



**Promoting fair and
effective criminal justice**

**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**

Comments by Penal Reform International

11 March 2015

Penal Reform International (PRI) commends the Working Group on Arbitrary Detention on the Draft Principles and Guidelines on the right to challenge the lawfulness of detention and would like to thank the Working Group for the opportunity to submit comments.

We submit below a few suggestions for amendments or changes based on PRI's experience relating to imprisonment in various jurisdictions, structured under each of the relevant sections and paragraphs, and are happy to provide further input or information as necessary.

Introduction

We believe that it may be helpful to explain briefly in the introduction the nature of the differentiation between 'principles' as compared with 'guidelines', and how their differing character and nature were taken in consideration when allocating specific points of guidance.

We note that Paragraph 111 explicitly mentions the practice of so-called 'protective detention' and calls for its elimination. However, we believe that this form of detention should be explicitly included in the substantive list of forms of 'deprivation of liberty' in Paragraph 10. This would reflect the fact that this type of detention is an ongoing practice in many countries, requiring unequivocal clarity on the victims' right to challenge this form of detention.

Principles

Principle 7: Right to be informed

We welcome the explicit mention of the need to enable persons with the 'means to bring forth such a challenge', and would like to recommend further clarification as to whether such 'means' would include providing financial means or assistance and/or the provision of legal aid.

Principle 8: Timeframe for the exercise of the right to bring proceedings before the court

PRI has noted that the term ‘arrest or detention’ has been misinterpreted in practice at the national level and would therefore recommend clarification of the term to mean the ‘moment of apprehension’.

See, for example: ‘In March 2012, the Constitutional Council of Kazakhstan had to rule on the interpretation of Article 16 (2) of the Constitution, according to which a person may only be detained for a period of 72 hours before being brought before a judge. There had been differing opinions on what triggers the start of this time period, with the prevailing interpretation being that it should start from the arrival of the suspect in a detention centre or the registration of the detainee. However, such an interpretation would mean that authorities could determine – and manipulate – access to safeguards, by delaying the transfer or registration of the arrestee and thereby undermining their protection. In part based on a submission by Penal Reform International Central Asia, the Constitutional Council established that ‘arrest’ refers to the moment when a person is apprehended.’ (*Penal Reform International/ Association for the Prevention of Torture, Fact-sheet on Pre-trial detention: Addressing risk factors to prevent torture and ill-treatment, 2014*)

Principle 9: Prompt and effective legal assistance

Paragraph 27: In light of problems in practice relating to the timeliness of prompt and effective legal assistance, we recommend an addition to Paragraph 27, namely that the right of prompt and regular access has to be granted ‘without delay, interception or censorship and in full confidentiality.’ Reference should be made to relevant international standards for example Principle 8 of the UN Basic Principles on the Role of Lawyers which provides ‘All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. (...)’

Paragraph 31: Additionally we suggest adding a reference in Paragraph 31 to the UN Guidelines and Principles on Legal Aid in Criminal Procedures as a footnote, in order to raise awareness about the existence of this relatively new and unknown standard. We appreciate that access to documents is mentioned under Guideline 5 (para. 77a) but fear that their mention under ‘Guidelines’ rather than ‘Principles’ may be misinterpreted as less authoritative.

Principle 17: Specific measures for women

We welcome the inclusion of a Principle on specific measures for women, given the discrimination faced by women in society and corresponding barriers in accessing financial means for legal representation. Women face particular and unique challenges in accessing remedies to challenge detention requiring specific measures to ensure realisation of their rights.

We refer you to our comments below as regards Guideline 19 on these specific measures.

Guidelines

Guideline 1: Scope of application

Paragraph 69 (a): As proposed above regarding the respective paragraph in the Introduction we would like to recommend including so-called ‘protective detention’ within the scope of application as a situation of deprivation of liberty. Typically, access to rights relating to this form of detention tends to be withheld due to its alleged purpose being protective - and thereby not being understood as deprivation of liberty.

Guideline 6: Registers and record keeping within prisons and other facilities of detained persons

Given that record keeping is a key component of ensuring detention-related rights overall, we commend the Working Group for including this issue in the Principles and Guidelines. We would like to further recommend the addition of two important elements to effective record keeping with a considerable impact on the exercise of the right to challenge detention: the documentation of any transfer of a detained person and its destination, and procedures being put in place to safeguard against unauthorised access or modification of any information contained in the register/record.

Existing standards and guidance on this issue can be found, for example:

- Principle 16(1) of the UN Body of Principles for the Protection of All Persons under Any Form or Detention or Imprisonment which states: 'Promptly after arrest *and after each transfer from one place of detention or imprisonment to another*, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.'
- Article 17(3)(h) of the Convention for the Protection of All Persons from Enforced Disappearance requires: Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, [...] The information contained therein shall include, as a minimum: (h) 'The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.'
- The UN Office on Drugs and Crime (UNODC) Handbook on Prisoner File Management (2007) states at Page 21: '[t]ransfer details of prisoners should be duly recorded to ensure these rights are exercised and to ensure against disappearances. Accurate records should also contain parole eligibility and/or release dates.'

The problem has been highlighted, for example, by LICADHO in Cambodia, where files are not transferred with prisoners who are transported from one prison to another. The NGO found that the two prisons where transfers are most frequent are also the ones where detainees are held beyond their release date and where detainees miss appeal hearings because they are 'lost in the system'.

Finally on this matter we note that Rule 7 regarding of the Standard Minimum Rules for the Treatment of Prisoners (headlined 'Register') is subject to the ongoing process of targeted revision of the Rules. While no revised text has yet been adopted, the UN Working Document which forms the basis for negotiations at the fourth Inter-governmental Expert Group Meeting in Cape Town between 2 - 5 March 2015 (UN Doc. UNODC/CCPCJ/EG.6/2015/2, 12 January 2015) has proposed the following for Rule 7:

Relevant recommendations from previous Expert Group meetings (as applicable):

- *Buenos Aires (2012): To change the heading for rule 7 from "Register" to "Record-keeping" and/or "Prisoner file management system", and to reflect technological advances in information management systems; to require that information on the circumstances and causes of death of and serious injury to a prisoner, as well as the destination of any remains, be included in the respective prisoner file (management system), along with cases of torture, confinement and punishment; and to include the need to establish information systems on prison capacity and occupancy rate by prison.*

Revision proposed by the bureau

Prisoner file management system

“7. (1) There shall be a standardized prisoner file management system in every place where persons are imprisoned. Such a system may be an electronic database of records or a registration book with numbered pages. Procedures shall be in place to prevent unauthorized access to or modification of any information contained in the system.

(2) No person shall be received in an institution without a valid commitment order. The following information shall be entered in the prisoner file management system upon admission of every prisoner:

(a) Information concerning his or her identity;

(b) The reasons for his or her commitment and the authority therefor, including date, time and place of arrest;

(c) The day and hour of his or her admission and release, as well as of any transfer;

(d) Any visible injuries and complaints about prior ill-treatment;

(e) An inventory of his or her personal property;

(f) The names of his or her children, as applicable, as well as their ages, location and custody or guardianship status.

(3) The following information shall be entered in the prisoner file management system in the course of imprisonment, as applicable:

(a) Information related to the judicial process, including dates of court hearings and legal representation;

(b) Initial assessment and classification reports;

(c) Information related to behaviour and discipline;

(d) Requests and complaints, including allegations of torture and other forms of cruel, inhuman and degrading treatment or punishment, unless they are of a confidential nature;

(e) Information on the imposition of disciplinary measures;

(f) Information on the circumstances and causes of injuries or death and, in the case of the latter, the destination of the remains.

(4) All records referred to above shall be kept confidential and made available only to those whose professional responsibilities require access to such records. Every prisoner shall be provided with copies of the records pertaining to him or her if so requested, and be entitled to receive a certified copy upon release.

(5) Prisoner file management systems shall also be used to generate reliable data about trends relating to and characteristics of the prison population, including occupancy rates, in order to create a basis for evidence-based decision-making.”

Rationale for the revision proposed by the bureau:

The revision reflects technological advancements since the adoption of the Standard Minimum Rules, follows the recommendations from the Expert Group meeting in Buenos Aires and draws on several drafting proposals received from Member States.

PRI extends its offer of keeping the Working Group informed of the state of negotiations and specifically the recommendations of the Inter-governmental Expert Group on this issue and Rule regarding register/ record keeping. The forth such Expert Group meeting has just been resumed in Cape Town.

Guideline 10: Appearance before the court

While we recognise the purpose of requiring detainees to appear before a court physically, as stated in Paragraph 93, PRI has noted that in many countries, prison administrations and other relevant authorities face problems in the physical transfer of detainees to court, often for reasons beyond the influence of courts and prison administrations. For instance, where places of

detention are in remote places with problematic access, there can be a lack of vehicles or inadequate numbers of staff for transfers.

While respective shortcomings do not legitimise limiting the rights of detainees, including appearance of persons deprived of their liberty before the court, due to the realities in many countries the limitation to 'physical' presence of the detainee before the court under this Guideline may in practice disadvantage detainees. Remote court appearances are being employed in some countries enabling access to justice for persons that would otherwise not be able to appear before court. Despite its shortcomings,¹ we propose to make mention of the possibility of appearing in court remotely, through video or other technology available, in cases where a detainee cannot be transported to court.

Guideline 16: Remedies and Reparations

We propose the inclusion of a subparagraph to explicitly mention non-custodial alternatives to detention, with reference to relevant UN standards, and to build on Paragraph 92(b) and (c) which address social rehabilitation and alternatives to detention. A subparagraph could read, for instance: '(ix) Providing non-custodial alternatives to detention in line with the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the UN Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).'

Guideline 19: Specific measures for women

Paragraph 110: To strengthen Guideline 19 as regards specific measures for women we propose that some suggested measures could be included to ensure it is clear what a 'gender-sensitive approach' could entail. For instance measures that take account of the financial barriers, including low levels of education and lack of access to financial means of the family (often a result of the disproportionate level of stigma experienced by women offenders compared to male offenders). In addition to financial barriers, specific measures should take into account prior victimisation and the high-levels of violence experienced by women in detention.

Reference should be made to the Bangkok Rules as regards access to legal representation, see:

- Rule 2: 'Adequate attention shall be paid to the admission procedures for women and children, due to their particular vulnerability at this time. Newly arrived women prisoners shall be provided with facilities to contact their relatives; access to legal advice [...].'
- Rule 26: 'Women prisoners' contact with their families, including their children, their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. [...].'

We also recommend to make reference to Principle 10 and Guideline 9 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems which require gender-specific measures to ensure access to legal aid, in recognition that women are more vulnerable when involved with the criminal justice system (See Preamble Paragraph 12).

¹ See discussion on concerns and benefits of remote court appearances in 'A Technology Opportunity for Court Modernization: Remote Appearances': A White Paper prepared for the Association of Canadian Court Administrators and Canadian Centre for Court Technology; Professor Erich P. Schellhammer Royal Roads University, Victoria, British-Columbia, January 2013. Available at <http://wiki.modern-courts.ca/images/1/1b/A_Technology_Opportunity_for_Court_Modernization_-_Remote_Appearances.pdf>, accessed 3 March 2015.

Paragraph 110(b): As regards training of persons who provide legal support to female detainees, we propose language that extends beyond knowledge of women's rights. The Paragraph could read, for example: 'Taking active steps to ensure that, where possible, *persons who possess education, training, skills and experience in the gender-specific needs and rights of women* are available to provide legal aid, advice and court support services in all legal proceedings to female detainees' (emphasis added).

Paragraph 111: We welcome the inclusion of the recommendation to replace so-called 'protective detention' with alternative measures, and propose that the UN Bangkok Rules (specifically Rule 59) is mentioned in this paragraph (in text or as a footnote).

PRI has also noted that in some countries women and girls are detained after being raped to ensure they give evidence against the perpetrator. It therefore would be useful to mention that this form of detention can go beyond reasons of 'protecting them from risks of serious violence'.

We thank the Working Group on Arbitrary Detention for the possibility to give further input and are looking forward to promoting the finalized Guidelines and Principles.

End./