



Prepared Remarks for the Working Group on Arbitrary Detention’s “Global Consultation on the Right to Challenge the Lawfulness of Detention

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I would like to thank the Working Group on Arbitrary Detention for providing me with this opportunity to share some of the findings of our research at the Global Detention Project. As a research center that focuses specifically on the use of deprivation of liberty by states as a tool for enforcing immigration laws and objectives, the Global Detention Project is very pleased to see the elaboration by the Working Group of “Draft Basic Principles on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before the Court.”

As you are all aware, people placed in immigration-related detention often face a number of particular hurdles to their enjoyment of procedural guarantees, including the ability to effectively challenge their detention in court. The Working Group has asked me to enumerate some of these hurdles in my presentation today and to provide some examples of how these problems are manifested in different domestic settings.

One of the more outstanding features of immigration-related detention is that it is typically carried out as an administrative rather than a criminal procedure. As other panelists at this consultation have previously noted, this is a critical distinction, which results in a series of vulnerabilities for administrative detainees. Thus, while the Working Group and other international and regional mechanisms have stated that irregular stay in a country should not be an aggravating circumstance for a criminal offence nor a criminal offence in itself, the administrative nature of immigration detention often means that immigration detainees paradoxically enjoy a lower level of procedural guarantees than persons in criminal proceedings. As one noted legal scholar has written, “immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication.”¹

¹ Legomsky, Stephen. “The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms.” *Washington and Lee Law Review* 64 (2007): 469-528, p. 469.

This state of affairs has led some observers to provocatively contend that migrant detainees would be better off if they were charged with criminal violations, which would at least ensure them basic due process guarantees. Regardless of the merits of this argument, it is becoming increasingly clear that authorities in many countries view the administrative nature of immigration detention as a convenient tool for addressing immigration matters.

While many migrant rights actors are rightly concerned about the apparent increasing “criminalization” of immigration violations, the Global Detention Project has noted a parallel trend whereby we see states de-criminalizing status-related violations. Removing immigration violations from the criminal process arguably makes immigration detention considerably cheaper and gives authorities more discretion on how to treat people accused of immigration violations. Thus, while it is critically important to track efforts to make immigration violations criminal offences, it is also important to interrogate the reasons states choose to de-criminalize such violations and assess whether this encourages increasing rates of detention.

Among the more common procedural vulnerabilities and shortcomings that immigration detainees face are: (1) the inability to access legal assistance; (2) failure by authorities to provide translations or linguistic services; (3) failure to ensure that legal proceedings are adversarial; (4) failure to ensure that detainees are promptly brought before a judge or have speedy trials; (5) failure to address the necessity of detention measures by not obligating authorities to consider non-custodial alternatives to detention; and (6) no automatic review of detention orders thereby making habeas corpus proceedings dependent on an application from detainees.

Before proceeding to specific examples of how these shortcomings are manifested in different domestic settings, it is worth highlighting here that many of these gaps in national legal systems are also reflected at the regional level. Thus, for instance, in contrast to its provisions for pre-trial detainees, the European Convention on Human Rights does not obligate authorities to consider alternatives to detention in immigration cases, which means the scope of review proceedings may be limited to the lawfulness of detention orders and not extend to assessments of their necessity.

This shortcoming is also reflected in both the EU Returns Directive and the Receptions Conditions Directive, neither of which contains a clear obligation on states to assess the availability and feasibility of non-custodial measures in each individual case, based on the presumption of innocence.

The EU detention regime, as embodied in the two aforementioned directives, also fails to provide many of the other protective features that are typically part of criminal processes. Regarding automatic review of detention orders, both directives leave discretion to national authorities on whether to provide automatic review or to grant the detainee the right to apply for it. Also, compulsory hearing before a tribunal is not provided in the directives. While access to free legal assistance to challenge detention is not provided in the Returns Directive, the Reception Conditions Directive is more generous as it provides that detained asylum seekers have access to free legal

assistance and representation in the initial review proceedings. However, subsequent reviews are not covered by this provision. Lastly, both directives fail to ensure access to free linguistic assistance in the course of review proceedings.²

Turning to particular national cases, one of the most important points to note is that we frequently observe a wide gap between law and practice. While most countries in Europe have adopted measures guaranteeing detainees the right to court reviews of detention measures, application of this right is decidedly mixed. Thus, for example, while observers in Germany state that detainees are assured a personal hearing, in other countries like Hungary, application of this right appears to be a mere formality. According to organizations in Hungary that work on immigration detention cases, pre-removal detainees are supposed to be granted a personal hearing upon request. In practice, however, this mechanism appears to lack transparency and consistency. With limited access to legal aid, it is difficult for detainees to request an oral hearing. Asylum detainees are also to be granted an obligatory personal hearing during the court's validation of the initial detention orders, however hearings for subsequent extensions must be requested. One source in Hungary described the personal hearing as "15 people ... brought together in front of a judge who simply confirms their detention orders, without any individual examination."³

Legal experts in Italy have reported similar problems in that country. For instance, in a study of the provision of legal guarantees in the Turin detention center, a group of lawyers reported that initial hearings to validate detention orders tend to last two or three minutes and are generally casual in nature. They write, "The judge makes two or three questions, the chancellor writes, lawyers say something, and there it is. It was really a mere formality. ... Many fellow lawyers barely participate in validation hearings, leaving the decision on what to do to the [judge]. So, there is a reduced defense."⁴

A key issue in Italy, which we have found to be endemic in immigration detention regimes around the globe, is the frequent inability of detainees to access effective legal aid. While the provision of such aid is provided for in law in Italy, experts report that in practice assigned attorneys often do not have enough time to prepare their cases as they are usually appointed in the morning of the hearing. As a detainee at the Turin detention center told investigators, "I only saw my staff attorney [avvocato d'ufficio] at the hearing together with the judge, that's it. They didn't tell me anything. That lawyer has never called me back again and I do not have his phone number so I cannot contact him."

A key obstacle to obtaining effective legal representation in many countries is the widespread practice of placing detention facilities far from population centers. Thus, for

² See Majcher, Izabella. "'Crimmigration' in the European Union through the Lens of Immigration Detention." Global Detention Project Working Paper No. 6. September 2013. Global Detention Project. Geneva, Switzerland.

³ Global Detention Project. "Immigration Detention in Hungary." February 10 2014. <http://www.globaldetentionproject.org/countries/europe/hungary/introduction.html>.

⁴ Global Detention Project. "Immigration Detention in Italy." November 2012. <http://www.globaldetentionproject.org/countries/europe/italy/introduction.html>.

instance, the East Japan Detention Center, one of that country's most important—and more notorious—immigration facilities, is located so far outside Tokyo that attorneys wishing to have a 30-minute consultation with a client must make a six-hour round-trip journey to do so. Further complicating matters is the fact that detainees in that facility are severely limited in their ability to make telephone calls and cell phones are not allowed due to unspecified security concerns.⁵

Japan's detention policies also reflect a growing tendency we have seen elsewhere in another crucial respect—in its adherence to mandatory detention of all people deemed to have violated various provisions in immigration law, including unauthorized entry or stay. It is in the nature of mandatory detention that the ability to challenge one's detention is severely limited. In the case of Japan, detention orders issued by immigration officials are not subject to control by the judiciary. Rather, a detainee can request a hearing with a Special Inquiry Officer, and then appeal to the Ministry of Justice if he or she disagrees with the decision of this officer.

Likewise in Australia, which was a pioneer in the application of mandatory immigration detention, deprivation of liberty can be applied to an entire cohort of people without being subjected to judicial review. There appear to be other countries that are following Australia's lead, even countries like New Zealand, which recently adopted mandatory detention for so-called mass boat arrivals although it has never faced the kinds of immigration cases they are preemptively passing laws against.⁶

Thus far I have focused my remarks on the internal detention practices of major industrialized countries. However, I would like to conclude by highlighting a growing set of challenges that have arisen as a result of the efforts by main immigration destination countries to pressure neighboring states to detain migrants transiting their territories.

On the one hand, this effort at extraterritorial control is leading to increasing numbers of people being detained in countries that lack appropriate legal frameworks for this type of deprivation of liberty or where the chain of command is not respected. Thus, for example, observers report that in Tunisia and Lebanon—both of which have been influenced by their European neighbors to halt migration—detaining authorities often fail to respect the decision of courts when they order the release of a detainee.⁷

Turkey has just finalized a readmission agreement with the EU that foresees the return of third-country nationals, many of whom will likely be detained upon arrival in Turkey. However, until quite recently, Turkey refused to acknowledge that migrants deprived of their liberty because of their immigration status were actually being detained, thereby preventing any systematic review of detention decisions. Also, in March 2013, the

⁵ Visit by Michael Flynn to the East Japan Detention Center with the Japan Bar Association. 15 July 2014.

⁶ Global Detention Project. "Immigration Detention in New Zealand." February 2014. <http://www.globaldetentionproject.org/countries/asia-pacific/new-zealand/introduction.html>.

⁷ Global Detention Project. "Immigration Detention in Tunisia." July 2014. <http://www.globaldetentionproject.org/countries/africa/tunisia/introduction.html>; "Immigration Detention in Lebanon." June 2014. <http://www.globaldetentionproject.org/countries/middle-east/lebanon/introduction.html>.

European Court of Human Rights finalized a ruling concerning a case involving an Iranian refugee who had challenged his detention. The court found that “the Turkish legal system did not provide the applicant with a remedy whereby he could obtain a speedy judicial review of the lawfulness of his detention.”⁸

While Turkey recently adopted new immigration legislation that expands procedural guarantees for detainees, observers have been critical of its inclusion of controversial statutes found in EU legislation—including provisions for accelerated procedures for asylum seekers—and its failure to eliminate geographical limits on international protection.

Extraterritorial detention schemes also lead to severe complications in the ability of migrants and asylum seekers to contest their detention in another important way—by leading to confusion over who has custody of the detainees. These problems were highlighted in a 2007 case before the UN Committee against Torture involving Spain’s effort to confine interdicted migrants in a detention center in Mauritania. The court rejected Spain’s argument that any alleged abuses at the facility occurred outside Spanish territory, concluding that it “maintained control over the persons ... from the time the vessel was rescued and throughout the identification and repatriation process that took place [in Mauritania]. ... Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the complaint that forms the subject of the present communication is concerned.”⁹

Another striking case, this one involving Mexico and the United States, occurred when the U.S. Navy interdicted an Ecuadorian smuggling vessel off the coast of Guatemala and towed it to southern Mexico, where the 270 migrants on board were briefly questioned and then repatriated. Although apparently in the custody of Mexican officials, the five crew members were questioned by U.S. immigration officials, who—rather remarkably given their location at the time—advised them of their rights under the U.S. Constitution. Although the crew had little or no understanding of U.S. laws, the U.S. officials asked them if they would waive their Miranda rights, which they did. The alleged smugglers were eventually put on a plane presumably to be departed to Ecuador, but when the plane made a layover in Texas, the passengers were taken into U.S. custody.¹⁰

There are numerous other cases one could cite that demonstrate how offshore detention practices make challenging one’s detention a practical impossibility. However, because of time constraints I will conclude my remarks here. Thank you for your time. I look forward to our continued discussions.

⁸ Global Detention Project. “Immigration Detention in Turkey.” April 2014. <http://www.globaldetentionproject.org/de/countries/europe/turkey/introduction.html>.

⁹ *Committee against Torture, J.H.A. v. Spain*, 21 Nov. 2008, no. 323/2007

¹⁰ See Flynn, Michael. “There and Back Again: On the Diffusion of Immigration Detention.” *Journal on Migration and Human Security*. Volume 2 Number 3 (2014): 165-197.