

**INPUTS OF THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF
MIGRANTS, FRANCOIS CREPEAU, TO THE WORKING GROUP ON
ARBITRARY DETENTION'S DRAFT BASIC 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**

The Special Rapporteur on the human rights of migrants agrees that ‘the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful, in accordance with their international obligations’ has certainly become a key principle of human rights law, and has been integrated into many domestic legal systems around the globe.

However, he notes that this principle is often understood by States to be relevant only to situations of detention for criminal acts, and not in terms of administrative detention. In this regard, he notes that over the years, criminal legal systems have developed a very wide reaching set of guarantees and rights, which when properly applied, can comprehensively protect the rights of persons allegedly detained for criminal offenses.

However, in numerous countries around the world, administrative law hasn't yet adopted the same rights and guarantees as criminal law. In particular, administrative detention is an increasingly popular tool in countries of the Global North in order to “fight” irregular migration, without the need to provide the guarantees of criminal law.

Although irregular migration is often depicted as a crime, and is sometimes in fact prescribed as such by national legislation, for the most part, irregular migrants are largely detained using tools under administrative law. These administrative laws very often enable the use of unlimited detention, very often provide no minimum standard for detention conditions, and may even fail to stipulate monitoring or regulation of conditions of detention.

Furthermore, and of particular relevance to the WGAD's guidelines, administrative laws enabling migration detention very often do not establish a right of detainees to access to legal services, including translation/interpretation services, a right to a lawyer, a right to have the case heard before a judge, or a right of appeal. Other important procedural rights that may ensure that detention is not arbitrary including means of contacting family or consular representatives and ways of challenging detention are often also often not prescribed by administrative law, thus leaving migrants at higher risk of being arbitrarily detained.

Moreover, migrants are often in a particular situation of vulnerability, given that they are, inherent to their migrant status, not citizens of the country in which they may be detained. Thus, they may not speak the language and therefore understand why they have been detained, may be unfamiliar with the legal system and otherwise unaware of ways to challenge the legality of their detention. Some migrants inherently fear the imagined power of the authorities and refrain from engaging in procedures that could

help their case. In this regard, migrants in detention may be considered a special category of vulnerable persons, who are often doubly jeopardized by their ‘foreigner status’ and the lack of guarantees afforded to them under administrative law.

The Special Rapporteur welcomes the resolution of the Human Rights Council 20/16, which invited the WGAD to develop the guidelines, and is pleased to note that the resolution specifically acknowledges that the right of anyone deprived of his or her liberty to bring proceedings before court must be ‘equally respected in cases of administrative detention’ (para (d) and (e)).

It is in this context, the Special Rapporteur would encourage the WGAD in the drafting of its guidelines to make specific reference to migrant detention as a particular category or detention which merits its own consideration.

He also brings to the attention of the WGAD his thematic report of 2012 to the Human Rights Council which focused on the detention of migrants in an irregular situation (A/HRC/20/24). As he observed in that report, in order not to violate the right to liberty and security of person and to protect against arbitrariness, detention of migrants must be prescribed by law and necessary, reasonable and proportional to the objectives to be achieved. Legitimate objectives for detention are the same for migrants as they are for anyone else: when someone presents a risk of absconding from future legal proceedings or administrative processes or when someone presents a danger to their own or public security (para 9).

Furthermore, international law is very clear on the point:

Article 9, paragraph 2, of the International Covenant on Civil and Political Rights provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his/her arrest. Paragraph 4 of the same treaty provides that anyone who is deprived of his/her liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful. The Human Rights Committee in its general comment No. 8 stated that this provision is applicable to all deprivations of liberty, including immigration control.

Article 16, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides the same right specifically for migrant workers and members of their families.

Article 16, paragraph 8, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families further provides the right of migrants to have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used. Such guarantees are important in first instance, but also at the appeal level.

The Working Group on Arbitrary Detention stated in its deliberation No. 5 on the situation regarding immigrants and asylum-seekers that a notification of the detention must be given in writing, in a language understood by the asylum - seeker or immigrant, stating the grounds for the detention, and set out the conditions to apply for a remedy to a judicial authority.

Some particular issues to consider regarding migrant detention:

(i) Length of detention:

As noted in his report to the Human Rights Council, administrative detention of migrants is becoming increasingly long, with some states even not providing any maximum limit, leading to indefinite detention.

Moreover, as Migrants who are detained may not always be aware of their right to request review of their detention, sometimes due to language barriers or lack of access to a lawyer, the Special Rapporteur is therefore of the opinion that periodic review of detention should be automatic. This position is supported by the Working Group on Arbitrary Detention, which has stated that there should be automatic, regular and judicial, not only administrative, review of detention in each individual case, and that review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. (A/HRC/20/24 para 23).

(ii) Places of Migration Detention

The Special Rapporteur notes that the wide range of types of detention facilities used for migrants is another important factor that can contribute to the ability of detained migrants to bring their case before a court. Migrants are often detained in facilities which are located far from urban centres, making access difficult for family, interpreters, lawyers and NGOs, which in turn limits the right of the migrant to effective communication. He has observed, in his country visits, that migrants may be detained in purpose-built detention centres, in present or former prisons, in army barracks, in police stations, in warehouses, in containers, and in many other types of facilities, and that there often doesn't seem to exist a common set of standards that need to be respected in order for the detention facilities to be considered appropriate, compared with prisons which often have to meet specific standards.

Furthermore, the Special Rapporteur also notes the increasing use of privately run migrant detention centres. Such centres pose particular difficulties in terms of the right to bring proceedings to court, as management of such centres is often focus primarily on financial or commercial incentives, without the necessary basis and training of detention centre staff in fundamental principles of international human rights law. It is important thus to note that the Guiding Principles on Business and Human Rights(A/HRC/17/31, annex) provide that States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights and the Human Rights Committee has stated in its communication No. 1020/2001 that “the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant” (para. 7.2)

(iii)Detention of vulnerable persons

In the Special Rapporteur's experience, many vulnerable migrants are uselessly detained. Migrant children should never be detained, as detention can never be in their

best interest: non-custodial alternatives to detention should be the rule. When they are unaccompanied, shelters could be a much better alternative. When they are accompanied by family members, they should not be detained under the pretext of respecting the principle of family unity: the whole family should be offered non-custodial alternatives to detention. For other vulnerable migrants, host country's authorities should systematically offer alternatives to detention: victims of human trafficking, refugees and asylum seekers, elderly migrants, pregnant women, etc. For all the others, detention should only be ordered if strictly necessary.

(iv) Alternatives to detention

In the Special Rapporteur's view, the obligation to always consider alternatives to detention (non-custodial measures) before resorting to detention and to only detain as a measure of last resort, should be established by law, in particular regarding migrant detention. This is especially the case as migrants are most often never charged with any criminal offence (except in countries which unduly make irregular migration a crime), are mostly not considered dangerous. Including some language on alternatives to detention in the guidelines would be very welcome in this regard. (For further suggestion on alternatives please see A/HRC/20/24 paras 48 – 67)

Conclusion

The Special Rapporteur on the human rights of migrants warmly welcomes the initiative of the WGAD to develop 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. He also recognizes that the WGAD is already very sensitive to issues of administrative detention of migrants, as demonstrated by the important work done and decisions they have already made in this area.

The Special Rapporteur thus urges the Working Group to continue to include the migrants perspective in the guidelines, in particular by making explicit the application of these guidelines to migration detention. The Special Rapporteur believes it will be important to make clear the specific vulnerabilities of migrants detainees, specifically noting the lack of guarantees provided for in domestic administrative law under whose jurisdiction migrants often find themselves detained, and the other practical considerations noted above which often result in the limitation of these rights for detained migrants.

Although the Special Rapporteur is aware that there are certainly other vulnerable groups that may be considered by the WGAD in the guidelines, he considers it important to specifically include language on the detention of migrants. Migration, and in particular irregular migration, is a highly politicized area where negative discourse is prevailing, and as a result detention is in fact increasing and rights are being retracted. Thus explicit proclamations by the WGAD in respect of migrants rights would be an important contribution to this area of international human rights law.

Finally, the Special Rapporteur looks forward to further working together on these guidelines and offers his ongoing support and collaboration as the guidelines are developed.