



Consultation on the right to challenge the lawfulness of detention before a court

Migrants and Asylum Seekers

We emphatically reject the use of detention as a response to irregular migration, and firmly support the idea of progressively abolishing the detention of migrants for administrative reasons. However, until this objective is achieved, the administrative detention of migrants may only be justified in exceptional circumstances, with a clear legal basis and with the procedural guarantees enshrined in international human rights law.

Migrants in an irregular situation are particularly vulnerable to automatic administrative detention without consideration of their individual circumstances. In this context, it is important to insist upon the right to judicial review of the administrative decision as a safeguard against arbitrary detention. At the same time, judicial review of detention constitutes a means to protect the right to life and personal integrity, and prevent enforced disappearances.¹

It should be noted that the administrative detention of migrants and asylum seekers can take place in a range of different places: detention centres, prisons, and police stations and even boats and the international zones of airports. In this regard, we note with concern the attempts by States to exclude migrants in border zones from the right to judicial review of detention.² We also note that the difficulty in obtaining legal assistance prevents migrants from exercising in practice the right to challenge the lawfulness of detention, particularly in establishments which are far from urban centres. We agree with the United Nations Special Rapporteur on the Human Rights of Migrants that States should avoid the use of legal mechanisms and methods of interception which limit judicial control of the lawfulness of detention.³

As well as providing legal mechanisms through which the lawfulness of detention can be challenged, States must ensure effective access to these remedies by the detained person. Migrants in an irregular situation who are deprived of their liberty are in a situation of heightened vulnerability, which requires States to take measures to

¹ Inter-American Court of Human Rights (IACtHR), Advisory Opinion 8/87, Judicial Guarantees in States of Emergency (arts. 27.2, 25.1 and 7.6), 30 January 1987, para. 35; IACtHR Case of Yvon Neptune vs. Haiti, Judgment of 6 May 2008, para. 115.

² For example, in the United States migrants who arrive at any border without documentation may be detained and do not have the right to any form of judicial review of the detention. Numerous courts have rejected the argument that persons who have not been admitted into the territory do not have the right to challenge the lawfulness of their detention, see for example European Court of Human Rights, *Amuur v France* (Application No. 19776/92) Judgment of 25 June 1996 para. 52-3; Judgment of an Argentinian Court regarding 'virtual borders' in the international zones of airports, Federal Court of La Plata, Judgment of 23 February 2012 "HABEAS CORPUS".

³ United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, E/CN.4/2003/85, para. 75(h) (30 December 2002)

ensure they enjoy *effective* access to justice on equal terms. ⁴ We have identified below some of the measures which states should adopt in order to guarantee effective and equal access to the right to challenge the lawfulness of detention:

- An essential precondition for the exercise of the right to challenge the lawfulness of detention is the provision of information regarding the specific reasons for detention as well as the detained persons' rights and how to exercise them, *in a language the detained person can understand*. ⁵
- The right to due process requires the detained person must be assisted by a lawyer and where necessary an interpreter.⁶ The Inter-American Court of Human Rights (IACtHR) has stated that where the right to liberty is at stake, the interests of justice require in principle the provision of *free* legal assistance.⁷
- The detained person must be informed of their right to consular protection. ⁸ The IACtHR has underlined the importance of consular notification as a fundamental guarantee of access to justice without discrimination, which must be carried out together with the obligation to provide the reasons for detention.⁹ In practice, consular protection has the potential to ensure and give effect to the right to challenge the detention, as the consul may provide the detained person with information on their rights, assist in finding a lawyer, and monitor the conditions in which legal assistance is provided.¹⁰
- We are concerned by the lack of concrete mechanisms which guarantee in practice access to the right to challenge the lawfulness of detention by unaccompanied migrant and asylum-seeking children. ¹¹ The situation of vulnerability that they face requires immediate judicial control of any measure that deprives them of their liberty. To that end, the Committee on the Right of the Child has indicated that children must be provided with speedy access to free legal assistance, must be appointed a guardian who will advocate for full respect for their rights.¹²

⁴ See IACtHR Case of Vélez Loo vs. Panama, Judgment of 23 November 2010, para. 143. The right to due process must be guaranteed for all persons, regardless of migration status, see IACtHR, Advisory Opinion 18/03 Legal Status and Rights of Undocumented Migrants, 17 September 2003, paras. 121 - 122.

⁵ The failure to provide reasons for detention has been identified as one of the abuses which take place in detention centres in the United States, see PDIB, *Primer Informe 2011: Violaciones de Derechos Humanos de Mexicanos Detenidos en los Estados Unidos 2010-11*, p. 55, available: <http://programadefensaincidenciabinacional.wordpress.com/documentos-docs/>

⁶ The problems with access to legal advice and the quality of legal representation and interpretation, as well as lack of access to telephones for legal calls, in the case of Mexican migrants detained in the United States, have been documented, see PDIB, *Primer Informe*, op.cit. p. 56.

⁷ IACtHR, Case of Vélez Loo vs. Panama, Judgment of 23 November 2010, para. 146.

⁸ According to the PDIB, Mexicans detained in the United States are routinely denied their rights to consular information (the right to be informed without delay of the right to consular notification and communication) in detention centres in the United States see, op.cit. PDIB, *Primer Informe*, p. 44.

⁹ IACtHR, Case of Vélez Loo vs. Panama, Judgment of 23 November 2010, para. 254.

¹⁰ IACtHR, Case of Vélez Loo vs. Panama, Judgment of 23 November 2010, para. 154; IACtHR Advisory Opinion 16/99 The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, para. 122.

¹¹ For example, from the cases studied during an investigation into the situation of children on the border between Mexico and Guatemala, none of the detained children had legal assistance, a guardian or information about their rights, see Ceriani, Niñez detenida: los derechos humanos de niñas, niños y adolescentes migrantes en la frontera México-Guatemala. Diagnóstico y propuestas para pasar del control migratorio a la protección integral de la niñez. September, 2012.

¹² CRC, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin (CRC/GC/2005/6), 1 September 2005, para. 63.