Working Group on Arbitrary Detention - Consultation on the Draft 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 a court

Following the participation of the Open Society Justice Initiative in the Working Group's expert meeting in September 2014 we are pleased to contribute to the updated draft, drawing on the Justice Initiative's work on criminal justice reform and national security and counter-terrorism. We hope civil society groups have the opportunity to make further contributions as the drafting process progresses.

FORMAT

The delineation between Principles and Guidelines is useful and reflects the inputs from the expert meeting and the format adopted in the recent UN Principles and Guidelines on Access to Legal Aid in Criminal Justice systems.

We would encourage a clearer distinction between the 'Principles' that articulate the core essence and basic principle being addressed; and further detail and explanation through the 'Guidelines'. This should also ensure that there is no duplication between the two sections.

INTRODUCTION

In the introduction it would be important to make reference to some of the overarching factors that may deter or dissuade an individual from challenging the lawfulness of his/her arrest or detention. The Justice Initiative has done considerable work to document and assess the scale and consequences of excessive and arbitrary pretrial detention and the increased exposure to torture and corruption. The decision to detain a person before he is found guilty of a crime is a particularly draconian decision for a state to make, and for the individual, has severe and immediate consequences. A suspect may lose his/her job, home, community and family ties.[1] As Professor Manfred Nowak noted in his interventions at the expert meeting:

> *Deprivation of liberty creates a situation in which human beings exercise extensive* power over others*. This power of the police, prison wardens, health care personnel, parents and other guardians can be easily abused. Article 10 CCPR, therefore, establishes a special right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. In order to prevent abuse, children shall be segregated from adults, accused from convicted persons, and in most detention facilities, women are separated from men, and precautionary measures are taken to protect vulnerable groups, such as the LGBT community, sex offenders, child abusers or mentally ill persons.*

[1] Open Society Justice Initiative, Presumption of Guilt: The Global Overuse of Pretrial Detention, 2014.

Torture, inhuman and degrading treatment, corruption[2] and the physical and psychological conditions of detention should all be borne in mind when considering whether an individual is able, and in a position, to practically and effectively challenge the lawfulness of his/her arrest or detention.

RIGHT TO BE FREE FROM ARBITRARY OR UNLAWFUL DEPRIVATION OF LIBERTY

The need to include 'unnecessary and disproportionate' deprivation of liberty was raised by a number of organizations and experts in September. Paragraph 12 of the Introduction cites the Working Group's annual report, and notes that states need to ensure '*a strict review of the lawfulness, necessity and proportionality of any measure depriving anyone of their liberty*.' It would be useful to supplement in relation to pretrial detention with a reference to the principle established at the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders:

> *Pretrial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are let free.*

RIGHT TO BE INFORMED

We welcome the emphasis on the right to be informed and the recognition that suspects need support to be able to challenge the lawfulness of detention. The guidelines could recommend that states develop a simple letter of rights as stipulated in the recent EU directive on the right to information in criminal proceedings and that they should have access to legal assistance.[3] The EU model letter of rights states:

> *When you are arrested and detained, you (or your lawyer) have the right to access essential documents you need to challenge the arrest or detention.*
>
> *Ask your lawyer or the judge for information about the possibility to challenge your arrest, to review the detention or to ask for provisional release.*

RIGHT TO PROMPT AND EFFECTIVE LEGAL ASSISTANCE

Recently there has been greater emphasis on the importance of early access to legal assistance. Following the judgment in the European Court of Human Rights (ECHR) in Salduz v. Turkey a number of European countries have changed their legislation and in 2013 an EU Directive on the Right to Access a Lawyer made explicit the timing of access to a lawyer; that is should be without undue delay and importantly prior to questioning or to certain investigative processes.[4]

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[2] Kolawole Olaniyan, Corruption and Human Rights Law in Africa, 2014. Includes reference to ACHPR communications.

[3] DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2012 on the right to information in criminal proceedings

[4] EU Directive DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

As noted above it would also be useful to explicitly add that a legal representative should have access to documents in order to challenge the lawfulness of arrest or detention. A 2014 IACHR report on the Use of Pretrial Detention in the Americas linked this to the equality and arms and references the case law of the ECHR stating:

> *To ensure this equality of arms, it is essential that defense attorneys be given access to those documents in the investigation that are necessary to effectively challenge the lawfulness of their clients' detention.*
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> Brogan and Others v. The United Kingdom (Applications No. 11209/84, 11234/84, and 11386/85), Judgment of November 29, 1988 (Grand Chamber), para. 65.
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> Case of Piruzyan v. Armenia (Application No. 33376/07), Judgment of June 26, 2012 (Third Section of the Court), para. 116;
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> Nikolova v. Bulgaria (Application No. 31195/96), Judgment of March 25, 1999, para. 58.

Currently the Principles and Guidelines use, seemingly interchangeably, legal representative, counsel and lawyer. This should be streamlined to use one term – legal representative with reference to the 2012 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[5] that elaborate on different legal service providers.

MEASURES FOR GROUPS WITH SPECIFIC NEEDS

As noted above the conditions and experience of detention may have a significant impact on the ability of an individual to be able to challenge the lawfulness of their detention. The Guidelines should provide for specific measures to protect vulnerable groups including that pretrial detainees should be held in separate units / facilities from sentenced prisoners. Reference can be made to the UN Rules on the Treatment of Women Prisoners, (the Bangkok Rules) and to Guidelines 9 and 10 of the Standard Minimum Rules on the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

EXERCISE OF THE RIGHT TO BRING PROCEEDINGS BEFORE A COURT WITHOUT DELAY TO CHALLENGE THE LAWFULNESS AND ARBITRARINESS OF THE DETENTION IN SITUATIONS OF ARMED CONFLICT, PUBLIC DANGER OR OTHER EMERGENCY THAT THREATENS THE INDEPENDENCE OR SECURITY OF A STATE.

'Acts of Terrorism': Guideline 17, in paragraph 102, may be read as regarding any and all 'acts of terrorism' as automatically existing in a context of 'armed conflict, public danger or other emergency that threatens the independence or security of a state.' This is not always the case, as acts of terrorism can be isolated or collective incidents, as in some cases non-violence acts depending on the domestic legal system of States, that will never rise to the level of being linked to armed conflict, public danger or other emergency that threatens the independence or security of a state. While paragraph 102 may,

[5] http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

rightly, have been crafted to emphasize that States, when combating terrorism, cannot ignore the right of a detainee to bring proceedings before a court, the current structure of paragraph 102 could have the unintended consequence of perpetuating the notion that States, as a default, may subject all acts of terrorism to exceptional responses that undercut human rights. It is particularly important to avoid this outcome given the practice of States to do exactly this.

Non-refoulement: While the draft considers various scenarios where a person detained must retain his or her right to challenge the lawfulness of deprivation of liberty, absent from those scenarios is a consideration of the principle of *non-refoulement*. It is recommended that this principle be included in the document and that an individual be permitted to have the lawfulness of his or her transfer considered in all instances, including in situations of armed conflict, public danger or other emergency that threatens the independence or security of a state. This right should also apply on a case-by-case basis, with each individual's case being assessed.[6] It may be worth noting that while the wording of Article 118 of the Third Geneva Convention is firm with regard to the need to repatriate in international armed conflict, the authoritative International Committee of the Red Cross Commentary to the Third Geneva Convention states that exceptions to Article 118 are permissible if there are 'serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty…'[7]

Criminal detention in armed conflict: Principle 16 and Guideline 17 focus exclusively on internment in times of armed conflict but do not address the rights of individuals charged with criminal offenses relating to the armed conflict and their right to challenge the lawfulness of their deprivation of liberty. It is important that not only 'terrorist' (however so defined), prisoners of war, and civilian internees are permitted this right, but also that individuals charged with war crimes or other armed conflict-related offenses – be them offenses under international or domestic law – have the right to take proceedings before a court without delay to challenge the lawfulness and arbitrariness of the detention.

Extraterritoriality: We recommend that the draft emphasize that the content of the document applies extraterritorially, including in situations of armed conflict, public danger or other emergency that threatens the independence or security of a state. While the extraterritorial reach of the rights discussed in the document could be implied in Principle 3 and Guideline 1 ('Scope of application') the document would benefit from the inclusion of a more explicit statement that reflects the widely agreed upon understanding that human rights law applies extraterritorially, including in situations of armed conflict and detention. To this end, the draft already partially addresses the issues of extraterritoriality when it discusses the rights of individuals detained by an Occupying Power. (See para. 103(b).)

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[6] See Nigel Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law* (3d ed. 2009), at 174.

7 Int'l Comm. of the Red Cross, Commentary: III Geneva Conventions relative to the Treatment of Prisoners of War (Jean Pictet ed. 1960) at 547. As a matter of practice, the International Committee of the Red Cross has, according to Cordula Droege, 'always taken the view that, while the mere wish of prisoners of war could not be a bar to repatriation, they must not be repatriated if it would be 'contrary to the general principles of international law for the protection of the human being.'' Cordula Droege, *Transfers of Detainees: Legal Framework,* Non-Refoulement *and Contemporary Challenges*, 90 Int'l Rev. Red Cross, 669, (2008), at 674.

Derogations: It may be helpful to emphasize, as done in the Human Rights Committee General Comment 29, that not all armed conflicts permit derogations: 'The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.' (at para. 3).

ADMISSIBILITY OF EVIDENCE OBTAINED BY TORTURE

Guideline 12 rightly reflects the norm that statements obtained by torture shall not be used in any proceeding, except against a person accused of torture as evidence that the statement was made. Guidelines 12 should, however, also include, at a minimum, *other ill-treatment*. The rule prohibiting the use of torture in any proceeding is found in Article 15 of the Convention Against Torture and the Committee Against Torture has stated in its General Comment No. 2 that Article 15 is 'likewise obligatory as applied to both torture and ill-treatment' and that it must be observed in all circumstances (at para. 6). The General Assembly, in The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (resolution 3452 (XXX)), also expressly stated that 'any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence … in any proceedings.' (Article 12)[8]

It is also noticeable that while most of the draft principles mirror the draft guidelines, there is no principle that mirrors Guidelines 12. It would be worth addressing this inconsistency if the structure of the draft remains as it is currently.

[8] For a detailed discussion and additional support see, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/25/60, 10 April 2014, Section III.