Submission to UN Working Group on Arbitrary Detention in response to the Questionnaire related to the "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"

Global Detention Project

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The Global Detention Project (GDP) is a research initiative that tracks the use of detention in response to global migration. Based at the Graduate Global Migration Centre in Geneva, Switzerland, the GDP's aims include: (1) providing researchers, advocates, and journalists with a measurable and regularly updated baseline for analysing the growth and evolution of detention practices and policies; (2) encouraging scholarship in this field of immigration studies; and (3) facilitating accountability and transparency in the treatment of detainees.

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This submission is provided in fulfilment of the Working Group on Arbitrary Detention's mandate to develop 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, as per Human Rights Council resolution 20/16. The Global Detention Project frames its submission based on the Working Group 's undertaking to produce "a thematic study on this right of all persons to seek review of their detention" and "to seek information on national and regional laws and regulations on this right."[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?

The Global Detention Project (GDP) is a research initiative based at the Graduate Institute's Global Migration Centre in Geneva, Switzerland, that seeks to assess the policies and practices of states with respect to immigration-related detention. A key goal of the project is to develop criteria for measuring whether states adhere to relevant international and regional legal provisions, and to identify gaps in protections by undertaking comparative analysis of detention regimes. As such, we are particularly aware of patterns in national legal procedures regarding an immigration detainee's ability to challenge his or her arrest or detention in court proceedings. Because a key element of the GDP's mission is help facilitate accountability in the treatment of migrant detainees, we find the Working Group's efforts to develop Basic Principles and Guidelines a highly relevant endeavour about which we can provide some level of expertise.

The GDP submission is made bearing in mind WGAD Deliberation No.5: Situation regarding immigrants and asylum-seekers (E/CN.4/2000/4, 28 December 1999) and WGAD recommendations on Detention of asylum-seekers, refugees and immigrants in an irregular situation contained in its report to the Tenth Session of the Human Rights Council, in which the WGAD reminded states that "the legality of detention must be open for challenge before a court" (A/HRC/10/21, 16 February 2009, § 67, 75 and 82) (WGAD Rec. 2008).

In your organizations 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?

GDP research findings indicate that immigration detention is mainly carried out as an administrative measure (although the trend for criminalization is growing), and that as a result immigration detainees are often prevented from accessing relevant rights and

[1] OHCHR. 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 .http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx

procedures (please see, for example, the GDP's recent working paper, "'Crimmigration' in the European Union through the Lens of Immigration Detention," available at http://www.globaldetentionproject.org/publications/working-papers/crimmigration.html).

The WGAD has stated that qualifying the irregular stay in the country should not be an aggravating circumstance for any criminal offence, a position supported by other international and regional human rights mechanisms. However, the administrative nature of immigration detention often means that immigration detainees paradoxically enjoy a lower level of procedural guarantees than persons, including non-nationals, in criminal proceedings. This administrative process often results in confusion in courts regarding applicable jurisdiction when it comes to challenging the legality of detention. In practice, even when procedural standards to challenge detention are defined in law, practice shows that most immigration detainees are kept ignorant or denied access to such proceedings.

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 following points should be considered in the Principles and Guidelines to help states ensure that their policies and practices adhere to relevant international legal standards:

Pre-conditions to the possibility to challenge immigration detention in court:

- Legality/lawfulness of detention
  - Grounds for immigration-related detention must be clearly and exhaustively defined in law;
  - A detention order must be adopted by a court;
- Legal provisions for the right to be informed orally and in writing of the reason/s for detention, and on the rights of persons in immigration detention, including the right to challenge detention, in a language the person detained understands. A good practice observed in some countries is that such information is posted in writing in places of immigration detention.
- Access to places of immigration detention by lawyers, civil society organisations, consular officials (conditional upon request by the immigration detainee), National Human Rights Institutions (NHRIs) as well as regional and international human rights mechanisms.
- Access to free legal assistance.
- Legal provisions must make it possible for challenges to detention to be made on behalf of immigration detainees – especially as access to courts, and language barriers might make it impossible for them to launch proceedings. This is particularly relevant in cases where countries do place unaccompanied minors in detention, despite recommendations that detention of minors should be avoided.

Principles for immigration detainees to be able to challenge detention and bring remedies before a court

- Proceedings to challenges of immigration detention decisions must be suspensive to avoid expulsion prior to the case-by-case examination of immigration detainees under administrative detention.
- Procedural safeguards should apply without derogatory regimes on all territories under state jurisdiction, including overseas territories (see ECtHR *De Souza Ribeiro V. France* on the lack of an effective remedy in French Guiana, Http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-115498).
- Monitoring and public reporting should be allowed to ensure that access to legal provisions for procedural guarantees is effective. In countries where immigration detainees can be placed in prisons, it is important that national human rights institutions authorized to visit penal institutions can also monitor the situation of immigration detainees (i.e. Canada's Office of the Correctional Investigator monitors conditions of detention in correctional facilities—which hold some 35 percent of immigration detainees—but it is mandated to receive complaints from criminal detainees only).
- Periodic judicial review of continued detention enables challenges the lawfulness of the continuance of detention (see CCPR [under article 9(4) of the ICCPR] *A. v. Australia*, para. 9(4) and 9(5); *Bakhtiyari v. Australia*, para. 9(4); *C. v. Australia*, para. 8(3); *Shafiq v. Australia*, para. 7(2) and 7(4); *Shams and others v. Australia*, para. 7(3); and *Sharif Baban v. Australia*, para. 7(2)).
- Compensation for unlawful detention: research indicates that compensation is rarely afforded mainly due to expulsion from the territory before proceedings can be initiated or completed.