Promoting fair and effective criminal justice

Working Group on Arbitrary Detention
Consultation on the Right to Challenge the Lawfulness of Detention Before Court
Geneva, 1-2 September 2014

Statement of Penal Reform International

Penal Reform International (PRI) would like to highlight that restrictions of the right to liberty are not only problematic in human rights terms if they are 'unlawful', but also if deprivation of liberty is arbitrary, unnecessary or disproportionate.

Despite existing international standards stipulating that detention should be used as a last resort, pre-trial detention is employed excessively across the globe and long prison sentences are handed down, even for minor non-violent offences, resulting in an ever increasing global prison population. This growth does not reflect a rise in crime and also exceeds population growth. Rather it is a result of political policy choices and an increasing leniency in depriving individuals of their right to liberty.

In order for the Working Group on Arbitrary Detention's 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 to be of added value they should clarify that a review of the 'lawfulness' of detention must not be limited to the existence of a legal basis in national law or compliance with legal formalities, but also constitute a substantial review based on the **legality, necessity and proportionality** of the deprivation of liberty.

The requirement that imprisonment be proportionate has been based on human dignity, but jurisprudence is also starting to balance possible forms of intervention as is well-established practice to assess the permissibility of infringements of other human rights.

Thus where non-custodial measures and sanctions suffice to achieve the purpose pursued, i.e. securing a criminal procedure or providing accountability for a criminal offence, deprivation of liberty is unnecessary and/ or disproportionate.

The Working Group has expressed this principle stating that the right to liberty requires that States should have recourse to the deprivation of liberty only insofar as it is necessary to meet a pressing societal need and in a manner proportionate to that need.

As expressed in the United Nations Standard Minimum Rules for Non-custodial Measures (The **Tokyo Rules**), 'the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions', 'consistent with the nature and gravity of the offence, the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment' (Rule 2(3)).

Secondly, there are a **range of factors and other human rights** without which the right to challenge the 'lawfulness' of detention cannot be exercised. These include access to a lawyer - for many not realistic without access to legal aid (see UN Principles and Guidelines on

Access to Legal Aid in Criminal Justice Systems[1]) - adequate opportunities, time and facilities to be visited by and to communicate and consult with legal representation as well as access to (legal) documents.

Other important elements to exercise the right to challenge detention are accurate and complete **prison registers** and adequate **case management**. Where detention has not been registered at all, or inaccurately, or where state authorities do not even know who is held in their prisons, the right to challenge detention will unavoidably be jeopardised.

As the UN Office on Drugs and Crime (UNODC) Handbook for Prison Leaders stipulates, 'Prison registries and records are vital in order for managers to know who are in their prisons at all times. (...) Where prison records are poor, there is a great risk of individual prisoners becoming "lost" in the system and no one knows why they are being detained, for how long and when they should be released. In many countries it has happened that "lost" prisoners thought to have been released were 'discovered' still in prison many years later.'

We would like to recall the recently adopted **UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems**,[2] as an inspiration and possible model for scope and structure as regards the Principles and Guidelines on the right to challenge detention.

As paragraph 6 of the Legal Aid Principles and Guidelines explicitly states, they are 'drawn from international standards and recognized good practices' (hence not limiting themselves to existing binding or customary human rights law) and aim 'to provide guidance to States on the fundamental principles on which a legal aid system in criminal justice should be based and to outline the specific elements required for an effective and sustainable national legal aid system, in order to strengthen access to legal aid'.

Along the same lines, the Principles and Guidelines on the right to challenge detention could include (e.g. in a preamble and as Guidelines) the above-mentioned factors and rights necessary to put this right into practice.

We also strongly recommend that the Principles and Guidelines capture particular obstacles of **vulnerable groups**, including women detainees.

Research shows that **women detainees** face particular obstacles in accessing the right to challenge the lawfulness of detention. Linked to discrimination in access to education in society, women prisoners typically have low education levels which impede their access to legal remedies. Also, gender roles in the society and families in many countries mean that they are financially dependent on male family members, who may not be willing to spend resources for legal representation for them.

We would also like to highlight specific challenges for the group of women in so-called '**protective' detention**, a form of arbitrary detention which the Working Group has addressed within its work. Usually based on 'Crime Prevention Laws', which are the basis for other highly problematic forms of preventive detention as well, women are detained allegedly for their 'protection' because of a risk of becoming victim to 'honour crimes'.

In these cases it is not the alleged perpetrator of the act or threat of gender-based violence who is detained, but the victim, ironically resulting in particular obstacles when exercising the right to challenge the lawfulness of detention. Taking the example of one country, under the national law such women can only be released if the prison director signs a release form, based on the assurances of family members that the woman will not be harmed – assurances that cannot be obtained by legal remedies. Where a remedy is available it must be directed to

[1] UN-Doc E/RES/2012/15, 26 July 2012.
[2] ECOSOC, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: UN Doc E/RES/2012/15, 26 July 2012.

the Supreme Court and hence requires a highly qualified – and expensive – lawyer. Women affected can seldom afford such legal representation, and cannot rely on family support as in these cases they are typically abandoned by their family.

We therefore strongly recommend that the Guidelines and Principles address the right to challenge protective detention of women and the particular obstacles faced by women detainees - often as a consequence of their discrimination in the family and in society.

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