

UNITED NATIONS HUMAN RIGHTS COUNCIL
68th Session of the Working Group on Arbitrary Detention
13 to 22 November 2013

**INTERNATIONAL COMMISSION OF JURISTS: KEY ELEMENTS FOR BASIC
PRINCIPLES AND GUIDELINES ON REMEDIES FOR ARBITRARY OR UNLAWFUL
DETENTION, AND THE RIGHT TO CHALLENGE THE LAWFULNESS OF
DEPRIVATION OF LIBERTY BEFORE A COURT**

Submitted 11 November 2013

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Key Elements for the Basic Principles and Guidelines

The International Commission of Jurists (ICJ) provides this submission in response to the Questionnaire circulated by the Working Group on Arbitrary Detention as part of its preparation of "draft basic 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 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", pursuant to Human Rights Council resolution 20/16 of 17 July 2012.

The ICJ hereby provides information in relation to Question 5, "What should be the key points of these basic principles and guidelines". At this relatively early stage in the process, the ICJ is providing key elements in summary form. The ICJ would be pleased to provide more detailed submissions on these and other relevant issues later in the process.

The ICJ recommends that the basic principles and guidelines should include the following points:

1. Victims of unlawful or arbitrary detention are entitled to an effective remedy and reparation before an independent judicial authority.
 - a. A remedy and reparation must be available both for the detention itself and for any other human rights violations occasioned thereby.
 - b. Judicial procedures must be available both to bring the violation to an immediate end (cessation) and to obtain reparation. The elements of effective reparation include:¹ restitution, compensation,² rehabilitation, satisfaction and guarantees of non-repetition.
 - c. The right to an effective remedy is essential for the protection of all other rights and may not be impaired even in times of emergency.³
 - d. For a remedy to be effective, it must be prompt and accessible.⁴
 - e. As regards unlawful or arbitrary detention, the primary (but not exclusive) form of restitution is restoration of liberty.⁵

¹ See e.g. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("UN Basic Principles on Remedy and Reparation"), adopted and proclaimed by General Assembly in resolution 60/147 of 16 December 2005, paras 18-23; Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16.

² The right of victims of unlawful arrest or detention to prompt and adequate compensation is explicitly affirmed by, among other sources, article 9(5) of the International Covenant on Civil and Political Rights ("ICCPR"). African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ("African Principles"), 2001, DOC/OS(XXX)247, Principle M(1)(h). As to the components of such compensation, see also UN Basic Principles on Remedy and Reparation, para 20.

³ See Human Rights Committee, General Comment No 29, States of Emergency (article 4), UN Doc CCPR/C/21/Add.11, paras 14 and 16.

⁴ See ICJ, The right to a remedy and to reparation for gross human rights violations – Practitioners Guide no. 2 (2006), Chapter 3, available at : <http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/>.

⁵ See UN Basic Principles on Remedy and Reparation, para 19.

- f. Cessation of the unlawful or arbitrary detention, through restoration of liberty, may be effectuated, among other means, by the exercise of the right to challenge the lawfulness of detention through habeas corpus or similar procedures as described below.
2. Anyone who is deprived of liberty by arrest or detention must be guaranteed, in law and practice, an effective opportunity to take proceedings before a 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.⁶
 - a. "Unlawfulness" in this context is not limited to detention that violates domestic law. The court responsible for such proceedings must be capable of ordering release where the detention in question is prohibited as arbitrary by international law, or is otherwise incompatible with internationally recognized human rights, regardless whether the detention is otherwise compatible with national law.⁷
 - i. If a person subject to internationally unlawful but domestically legal detention is not ordered released because the court does not have the power to do so, the detainee's procedural right to challenge the lawfulness of one's detention will be violated (in addition to their underlying substantive right to liberty).⁸
 - b. International law does not in this regard equate "arbitrariness" with "against the law". Arbitrariness must instead be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as basic principles of reasonableness, proportionality and necessity.⁹ The Court must therefore have the ability to examine and act on all of these elements in reviewing the lawfulness of the detention and, if necessary, as grounds for ordering release.
 - c. The right to challenge the lawfulness of a deprivation of liberty applies to anyone deprived of liberty on any grounds and in any context.¹⁰

⁶ Human Rights Council, Resolution 24/7 (2013), paragraph 6(d); ICCPR, Article 9(4); American Convention on Human Rights, Article 7(6); Arab Charter on Human Rights, Article 14(6). See also the UN Body of Principles for the Protection of All Persons under Any Form of Detention ("Body of Principles"), adopted by the General Assembly in resolution 43/173 of 9 December 1988, Principle 32; Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas ("Inter-American Principles"), OAS Doc OAS/Ser.L/V/II.131 doc 26 (2008), Principle V; African Principles, Principles M(4) and (5).

⁷ See e.g. Human Rights Committee, *Shams et al. v Australia*, UN Doc CCPR/C/90/D/1255/2004 et al. (20 July 2007), para 7.3; *Yklymova v Turkmenistan*, UN Doc CCPR/C/96/D/1460/2006 (20 July 2009), para 7.4; *Aboussedra v Libyan Arab Jamahiriya*, UN Doc CCPR/C/100/D/1751/2008 (25 October 2010), para 7.6. European Court of Human Rights (Grand Chamber), *Chahal v United Kingdom*, App No 22414/93 (15 November 1996), para 127; (Grand Chamber), *Nikolova v Bulgaria*, App No 31195/96 (25 March 1999), para 58; (Grand Chamber), *A and others v United Kingdom*, App No 3455/05 (19 February 2009), para 202.

⁸ See sources cited in the previous note.

⁹ Human Rights Committee, *Gorji-Dinka v Cameroon*, UN Doc CCPR/C/83/D/1134/2002 (17 March 2005), para 5.1; *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 (23 July 1990), para 5.8; *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), para 9.2; *Kulov v Kyrgyzstan*, UN Doc CCPR/C/99/D/1369/2005 (26 July 2010), para 8; *Womah Mukong v Cameroon*, UN Doc CCPR/C/51/D/458/1991 (21 July 1994), para 9.8.

¹⁰ Eg Human Rights Committee, General Comment No 8, Article 9 (Right to liberty and security of persons), UN Doc A/37/40 pp 95-96 (30 June 1982), para 1. Citing the General Comment, the International Court of Justice in *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea*

- d. The person must have access to a proper court of law for these purposes. It is not sufficient that some other type of authority, be it judicial, quasi-judicial, or administrative, can review the detention and compel release. The court must satisfy essential requirements of competence, impartiality, independence and procedural safeguards.¹¹
- e. The proceedings must be simple and expeditious and at no cost for detained persons without adequate means.¹² The court must make its decision "without delay", "speedily", "promptly".¹³
- f. The proceedings 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.¹⁴
- g. The right to challenge and obtain release must be "in its effects, real and not merely formal." Among other things, this means that to satisfy the right to challenge, the court must have the power actually to obtain the release of the person through a binding order, and must in practice exercise that power without delay if it finds the detention to be unlawful.¹⁵ The authorities must respect and promptly implement any court order for release.¹⁶

v Democratic Republic of the Congo) ICJ Reports 2010 (30 November 2010) affirmed that ICCPR article 9(1) and (2) and article 6 of the African Charter "apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued"(para 77) – while article 9(4) was not at issue in the case, it clearly follows from the Court's reasoning that 9(4) must have a similarly broad scope of application. See also Inter-American Principles, Definition of "Deprivation of Liberty" and Principle V, fifth paragraph.

¹¹ See for instance, Human Rights Committee, *Vuolanne v Finland*, UN Doc CCPR/C/35/D/265/1987 (7 April 1989), paras 7.2 and 9.6. European Court of Human Rights (Grand Chamber), *D.N. v Switzerland*, App No 27154/95 (29 March 2001), para 42. Inter-American Court of Human Rights, *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, Series C No 170 (21 November 2007), paras 128-130. African Commission on Human and Peoples' Rights, *Constitutional Rights Project v Nigeria*, No 153/96, 13th Activity Report (15 November 1999) paras 15-18. See also Human Rights Committee, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007), paras 19-24; and African Principles, Principles A(4) and A(5).

¹² UN Body of Principles, Principle 32(2).

¹³ Article 9(4) of the ICCPR; Article 5(4) of the European Convention on Human Rights; Article 7(6) of the American Convention on Human Rights; African Principles, Principle M(4). The European Court has remarked that a period of six days "sits ill with the notion of 'speedy' contained in article 5(4)" of the European Convention: *Çetinkaya and Çağlayan v Turkey*, App Nos 3921/02, 35003/02 and 17261/03 (23 January 2007), para 43. The Inter-American Court has held nine days to be incompatible with the term "promptly" in article 7(6) of the American Convention: *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, Series C No 170 (21 November 2007), para 135; see also *Tibi v Ecuador*, Series C No. 114 (7 September 2004), para 134 (21 days after filing of the application was "clearly an excessive time").

¹⁴ See e.g. UN Body of Principles, Principle 32(1). Article 17(2)(f) of the International Convention for the Protection of All Persons from Enforced Disappearances. Article 7(6) of the American Convention on Human Rights. African Principles, Principle M(5)(b) and (e). Inter-American Principles, Principle V, fifth paragraph, and Principle VII, first paragraph.

¹⁵ See e.g. Human Rights Committee, *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), at para 9.5; *Shams et al. v Australia*, UN Doc CCPR/C/90/D/1255/2004 (20 July 2007), para 7.3. European Court of Human Rights (Grand Chamber), *A and Others v the United Kingdom*, App No 3455/05 (19 February 2009), paras 200-202. European Court of Human Rights, *Benjamin & Wilson v the United Kingdom*, App no 28212/95 (26 Sept 2002), paras 35-36. Inter-American Court of Human Rights, *Tibi v Ecuador*, Series C No. 114 (7 September 2004), para 131; *Juan Humberto Sánchez v Honduras*, Series C No. 99 (7 June 2003), para

3. The procedures for challenging the lawfulness of detention before a court must provide guarantees for the effectiveness and fairness of the proceedings, which must be respected in practice. For instance, the proceedings must respect the right to equality before the courts and the principle of equality of arms,¹⁷ 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.¹⁸ For instance, the person deprived of liberty should have the opportunity to contest all the arguments and evidence adduced by the authorities to justify the detention.¹⁹
4. The detained person must have a right to be physically present before the Court during the challenge proceedings. This is important 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).²⁰
5. For the right to challenge detention to be effective, the right of everyone deprived of liberty to have prompt access to an independent lawyer of his or her choosing, including immediately after arrest or detention, must be provided for by law and respected in practice.²¹ This again serves a dual

121; *Bámaca Velásquez v Guatemala*, Series C No. 70 (25 November 2000), para 191; *Suárez-Rosero v Ecuador*, Series C No. 35 (12 November 1997), para 63.

¹⁶ See e.g. ICCPR article 2(3)(c); American Convention Human Rights, article 25(2)(c); African Principles, Principles C(c)(4) and M(2)(h). Human Rights Committee, *Carmen Amendola Masslotti and Graciela Baritussio v. Uruguay*, Communication No. R.6/25, UN Doc Supp. No. 40 (A/37/40) at 187 (1982), paras 12-13. European Court of Human Rights, *Assanidze v Georgia*, App no 71503/01 (8 Apr 2004), paras 173 and 185-187.

¹⁷ Human Rights Committee, General Comment No. 32, paras 7, 8 and 13; Concluding Observations on: Tajikistan, UN Doc CCPR/CO/84/TJK (2005), para 12; Bosnia and Herzegovina, UN Doc CCPR/C/BIH/CO/1 (2006), para 17; United Kingdom, UN Doc CCPR/C/GBR/CO/6 (2008), para 17; India, UN Doc CCPR/C/79/Add.81 (1997), para 24. European Court of Human Rights, *Mamedova v Russia*, App No 7064/05 (1 July 2006), para 89; *Garcia Alva v. Germany*, App No 23541/94 (13 February 2001), para 39; (Grand Chamber), *A and Others v the United Kingdom*, App No 3455/05 (19 February 2009), paras 203-224; (Grand Chamber), *Mooren v Germany*, App No 11364/03 (9 July 2009), paras 121-125.

¹⁸ Human Rights Committee, General Comment No 32, para 13, citing *Dudko v. Australia*, UN Doc CCPR/C/90/D/1347/2005 (23 July 2007), para 7.4.

¹⁹ European Court of Human Rights, *Lamy v Belgium*, App No 10444/83 (30 March 1989), para 29; (Grand Chamber), *Nikolova v Bulgaria*, App no 31195/96 (25 March 1999), para 63; (Grand Chamber), *Mooren v Germany*, App no 11364/03 (9 July 2009), paras 121-125. See also Human Rights Committee, General Comment No 32, para 13, citing *Jansen-Gielen v The Netherlands*, UN Doc CCPR/C/71/D/846/1999 (3 April 2001), para 8.2 and *Äärelä and Näkkäläjärvi v Finland*, UN Doc CCPR/C/73/D/779/1997 (24 October 2001), para 7.4.

²⁰ On the requirement to bring the person before the Court as an aspect of the right to challenge the lawfulness of detention, see among others: UN Body of Principles, Principle 33(2). Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) *American Convention on Human Rights*) (1987), Advisory Opinion OC-8/87, Series A, No. 8, para 35; *Chaparro Álvarez and Lapo Íñiguez v Ecuador* Series C No 170 (21 November 2007), paras 129-130. European Court of Human Rights, *Singh v the United Kingdom*, App No 23389/94 (21 February 1996), para 67; *Klamecki v Poland* (no 2), App No 31583/96 (3 April 2003), paras 128-131; *Lebedev v Russia*, App No 4493/04 (25 October 2007) para 113. On its role in protecting against torture, see UN General Assembly, Resolution 67/161 (20 December 2012), para 22; Human Rights Council, Resolution 13/19 (2010), para 5; Committee against Torture, General Comment no 2, UN Doc CAT/C/GC/2 (24 January 2008), para 13.

²¹ Human Rights Committee, *Paul Kelly v Jamaica*, UN Doc CCPR/C/41/D/253/1987 (8 April 1991), para 5.6; *Rafael Marques de Morais v Angola*, UN Doc CCPR/C/83/D/1128/2002 (29 March 2005), paras 6.3, 6.5; *Umarova (re Umarov) v Uzbekistan*, UN Doc

purpose, since it is also an important safeguard against torture and other such human rights violations in detention. Key aspects of this right include:

- a. The lawyer must be able to carry out his or her functions free from fear of reprisals or interference.²²
- b. The authorities must respect the privacy and confidentiality of lawyer-detainee communications.²³
- c. The lawyer must be permitted timely access to materials within the possession of the authorities that are relevant to challenging the lawfulness of the detention.²⁴
- d. 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.²⁵

6. The right to challenge detention before a court is non-derogable.²⁶

CCPR/C/100/D/1449/2006 (19 October 2010), paras 8.5-8.6; *Bousroual v Algeria*, UN Doc CCPR/C/86/992/2001 (30 March 2006), paras 9.6 and 9.7. See also: Concluding Observations on Israel, UN Doc CCPR/C/CO/78/ISR (2003), paras 12-13; Azerbaijan, UN Doc CCPR/C/AZE/CO/3 (2009); Belgium, UN Doc CCPR/C/BEL/CO/5 (2010), para 17; Portugal, UN Doc CCPR/C/PRT/CO/4 (2012); Suriname, UN Doc CCPR/C/80/SUR (2004), para 14; Egypt CCPR/CO/76/EGY (28 November 2002), para 14; CCPR/C/TUR/CO/1 (13 November 2012), para 17; CCPR/CO/72/CZE (27 August 2001), para 17; CCPR/C/NLD/CO/4 (25 August 2009), para 11. UN Basic Principles on the Role of Lawyers, unanimously endorsed by the General Assembly in resolution 45/166 of 18 December 1990, Principle 7; UN Body of Principles, Principles 17 and 18; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly in resolution 67/187 of 20 December 2012, paras 43(a), (b) and (d). Inter-American Court of Human Rights, *Vélez Loor v Panama*, Series C No 218 (23 November 2010), para 139. Inter-American Principles, Principle V, fourth para. African Commission on Human and Peoples Rights, *Liesbeth Zegveld and Messie Ephrem v Eritrea*, No 250/2002, 17th Activity Report (November 2003), para 55; African Principles, Principles M(2)(b), (e), and (f) ["Provisions Applicable to Arrest and Detention"]. European Court of Human Rights, *Castravet v Moldova* App No 23393/05 (13 March 2007) paras 47-50; *Singh v the United Kingdom* (App No 23389/94) ECHR1996-I (21 February 1996), para 68; *Soysal v Turkey* App No 50091/99 (3 May 2007) paras 77-81.

²² See e.g. *Akhadov v. Kyrgyzstan*, UN Doc CCPR/C/101/D/1503/2006 (25 March 2011), paras 2.2, 7.4. UN Basic Principles on the Role of Lawyers, Principle 16.

²³ UN Basic Principles on the Role of Lawyers, Principles 8 and 22; UN Principles and Guidelines on Access to Legal Aid, para 43(d); UN Body of Principles, Principles 18(3) and (4). See also: Human Rights Committee, Concluding Observations on Spain, UN Doc CCPR/C/ESP/CO/5 (2008), para 14; Austria, UN Doc CCPR/C/AUT/CO/4 (2007), para 16. European Court of Human Rights, *Castravet v Moldova* App No 23393/05 (13 March 2007), paras 51-55, 58-60; *Istratii and Others v Moldova* App No 8721/05 (27 March 2007) paras 91-95, 98-100; *Modarca v Moldova* App No 14437/05 (10 May 2007) paras 89-93, 96-98; *Musuc v Moldova* App No 42440/06 (6 November 2007) para 57; *Rybacki v Poland*, App no 52479/99 (13 January 2009), paras 53-62. See also Inter-American Principles, Principle V, fourth para; African Principles, Principle I(c).

²⁴ E.g. UN Basic Principles on the Role of Lawyers, Principle 21; European Court of Human Rights, *Lamy v Belgium*, App No 10444/83 (30 March 1989), para 29; (Grand Chamber), *Nikolova v Bulgaria*, App no 31195/96 (25 March 1999), para 63 and (Grand Chamber), *Mooren v Germany*, App no 11364/03 (9 July 2009), paras 121-125.

²⁵ See e.g. Human Rights Committee, *Komarovski v Turkmenistan*, UN Doc CCPR/C/93/D/1450/2006 (24 July 2008), paras 2.7, 3.4, 7.4.

²⁶ See e.g. Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/22/44 (2012), para 47. Human Rights Committee, General Comment No 29, UN Doc CCPR/C/21/Rev.1/Add.11(2001), para 16. Articles 4(2) and 14(6) of the Arab Charter on Human Rights. Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) (1987), Advisory Opinion OC-8/87 of 30 January 1987, paras 13, 42-44.