

PRINCIPLES OF INTERNATIONAL LAW CONCERNING ARBITRARY DETENTION

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ABSTRACT

Arbitrary detention is a common phenomenon in several human rights violations across the world. The prerogative of detention usually belongs to personnels under law enforcement and the armed forces, with permission of the Court. It comprises of violations ranging from torture to the right to fair trial. It intertwines the basic duties of crime prevention with abuse of State powers. In a democracy, the international community follows certain acceptable standards to be followed by the criminal justice system. This paper seeks to divulge the issue of arbitrary detention as a human rights violation and the scope of international legal instruments that deal with these matters.

Keywords: arbitrary detention, criminal justice system, international law, human rights, torture.

Introduction

The amalgamation of cases in arbitrary detention that affects millions of people around the world is a form of human rights abuse and leads to undermining the rule of law. Pretrial detainees may lose their jobs and homes; contract and spread disease; be asked to pay bribes to secure release or better conditions of detention; and suffer physical and psychological damage that lasts long after their detention ends.²Arbitrary detention does not only shatter public confidence in the State, but also depicts a frail rule of law and tramples over the justice seeking individuals. Three main causes have been identified for the prevailing situation, namely, a ruined legal culture, corruption in the criminal justice system and a crumbled infrastructure and crippled institutions.³

Definition

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²“Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk”, A Global Campaign For Pretrial Justice Report, 2011, Open Society Foundations.

³“Guilty Until Proven Innocent”, Report on the Causes of Arbitrary Arrest, Lengthy Pretrial Detention and Long Delays in Trial, by Donna El Hindi, ALEF-Act for Human Rights, 2013.

As the term ‘arbitrary detention’ has not been properly defined in International Law, the Working Group on Arbitrary Detention (WGAD)⁴ refers to it as a deprivation of liberty that is contrary to human rights provisions enshrined in major human rights standards and instruments.⁵

In International Law, the term ‘deprivation of liberty’ has been defined in many ways. The United Nations Commission on Human Rights coined the term ‘deprivation of liberty’ since it “relates to the protection of individuals against arbitrary deprivation of freedom in all its forms, and its mandate extends to deprivation of freedom either before, during or after the trial, as well as deprivation of freedom in the absence of any kind of trial (administrative detention).”⁶

The United Nations High Commissioner for Refugees (UNHCR) guidelines on detention state that it is “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed.”⁷ Whereas the United Nations Standards and Norms in Crime Prevention and Criminal Justice defines detention as: “the condition of being a detained person under investigation for having committed a criminal offence, having been accused of a criminal offence, or during trial; under administrative detention; or for any other reason other than as a consequence of a criminal conviction.”⁸

Legal Application

Article (9)(1) of the International Covenant on Civil and Political Rights states the requirement that deprivation must be prescribed by law. It interprets to mean that “the law must be accessible, understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including authorities, and be consistent with

⁴The Working Group on Arbitrary Detention, Fact Sheet No.26, 37. The WGAD, established by resolution 1991/42 of the former Commission on Human Rights is a non-treaty based body, mandated to investigate cases of arbitrary detention, seek and receive information about such detentions from governments, NGOs, individuals etc.

⁵United Nations Human Rights Council, A/HRC16/47, “Report of the Working Group on Arbitrary Detention,” 2011.

⁶ The Working Group on Arbitrary Detention, *Fact Sheet No.26*, (Geneva: Office of the United Nations High Commissioner for Human Rights, 2000), 5.

⁷*Legal and Protection Policy Research Series: Alternatives to Detention of Asylum Seekers and Refugees*, by Ophelia Field et. al., United Nations High Commissioner for Refugees (Geneva: POLAS, April 2006).

⁸ Centre for Human Rights Crime Prevention and Criminal Justice Branch, *Human Rights and Pre-Trial Detention: A Handbook of International Standards relating to Pre-Trial Detention*, Professional Training Series no. 3, (New York and Geneva: United Nations, 1994), 6, quoted in United Nations Publication, Sales No. E.92.IV.1.

other applicable law.”⁹ Hence, domestic and international legal standards must abide by the standard of lawfulness enshrined in the ICCPR.

To measure what can be considered ‘arbitrary’, “the element of injustice, unpredictability, unreasonableness, capriciousness and proportionality”, the procedure followed has been compiled by the International Committee of Jurists. The rules have established that the detainee must be promptly informed of the grounds of arrest.¹⁰ *Incommunicado* detention is strictly prohibited and a relative of detainee must be informed within 18 (eighteen) hours of detention¹¹. Access to a lawyer must be facilitated within 24 hours of the arrest. The procedure must ensure judicial control which gives effect to the right to be brought before a competent authority¹² and the right to have a court determine the lawfulness of the detention.¹³ All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person and have access to prompt medical care.¹⁴ The detainee is entitled to a fair trial by a competent, independent and impartial tribunal established by law within reasonable time or release.¹⁵ The trial must be conducted in accordance with international fair trial standards.

The Working Group on Arbitrary Detention considers five grounds to be arbitrary under customary international law, these are: (i) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty; (ii) when deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights; (iii) when total or partial non-observance of the international norms relating to the right to a fair trial established in the Universal Declaration of Human Rights and in the relevant international instruments; (iv) when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review of remedy; and (v) when the reasons are discrimination based on birth; national, ethnic or social origin; language; religion;

⁹ International Commission of Jurists, *The Definition and Scope of Arbitrary Deprivation of Liberty in Customary International Law*, 62nd Session of the Working Group on Arbitrary Detention (United Nations Human Rights Council, February 2012), 4.

¹⁰ Article 9 (2) of ICCPR

¹¹ Article 10 (1) of ICCPR

¹² Article 9(3) of ICCPR

¹³ Article 9 (4) of ICCPR

¹⁴ Article 10 of ICCPR

¹⁵ Article 9(3) and Article 14 of ICCPR

economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights.¹⁶

In between the course of criminal investigations and judicial proceedings, pretrial detainees must be free from all forms of torture and other inhuman or degrading treatment. The International Court of Justice in its *Diallo*¹⁷ decision concluded that article 9, paragraphs 1 and 2, of the Covenant apply in principle to any form of arrest or detention and are not confined to criminal proceedings. The Optional Protocol to the Convention Against Torture (OPCAT) provides clear opportunities to strengthen the torture prevention framework at the national level, and has created an opportunity for countries to review their monitoring practices for police detention and other pretrial facilities.

Conclusion

In order to ensure the aforementioned international standards, it becomes necessary to place a clear public mechanism for regular monitoring of the judicial system, a detailed calendar for any reforms to be achieved, a regular evaluation of the implementation and systematic consultations with human rights NGOs. Raising public awareness on the issue of arbitrary detention would also serve a better cause. Building of detention facilities and more holding cells in various court houses will ensure better living conditions for detainees. The key actors such as lawyers, judicial officers, police, public prosecutors and judges may undoubtedly help in prevention of the evils of arbitrariness by gaining better understanding on the role and function of detention and the rights of suspects in the context of the criminal procedural law and resort to alternative investigation and interrogation process. The practice outcomes should reflect adherence to international human rights standards.

¹⁶ Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012.

¹⁷ See Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), para. 77.