

31ST LEGAL ADVISERS MEETING

Informal Discussions on International Law during Law Week 2021

Scene Setter and Draft Programme Tuesday, October 26, 2021 from 10:00am

For the past three decades, the Legal Advisers of Canada, India, Mexico, Poland, and Sweden have organized an annual Meeting of Legal Advisers on the margins of the Sixth Committee's International Law Week. Regrettably, due to the COVID-19 pandemic, the meeting was cancelled in 2020, as the purpose of past meetings was to bring together states' Legal Advisers for informal, in-person discussions. The Meeting of Legal Advisers typical format has included an opening segment with the UN Legal Adviser, three thematic panels, and a post-dialogue reception.

Despite the challenges of the ongoing pandemic, Canada looks forward to hosting an abbreviated 31st Meeting of Legal Advisers at Law Week 2021 as a temporary measure with the intent to reschedule the full meetings in person next year.

This year the programme will consist of a two- to 2.5-hour virtual online event. It will include an opening segment for the traditional statement of the UN Legal Adviser. It will be followed by one thematic panel on an emerging topic followed by a question and answer session for event participants. Our hope is that this format will allow once again this year for a dynamic discussion among legal advisers. The event will be hosted by Alan Kessel, Assistant Deputy Minister and Legal Adviser with Global Affairs Canada.

Proposed Programme

Host's Welcoming Remarks

Alan Kessel, Assistant Deputy Minister and Legal Adviser, Global Affairs Canada

Informal Exchange with the Legal Counsel of the United Nations

Miguel de Serpa Soares

Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations

Panel Discussion

"Emerging Issues: The Convergence of Consular Law, International Human Rights Law and State-to-State Practice in the Treatment of Foreign Nationals in Situations of Arbitrary Detention" (Presentations by panellists from various regions/ gender-balanced, followed by a Q&A session)

This event proposes to advance, from a legal perspective and in a collaborative way, the discussion of the emerging legal issues arising from the practice of arbitration detention, a practice that can adversely affect the nationals of any UN Member State.

To join online:

<https://us02web.zoom.us/j/87175762304?pwd=cVJ5WEordmRPdVNXMk9hTTlYdTcwQT09>

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ANNEX

“Emerging Issues: The Convergence of Consular Law, International Human Rights Law and State-to-State Practice in the Treatment of Foreign Nationals in Situations of Arbitrary Detention”

Background

Arbitrary detention refers to the arrest and detention of an individual where no verifiable evidence exists that a crime has been committed against a legal statute, or where due process of law has not occurred. It applies equally to those arrested or detained by their state of nationality and to foreign nationals.

The notion of “arbitrary” in the legal concept of arbitrary detention includes the requirements that a deprivation of liberty is not in accordance with applicable law and procedure, or is disproportionate, unreasonable or unnecessary in the circumstances. “Arbitrariness” here should not be equated with “illegality,” but should be approached more broadly to include elements of injustice and lack of consistency or due process of law.

Individuals who are arbitrarily detained may not be given an explanation for their arrest or provided with an arrest warrant. Detainees may be held incommunicado, with their whereabouts concealed from family, consular officials, open trial courts, and the general public. Many detainees may also suffer physical or psychological torture or mistreatment during their detention, as well as extrajudicial punishment.

Arbitrary Detention in International Instruments and Fora

Arbitrary deprivation of an individual’s liberty is prohibited by customary international law and codified in multiple instruments, including Article 9 of the *International Covenant on Civil and Political Rights*, which provides that “no one shall be subject to arbitrary arrest or detention”, as well as Article 9 of the *Universal Declaration of Human Rights*. No individual, regardless of circumstances, should be deprived of their liberty without due process of law.

A Working Group on Arbitrary Detention (UNWGAD) exists within the UN’s Office of the High Commissioner on Human Rights (OHCHR). The Working Group’s mandate is to investigate cases of deprivation of liberty imposed inconsistently with the *Universal Declaration of Human Rights* and any other relevant international legal instruments accepted by the implicated state.

The Working Group investigates alleged cases of arbitrary detention by sending urgent appeals and communications to concerned governments to address such cases. It is comprised of five independent experts appointed by the UN Human Rights Council. Current members are from Australia, Ecuador, Latvia (Chair), Malaysia, and Zambia.

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In its 2018 Report, the Working Group included a thematic discussion of consular assistance and diplomatic protection for persons deprived of their liberty, focusing on foreign nationals detained for reasons including national security charges. The Report concluded that foreign

national detainees are particularly vulnerable to violations of the right to fair trial and other legal protections, and noted linkages between arbitrary detention and torture.¹

Nexus with Consular Law

The consular function, codified in the *Vienna Convention on Consular Relations*, provides rights to consular officials of a State to provide services to its detained nationals and make representations on their behalf, for example in instances of alleged mistreatment or torture while in detention. As such, consular officers and legal advisers may be involved in cases of arbitrary detention involving their nationals in a foreign state, and have a direct interest in the prevention of those cases.

Cases may arise where the nature or purpose of the detention rises to the level of a bilateral irritant, with the potential to undermine trust and friendly relations between nations.

Arbitrary detention may raise legal concerns that are different for a foreign national (Sending State) compared to a national of the state (Receiving State) carrying out the detention. The provision of consular services to those foreign nationals often focuses on these concerns, including vulnerability to mistreatment or torture; unfamiliarity with different cultural and legal systems; mistrust of foreigners and suspicions of espionage; and language and translation issues.

The arbitrary arrest or detention of foreign nationals can be used to compel action or to exercise leverage over a foreign government. It has a negative impact on foreign nationals traveling, working, and living abroad. In response, a group of 66 UN Member States (65 countries plus the European Union) have joined the *Declaration Against Arbitrary Detention in State-to-State Relations*. Underpinning the Declaration is a commitment to uphold core principles of human rights, consular relations, international cooperation, the rule of law, and judicial independence, all universal values grounded in international law.

Discussion

This event proposes to advance, from a legal perspective and in a collaborative way, the discussion of the emerging legal issues arising from the practice of arbitrary detention, a practice that can adversely affect the nationals of any UN Member State.

Panellists

- **Dr. Elina Steinerte**
- **Prof. John Quigley**
- **Dr. Carla Ferstman**
- **Prof. Philippa Webb**
- **Ms. Priya Gopalan**

¹ See: <https://undocs.org/A/HRC/39/45> (pp. 26-27)