



FREEDOM NOW

QUESTIONNAIRE: 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

Submitted by Freedom Now to
The UN Working Group on Arbitrary Detention

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1) Please describe your organization's concern with the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court?

Freedom Now is a non-profit, non-governmental legal advocacy organization that works to free prisoners of conscience around the world. Although each of our clients have been detained for peacefully exercising some fundamental right—and are thus arbitrarily detained pursuant to Category II as established by the United Nations Working Group on Arbitrary Detention (Working Group)—most of our cases also involve Category III due process violations. The right of anyone deprived of his or her liberty to seek judicial review of the lawfulness of his or her detention (habeas corpus) is among the most frequently violated international due process protections involved in Freedom Now cases.

2) In your organization's international/regional focus, how far is the right of anyone deprived of his or her liberty to seek proceedings before court part of national laws?

Of the 22 countries that have detained a Freedom Now client, an overwhelming majority have constitutional or legislative provisions that prohibit unauthorized detention.¹ However, the scope of the right to habeas corpus varies significantly between jurisdictions.

Some states have constitutional provisions that are quite detailed and establish specific timelines for the right to challenge the legality of one's detention. Article 19(3)(b) of the Gambian Constitution, for example, provides that “upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offense under the laws of The Gambia, and who is not released, shall be brought without undue delay before a court and, in any event, within seventy-two hours.”² Similarly, under Articles 19(3) of the Ethiopian Constitution, detainees

¹ Since its founding in 2001, Freedom Now has represented clients in 22 countries, including Azerbaijan, Bahrain, Belarus, Burma, Cameroon, China, Cuba, Ethiopia, Egypt, Gambia, Indonesia, Iran, Kazakhstan, Morocco, Peru, Rwanda, Syria, Turkmenistan, Uganda, Uzbekistan, Vietnam, and Zimbabwe. For more about our work, please visit www.freedom-now.org.

² While the Gambian Constitution provides for a right to habeas corpus after 72 hours in most cases, Article 36 extends the time period to thirty days when the government has invoked its emergency powers.

“have the right to be brought before a court within 48 hours of their arrest” and “to be given prompt and specific explanation of the reasons for their arrest...”

Other states, such as Uzbekistan, provide only limited constitutional protection against arbitrary detention³ and instead rely almost entirely on statute to protect the right to habeas corpus. Under Article 226 of the Uzbek Criminal Procedure Code, the government is required to present detainees before a court within 72 hours of his or her arrest for a determination regarding the legality of the detention. Other states, have adopted legislation that authorizes significantly longer periods before a detainee may challenge their detention in court. China, for example, allows the detention of a criminal suspect for up to 37 days before he or she must be presented before a judicial authority.⁴

3) Please describe the most common problems individuals face in their realization of the right?

Unfortunately, despite widespread protection in constitutional and statutory regimes, the right to prompt judicial review of one’s detention is regularly violated in a number of ways. First, some governments choose to ignore the right, subjecting detainees to varying periods of extra-judicial house arrest or *incommunicado* detention. Second, states avoid the habeas corpus requirement by resorting to administrative or other investigatory procedures. Finally, 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 habeas corpus by limiting access to legal counsel, conducting a biased or cursory review, or failing to adequately investigate credible allegations of torture or other mistreatment.

The most evident violation of the right to habeas corpus occurs where government authorities merely ignore the obligation under domestic law and detain an individual without access to any judicial process for a prolonged period. In the case of disappeared Gambian journalist Chief Ebrima Manneh, for example, the government simply arrested Mr. Manneh in 2006 and thereafter detained him *incommunicado* without conducting any legal process. As the Working Group noted in finding the detention of Mr. Manneh arbitrary, “[he] has not had his day in court. He has not even been charged with a criminal offense.”⁵ A variation of this type of violation occurs where the court conducts a formal hearing, but the defendant is not physically present during the proceedings.

Freedom Now cases involving such flagrant violations of the right to habeas corpus frequently also involve long periods of *incommunicado* detention or serious mistreatment. In Uzbekistan, the widespread practice of arbitrary detention without access to the courts has facilitated the brutal mistreatment of political dissidents and rights activists. In the case of the imprisoned Uzbek human rights activist and opposition leader Akzam Turgunov, authorities held Mr.

³ Article 25 of the Uzbek Constitution merely provides that “[n]o one may be arrested or taken into custody except on lawful grounds.”

⁴ Although Article 89 of the Chinese Criminal Procedure Code initially indicates that a public security organ must request approval for an arrest within three days, the Article’s broad exceptions expand the total time to 37 days.

⁵ *Chief Ebrima Manneh v. Republic of the Gambia*, U.N. Working Group on Arbitrary Detention, Opinion No. 14/2009 (Sept. 3, 2009) at ¶ 22.

Turgunov *incommunicado* for over two weeks and poured boiling water over his back during an interrogation. Mr. Turgunov's complaints to prosecutors were ignored and he did not have the opportunity to describe his mistreatment to a court until nearly two months later. Cases like Mr. Turgunov's were included in a report by Human Rights Watch documenting the widespread violation of habeas corpus rights in Uzbekistan.⁶

A second, more subtle, violation of habeas corpus rights occurs where the government employs administrative or investigative detention regimes to justify the imprisonment of individuals without access to judicial review. The most glaring example of this practice is use of so-called "residential surveillance" by the Chinese government. Under this system, an individual can be detained by police without charge while the government conducts an investigation. While in theory an individual should usually be subject to "residential surveillance" in their home, broad exceptions allow authorities to hold a suspect elsewhere for up to six months.⁷ This legal regime was used to justify the detention of 2010 Nobel Peace Prize Laureate and Chinese democracy activist Dr. Liu Xiaobo for six months prior to his formal arrest—much of it completely *incommunicado* at an unknown location. As noted by the Working Group in Opinion No. 15/2011:

Mr. Liu Xiaobo was not informed, at the time of arrest, of the reasons for his arrest or promptly informed of any charges against him. He was not brought promptly before a judge. He was held *incommunicado* for an extended period and not granted access to legal counsel. The pre-trial detention of Mr. Liu Xiaobo *constitutes a clear violation of Article 9 [of the Universal Declaration of Human Rights]*.⁸

This legally sanctioned form of arbitrary detention is especially worrying when combined with the Chinese government's practice of resorting to wholly unauthorized detention in other cases—such as the extra-legal house arrest of Liu Xia, Liu Xiaobo's wife, who has been detained by authorities in her Beijing home without access to any the legal process for over three years.⁹

In addition to preventing detainees from accessing the judicial process—either consistently with domestic law or without any legal justification whatsoever—governments may also undermine the right to habeas corpus by limiting the effectiveness of those proceedings. In Uzbekistan, for example, "habeas corpus remains largely a formality that has done little to protect detainee rights or prevent torture in pre-trial detention" despite revisions to the criminal code in 2008 requiring that they be brought before a judge within 72 hours of their arrest.¹⁰ Instead, Uzbek courts almost always authorize pre-trial detention under a legal regime that does not require that judges review admissible evidence to determine if there is "reasonable suspicion" that the detainee committed

⁶ *No One Left to Witness: Torture, the Failure of Habeas Corpus, and the Silencing of Lawyers in Uzbekistan*, Human Rights Watch, Dec. 2011, at 33, available at http://www.hrw.org/sites/default/files/reports/uzbekistan_1211webwcover.pdf (hereinafter HRW Report).

⁷ Criminal Procedure Code of the People's Republic of China § 72 - 74 (as amended Mar. 14, 2012).

⁸ *Liu Xiaobo v. People's Republic of China*, U.N. Working Group on Arbitrary Detention, Opinion No. 15/2011 (May 5, 2011) at ¶ 21 (emphasis added).

⁹ See *Liu Xia v. People's Republic of China*, U.N. Working Group on Arbitrary Detention, Opinion No. 16/2011 (May 5, 2011).

¹⁰ HRW Report, at 33.

any crime—a system that results in an “entirely symbolic” procedure.¹¹

Similarly, limited access to the government’s charges or interference with the right to assistance of legal counsel can seriously undermine the legitimacy of habeas corpus proceedings when they do occur. In Ethiopia, for example, the 2009 Anti-Terrorism Proclamation requires that a hearing take place within 48 hours of arrest. However, after arresting independent journalist Eskinder Nega on September 14, 2011, the government repeatedly held hearings authorizing Mr. Nega’s continued detention even though he did not have access to the assistance of legal counsel during this time. Further, the government only presented the charges against Mr. Nega nearly two months after arresting him.¹² Such restrictions, in addition to being freestanding procedural violations of their own, also so severely undermine the protections afforded by the habeas corpus proceedings that they also contravene the right to have one’s detention promptly subject to independent judicial review.

4) How do you assist individuals who do not enjoy the right to bring proceedings before the court?

Freedom Now seeks to redress violations of habeas corpus rights by advocating on behalf of prisoners of conscience through international legal, political, and public relations advocacy. Because our advocacy model requires an extensive vetting process before we can become fully engaged on a case, brief violations of habeas corpus rights may occur before Freedom Now publicly engages in any advocacy. However, once we become fully engaged on a case—or in circumstances where the violation of habeas corpus rights is prolonged—Freedom Now incorporates such violations directly into our advocacy.

These efforts include submissions to international bodies, such as the Working Group, seeking a finding that the lack of respect for habeas corpus rights in a particular case violates international law. As such, clear and enforceable international standards on the right to habeas corpus are critical to holding governments accountable for violations of such rights. Further, our work also involves galvanizing the international community through advocacy, which benefits greatly from opinions by the Working Group and other institutions that identify specific habeas corpus violations wherever they occur.

5) In your organization’s opinion, how would you advise the Working Group on Arbitrary Detention to draft the “draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty [...]” What should be key points of these basic principles and guidelines?

The right of a detained individual to challenge the legality of his or her detention before a judicial authority is well established under international law. The International Covenant on Civil and Political Rights (ICCPR) affirms the right to judicial review of one’s detention for both criminal and non-criminal detention. Article 9(3) of the ICCPR requires “prompt” judicial review of criminal detentions while Article 9(4) of the ICCPR provides that “anyone who is

¹¹ HRW Report, at 37-38.

¹² See *Eskinder Nega v. Federal Democratic Republic of Ethiopia*, UN Working Group on Arbitrary Detention, Opinion No. 62/2012 (Nov. 21, 2012).

deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not warranted.” This fundamental procedural requirement is reinforced by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which requires the government to provide an “effective opportunity to be heard promptly by a judicial or other authority” that “shall be empowered to review as appropriate the continuance of the detention.”¹³

The specific requirements of the right to habeas corpus have been widely discussed by a number of authoritative international institutions, including the Working Group. Importantly, the right to habeas corpus applies to imprisonment as well as other forms of detention, including house arrest.¹⁴ Any form of *incommunicado* detention is a per-se violation of the right to habeas corpus.¹⁵ In addition, the judicial authority reviewing the detention must operate with independence, objectivity, and impartiality.¹⁶

The Working Group has repeatedly endorsed the jurisprudence of the UN Human Rights Committee regarding the timing of habeas proceedings. Citing the Committee’s consistent jurisprudence, the Working Group held in *Crispin Mumango v. Burundi* that “prompt” review of criminal detention “refers to the first few days following the deprivation of liberty.”¹⁷ Similarly, in *Abbad Ahmed Sameer v. Yemen*, the Working Group reiterated that “delays must not exceed a few days.”¹⁸ The Committee’s Draft General Comment No. 35 (Article 9) provides some additional specificity, noting that “forty-eight hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than forty-eight hours should be justified by exceptional circumstances.” While the Committee has authorized slightly longer periods in the context of truly non-criminal detention,¹⁹ the more stringent “prompt” standard is appropriate where the individual is detained on the basis of suspected criminal activity and not

¹³ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. General Assembly, U.N. Doc. A/RES/43/173 (Dec. 9, 1998) at Principles 11(1) & 11(3).

¹⁴ *Liu Xia v. People’s Republic of China*, UN Working Group on Arbitrary Detention, Opinion No. 16/2011 (May 5, 2011), at ¶ 18 (“Such measures require the full set of procedural guarantees that follow from Articles 9 and 10 of the Universal declaration.”). See also *Maral Yklmova v. Turkmenistan*, UN Human Rights Committee, Opinion No. 1460/2006 (July 20, 2009) at ¶¶ 7.2 -7.4.;

¹⁵ *Ali Medjnoune v. Algeria*, UN Human Rights Committee, Opinion No. 1297/2004 (July 14, 2006) at ¶ 8.7. (violation of Article 9(3)); *Adam Hassan Aboussedra v. Libyan Arab Jamahirya*, UN Human Rights Committee, Opinion No. 1751/2008 (Oct. 25, 2010) at ¶ 7.6 (violation of Article 9(4)).

¹⁶ *Nayimizhon Bazarov v. Uzbekistan*, UN Human Rights Committee, Opinion No. 959/2000 (July 17, 2006) at ¶ 8.2; *Vladimir Kulomin v. Hungary*, UN Human Rights Committee, Opinion No. 521/1992 (Mar. 22, 1996) at ¶ 11.3.

¹⁷ *Crispin Mumango v. Burundi*, UN Working Group on Arbitrary Detention, No. 18/2012 (Apr. 26, 2012) at ¶ 13. The European Court of Human Rights has adopted a similar standard on promptness. *Case of Brogan and Others v. United Kingdom*, European Court of Human Rights, Opinion Nos. 11209/84, 11234/84, 11266/84, 11386/85 (Nov. 29, 1988) at ¶ 62 (“four days and six hours spent in police custody... falls outside the strict constraints as to time permitted [under the European Convention]”).

¹⁸ *Abbad Ahmed Sameer v. Yemen*, UN Working Group on Arbitrary Detention, No. 19/2012 (Aug. 27, 2012) at ¶ 18.

¹⁹ Although the Committee has authorized various periods of delay under Article 9(4), it has recommended that in the context of mental health related detention the delay not exceed a “few days.” *Concluding Observations (Ireland)*, Human Rights Committee (2000) U.N. Doc. A/55/40, at ¶ 450.

under another legal regime—even if the government has not yet formally charged them.²⁰

When habeas proceedings do occur, it is imperative that the detained individual be physically present before the judicial authority because this requirement serves as an essential safeguard against torture and other forms of inhuman or degrading treatment.²¹ Also, when the court reviews a particular detention, the government should be required to meet some objective evidentiary burden justifying the individual’s continued detention. For example, in *K.F. v. Germany*, the European Court of Human Rights looked to whether the government was able to demonstrate “reasonable suspicion” that the detainee committed a criminal offense.²² Finally, the court must have the power to order the release of the detainee where it finds the detention is arbitrary.²³

Freedom Now submits the following suggested recommendations regarding best practices that will assist states in avoiding arbitrary detention due to habeas corpus violations:

- States should specifically protect the right to habeas corpus under their constitutions.
- Protection of the right to habeas corpus under domestic law must conform to all international standards, including requirements related to promptness, the physical presence of detainees, the right of detainees to challenge the legality of their detention, the right of detainees to disclose torture or other mistreatment, and the power of the court to order release.
- All detentions, including criminal and non-criminal restrictions of liberty, should be subject to automatic review by an independent judicial body within 24 hours – especially where the detention involves minors or other vulnerable groups.
- No exceptions to the right of habeas corpus should be authorized under domestic law – including house arrest, administrative detention, or other alternative regimes.
- The right to a lawyer of one’s own choosing should be protected from the point of arrest and legal counsel should be allowed to participate in any habeas corpus proceedings.
- Domestic law should require the government to meet a specific evidentiary burden during habeas corpus proceedings – including the requirement that the prosecution demonstrate a “reasonable suspicion” that the detainee participated in some criminal activity.

²⁰ *Mathew Titiahonjo v. Cameroon*, UN Human Rights Committee, Opinion No. 1186/2003 (Nov. 26, 2007) at ¶ 6.5 - 6.6; *Rafel Marques de Morais v. Angola*, UN Human Rights Committee, Opinion No. 1128/2002 (Mar. 29, 2005) at ¶ 6.3-6.4; *Safarmo Kurbanova v. Tajikistan*, UN Human Rights Committee, Opinion No. 1096/2002 (Nov. 6, 2003) at ¶ 7.2.

²¹ *Case of Medvedyev and Others v. France*, European Court of Human Rights, Opinion No. 3394/03 (Mar. 29, 2010) at ¶ 118. See also *Draft General Comment No. 35 – Article 9: Liberty and security of person*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/107/R.3 (Jan. 28, 2013) at ¶ 35.

²² *K.-F. v. Germany*, European Court of Human Rights, Case No. 144/1996/765/962 (Nov. 27, 1997) at ¶ 56-57.

²³ *Danyal Shafiq v. Australia*, UN Human Rights Committee, Opinion No. 1324/2004 (Oct. 31, 2006) at ¶ 7.4.; *Case of Medvedyev and Others v. France*, European Court of Human Rights, No. 3394/03 (Mar. 29, 2010) at ¶ 124.