its understanding of the right to challenge the lawfulness of detention.
5. These preliminary observations are not exhaustive. Australia would be grateful for the opportunity to provide further comments on the Draft Principles and Guidelines, along with other stakeholders, as the draft is developed by the Working Group.

**D. GENERAL PRINCIPLES**

**Draft Principle 1 (Liberty)**

6. The Australian Government welcomes and endorses draft principle 1, which provides that everyone has the right to be free from the unlawful deprivation of liberty.

**Draft Principle 2 (Universality)**