

Chapter 16: Right to Review the Legality of Any Deprivation of Liberty

General Commentary

The provisions of Chapter 16 apply not only to any deprivation of liberty whatsoever but also to deprivation of liberty by arrest or detention in the context of criminal proceedings. For example, it could apply to administrative detention or police detention (e.g., not relating to criminal investigation but to public order).

Ordinarily, the right to review the legality of any deprivation of liberty would be contained in a separate law. However, given that it is a crucial element of criminal procedure law, and given its importance in terms of protecting the rights of persons deprived of their liberty, the drafters decided to include it as part of the procedures under the M CCP.

Article 339: Right to Review Legality of Deprivation of Liberty (Habeas Corpus)

1. Everyone who is deprived of his or her liberty has the right to take proceedings before a court, without delay, to challenge the lawfulness of the deprivation of liberty.
2. The court must order the release of a person who has been unlawfully deprived of his or her liberty.

Commentary

Paragraph 1: The wording of Paragraph 1 is taken from Article 9(4) of the International Covenant on Civil and Political Rights. Similar wording is also contained in the American Convention on Human Rights (Article 7[6]) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5[4]), although Article 5(4) uses the term *speedily* instead of *without delay*, which is used in the International Covenant on Civil and Political Rights and the American Conven-

tion. The right to challenge the lawfulness of deprivation of liberty is also found in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 32[1]).

Under the MCCP, a habeas corpus mechanism is established in Articles 340–345 to give effect to the general principle set out in Article 339. Any challenge to the lawfulness of the deprivation of liberty must be heard by a “court,” as required under international human rights law. The challenge must also be heard “without delay.” There is no objective standard as to what without delay means. The United Nations Human Rights Committee in the case of *Torres v. Finland* stated that adjudication must take place as expeditiously as possible but that each case should be assessed on a case by case basis (Communication no. 291/1988 UN document no. CCPR/C/38/D/291/1988, paragraph 7.3). In that case, the United Nations Human Rights Committee found that three months was too long a delay and violated international human rights law. Some commentators have suggested that proceedings to challenge the lawfulness of the deprivation of liberty should take place immediately, meaning in a matter of hours, days, or, in extreme circumstances, a few weeks.

Paragraph 2: Article 9(4) of the International Covenant on Civil and Political Rights provides that the court that is hearing the challenge to the lawfulness of the deprivation of liberty must immediately order the release of the applicant if the detention is found to be unlawful. This language is mirrored in the American Convention on Human Rights (Article 7[6]) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5[4]). This language has been interpreted to mean the immediate release of the person deprived of his or her liberty at the end of the hearing on the matter. This principle is given effect in Article 344(5) of the MCCP, which provides for the “immediate release” of a person found to be unlawfully deprived of his or her liberty.

Article 340: Procedure for Filing a Motion for Habeas Corpus

1. A person deprived of his or her liberty, his or her counsel, or any other person acting on the behalf of the person may file a motion for habeas corpus with the registry of any trial court orally, in writing, or by other technical means of communication.
2. If a motion is filed in a court other than the competent trial court, the motion must be immediately transferred by the registry of the trial court in which it was initially filed to the registry of the competent trial court.

Commentary

Article 340 provides that the right to challenge the deprivation of liberty begins with the filing of a motion with the registry of any trial court. This right, strictly speaking, belongs to the person deprived of his or her liberty. That person, through his or her counsel, usually makes the application for habeas corpus. Under Paragraph 1, the MCCP allows any other person to make an application for habeas corpus, for example, a family member. This is a requirement of Article 17(1)(f) of the International Convention on the Protection of All Persons from Forced Disappearances.

Where the motion is filed by a person deprived of his or her liberty without the assistance of counsel, the police or the detention authority (as defined in Article 1[14]) must ensure that the motion is transmitted promptly to the registry on behalf of him or her. This is a crucial step in facilitating the exercise of the person's right. The police and the detention authority and the trial court may wish to draw up a protocol or standard operating procedure that sets out the mechanism by which habeas corpus motions are delivered promptly to the court. Where there are high levels of illiteracy in a state, consideration should be given to the fact that the person deprived of his or her liberty or other persons may not be able to draft written motions. Thus, Paragraph 1 allows a person to file a motion orally with the registry of the trial court. This may be undertaken simply by the person going to the registry of any trial court and requesting that the court look into the deprivation of the liberty of a person. The staff member of the registry is then required under the MCCP to enter the request into the record and to act upon it by facilitating the assignment of the motion to a judge under Article 341.

To exercise the right to challenge the lawfulness of arrest or detention as a particular form of deprivation of liberty, an arrested or detained person must know of this right. This is particularly important where he or she does not have a lawyer. In order to ensure that an arrested or detained person is made aware of it, Article 172(3) requires that an arrested person be informed of his or her right to challenge the lawfulness of arrest or detention.

Article 341: Assignment of a Motion for Habeas Corpus to a Judge

Within twenty-four hours of the motion being filed, a competent judge must be assigned to review the motion for habeas corpus.

Article 342: Assignment of a Motion for Habeas Corpus and the Initial Review of the Habeas Corpus Motion

1. Within twenty-four hours of receiving the motion for habeas corpus, the competent judge must review the written motion.
2. The competent judge may reject the motion without a hearing where the motion is manifestly unfounded or where the motion is related to a deprivation of liberty based on an order for detention or an order for continued detention. A motion that relates to an order for detention or an order for continued detention must be forwarded to the competent judge dealing with the detention.

Commentary

The drafters of the MCCP initially discussed whether to provide for a hearing of a motion for habeas corpus or whether some other review would suffice. Some were of the view that a hearing should not be provided because this would go against the principle of judicial economy, particularly where a particular person, or his or her counsel, files numerous (and potentially unfounded) motions. They argued that in a resource-starved post-conflict criminal justice system, it would be preferable for habeas corpus to be provided for by way of “paper review.” Others argued that a public hearing on habeas corpus is essential. The term habeas corpus literally means “bring the body,” the idea being that the person who has been deprived of his or her liberty is brought before the court. This is especially important in cases of alleged enforced disappearance (in which a person may be detained by the police and thereafter disappears) because it requires the authorities to explain where the person is. It may also be important to ensure that the person deprived of his or her liberty has not been tortured or subject to other cruel, inhuman, or degrading treatment. The European Court of Human Rights in the case of *Schiesser v. Switzerland* (application no. 7710/76 [1979], ECHR 5 [December 4, 1979]) held that it is a procedural requirement of the right to challenge the lawfulness of arrest or detention that the judicial officer hearing an applicant’s challenge hear the applicant himself or herself (paragraph 31), although there is no obligation that this hearing be in public (see the European Court of Human Rights case of *Nuemeister v. Austria*, application no. 1936/63 [1968], ECHR 1 [June 27, 1968], paragraph 23).

The drafters decided to adopt a solution in the MCCP whereby an initial paper review would be conducted to extract any manifestly unfounded motions (e.g. on the face of the motion, the facts alleged do not characterize an unlawful deprivation of liberty or there are no facts to substantiate an unlawful deprivation) and then in all other cases, a hearing would be set in accordance with Article 344. Where the motion

for habeas corpus concerns an order for detention or continued detention, the order must be passed to the particular judge who is responsible for overseeing the order. The reason for this is that a person who is subject to an order for detention or an order for continued detention already has sufficient means to challenge the order. In the first instance, under Article 186 and Article 188, the order for detention or continued detention must be reviewed every three months. In addition, under Article 295, the detained person may challenge the order for detention or continued detention by way of interlocutory appeal. It would thus not be in the interest of judicial economy to allow the detained person another avenue by which to challenge his or her detention when sufficient oversight and appeal mechanisms already exist.

Article 343: Date for a Hearing of a Motion for Habeas Corpus

1. The competent judge must set a time and date for a hearing of a motion for habeas corpus as soon as possible after assignment of the motion to him or her.
2. Notice must be served upon the party who made the motion, the person deprived of his or her liberty, if he or she is not the person who submitted the motion, and the prosecutor in accordance with Article 27.

Article 344: Habeas Corpus Hearing

1. On the date and at the time scheduled by the competent judge under Article 343, the person deprived of his or her liberty, his or her counsel, the prosecutor, and the applicant (if the application was made by a person other than the person deprived of his or her liberty or his or her counsel) must be present for a hearing of the motion for habeas corpus.
2. The purpose of the hearing is to assess whether the deprivation of liberty was lawful.
3. The applicant and the prosecutor may present arguments before the competent judge.
4. The hearing must be recorded in accordance with Article 37.

5. The judge must consider the lawfulness of the deprivation of liberty, taking into account all the circumstances surrounding the deprivation of liberty, the applicable law, and the legitimacy of the purpose pursued by the deprivation of liberty.
6. After hearing the argument of the parties, the competent judge must pronounce the decision on whether to grant an order for habeas corpus in the same session.
7. The competent judge must make a written order for the immediate release of a person who has been deprived of his or her liberty unlawfully. The order must be executed immediately.
8. The competent judge must issue a written decision within a reasonable time after the hearing.
9. The decision must be written and reasoned and must contain the following:
 - (a) identification of the person deprived of his or her liberty;
 - (b) identification of the person who filed the motion for habeas corpus;
 - (c) a summary of the grounds upon which the motion was based;
 - (d) the legal grounds upon which the competent judge based his or her acceptance or rejection of the motion for habeas corpus;
 - (e) the name and signature of the competent judge and the name of the competent trial court; and
 - (f) the date of the decision.
10. The decision must be served upon the person deprived of his or her liberty, his or her counsel, the person who submitted the motion for habeas corpus, if different, and the prosecutor in accordance with Article 27.

Commentary

Paragraph 5: Paragraph 5 requires that the judge assess the totality of the circumstances surrounding the deprivation of liberty. This has been held to be an essential element of the right to challenge the lawfulness of a deprivation of liberty by the European Court of Human Rights in a significant number of cases. In the case of *Brogan v. United Kingdom* (application no. 11209/84;11234/84;11266/84 [1988], ECHR 24 [November 29, 1988], paragraph 65), which concerned a deprivation of liberty through an arrest, the European Court stated that the competent judge should examine not only compliance with the procedural requirements of the applicable law but also the reasonableness of the suspicion that underpinned the arrest and the legitimacy of the purpose of the arrest. These criteria, which have been affirmed in subsequent case law, were the inspiration for Paragraph 5.

Paragraph 7: As set out in Article 344(5), where the competent judge finds that the deprivation of liberty was unlawful, the judge must order the immediate release of the person. The judge must make an immediate written order that is executed in court after the hearing to release the person deprived of his or her liberty. At a later stage, the judge is required to draft a written and reasoned judgment. This judgment is important because it may be useful where the person who was unlawfully deprived of liberty seeks compensation under Article 346.

Article 345: Investigation into an Unlawful Deprivation of Liberty

Where the court finds that a person was unlawfully deprived of his or her liberty under Article 344, the court must notify the office of the prosecutor, which must investigate the matter.

Chapter 17: Right to Compensation for Unlawful Deprivation of Liberty or Miscarriage of Justice

Article 346: Establishment of a Compensation Mechanism for Unlawful Deprivation of Liberty or Miscarriage of Justice

1. Anyone who is unlawfully deprived of his or her liberty has an enforceable right to compensation.
2. When a person has by a final decision been convicted of a criminal offense, and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction must be compensated, unless it is proven that the nondisclosure of the unknown fact at the time is wholly or partly attributable to him or her.
3. The competent legislative authority must establish a mechanism for the award of compensation for unlawful deprivation of liberty or for cases in which there are conclusive evidence of a miscarriage of justice.

Commentary

Paragraph 1: Paragraph 1 duplicates the right to compensation set out in Article 9(5) of the International Covenant on Civil and Political Rights and Article 5(5) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This right applies only to persons who have been arrested or who have been unlawfully detained prior to a trial. It is distinct from the right contained in Para-

graph 2, which applies to persons who have been wrongly convicted, imprisoned, and then found to be innocent by a final verdict of the court.

Paragraph 2: The right to compensation for a miscarriage of justice is contained in Article 14(6) of the International Covenant on Civil and Political Rights, Article 3 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 10 of the American Convention on Human Rights. The right to compensation for miscarriage of justice pertains to a person who has been tried and wrongfully convicted of a criminal offense and who has subsequently been punished for it, for example, by imprisonment. In addition to providing the right to compensation, the MCCP also contains a mechanism by which a conviction can be appealed on the basis of an alleged miscarriage of justice (Chapter 12, Part 2).

Paragraph 3: In order for the rights set out in Paragraphs 1 and 2 to be effected, it is necessary to establish a mechanism to provide due compensation. This mechanism would exist separate to criminal proceedings and separate from the MCCP. Legislation would be required to establish such a mechanism. Paragraph 3 provides the imprimatur to a state to establish a compensation mechanism without prescribing it. National dialogue and discussion need to take place relating to its establishment. One fact that should be borne in mind is that post-conflict states are typically resource starved, and therefore providing compensation may be inherently challenging. When a mechanism for compensation is established, a sufficient budget must be allocated to it to make it practical and effective.

