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Open Dialog Foundation comments and suggestions to the WGAD Draft Pricniples and Guidelines worked out by the UN Working Group on Arbitrary Detention

Open Dialog Foundation appreciates the possibility to make a contribution to the elaborating of general principles to prevent arbitrary detention. We would like to concentrate on general remarks to recent document as well as to draw particular attention to human rights of detained refugees.

General comments to the Draft Principles and Guidelines worked out by the UN Working Group on Arbitrary Detention:

- There is a need to provide the guarantees for effective and correct implementation of Draft Principles and Guidelines in practice. For example, it concerns such applications as Right to be informed and Implementation measures. It is unclear, how much is this document binding for the States and whether there are sanctions for noncompliance.
- As well as measures to take for children, women, persons with disabilities and non-nationals there is a need to add specific measures for people arrested because of their convictions to the document. In Draft Principles and Guidelines there are not so many references to that problematic. In particular, there is only one concrete reference to human rights defenders in the whole document (Par. 9 Introduction).
- Along with Specific measures for children, women, persons with disabilities and other specific guidelines for extreme cases such as involuntary hospitalizations should be developed in the document.

To clarify or complete such concrete provisions:

In Introduction:

- In Par. 9 to extend the list of human beings who can suffer from inequality of human rights with political opponents and journalists who are very often victims of unlawful arrests. The category of persons suffering of mentally disorders could also be added instead of dementia disorders since dementia disorders do not include all persons who need a special protection.
- In Par. 10 in the framework of provisions on detention, arrest, pre-trial and post-trial detention and generally all situations of deprivation of liberty to develop more the theme of forced psychiatric treatment.
- In Par. 11 to extend the list of cases regarded as "arbitrary" deprivation of liberty with cases of political opponents and unlawful arrests due to freedom of speech and freedom of thought.

In Principles:

- In ***Principle 6 (The court as reviewing body)***, which concerns the court as reviewing body of the arbitrariness and lawfulness of the deprivation of liberty, to mention ways and means to control impartiality, competence and independence of the tribunal before the damage is done.
- In ***Principle 7. (Right to be informed)*** it is said that the detained person should be informed about his/her rights and obligations in an understandable language. This statement should be extended with guarantees for person to express him/herself clearly in given language. Moreover, the language used in a Justice Court is very technical and not easy to understand even for natives.
- It may be useful to mention in ***Principle 9 (Prompt and effective legal assistance)*** that the internal rules of the detention place cannot limit the access to a lawyer in a way with is not compatible with an effective defence, because for example a psychiatric hospital may strictly limit the access to patients or prohibit it for a certain period of time.

  Moreover, in part of privacy and confidentiality of legal representative-detainee communications (par.29) it would be better to underline that exchange between the legal counsel and the detainee could be within sight but not within the hearing. Legal strategy should remain strictly confidential towards the detention centre in order to avoid any measures of reprisal.
- In ***Principle 10. (Persons able to bring proceedings before a court)*** it could be added that the detainee should not be restricted to contact his/her employer as well as legal representative, family members or other interested parties.

In Guidelines:

- In ***Guideline 2. (Prescription in national law)*** to add a provision that national laws (which are the base for any restriction of liberty) should be in conformity with the basic principles of human rights.
- In ***Guideline 4. (Characteristics of the court and procedural guidelines for the review of the arbitrariness and lawfulness of the detention) par.73 (i)*** there should be listed measures which the court can take against the State authorities in control of the detention where the deprivation of liberty is determined to be arbitrary or unlawful and/or the treatment during the deprivation of liberty was abusive. Also, there are no guarantees that the court will be impartial enough to really take those measures.

  Par. 74 is devoted to the creation and activity of a specialized tribunal, but there are no guarantees that the tribunal would comply with qualities of competence, impartiality and the enjoyment of judicial independence.
- In ***Guideline 22. (Implementation measures)*** it is advisable to add that States are encouraged to provide training also to lawyers, legal representatives who are those who can challenge the detention. Also, Trainings or documents with useful information should be delivered to those who are in charge/ working in places of detention.

Detentions of refugees

Refugees' human rights are mentioned in the Introduction as a group which needs special protection. Both Principle 21. and Guideline 21. (Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers and refugees) provide detailed provisions aimed to protect refugees' and asylum seekers' human rights. Nevertheless, we would like to draw attention to more basic problem of arrests of refugees on the base of Interpol alert, which also frequently violates international norms and standards of human rights. Nevertheless, the facts of refugees' arrests on the base of Interpol alert are still in common.

The Open Dialog Foundation has prepared a report which details 44 high-profile cases in which political refugees or asylum-seekers have been the victims of abuse of the Interpol system by authoritarian states.[1] As we already reported in the letter to UN High Commissioner for Refugees António Guterres, refugees remain on lists of internationally wanted persons even after courts have refused to render them to authoritarian states. Due to this situation, refugees often have to limit their public activities, as they risk being detained at borders. In most cases, Interpol removes 'red notices' only after the state closes the criminal case or declares amnesty. However, situations in which the states themselves close politically motivated cases are uncommon.

After arrests political refugees are forced to remain behind bars for months or even years, while lengthy procedures for the consideration of extradition requests and the challenging of Interpol notices are on-going. Moreover, following arrests based on Interpol Red Notices, political refugees or asylum holders risk being extradited to an authoritarian state, which can subsequently lead to tragic consequences. For example, Rasoul Mazrae, an Iranian opposition activist, was rendered from Syria to Iran, despite the fact that the UN had recognised him as a political refugee. In Iran, Mazrae was tortured and sentenced to death. Human rights activists claim they have no information regarding his execution[2].

Open Dialog Foundation urges Working Group on Arbitrary Detention to consider the following suggestions:

- Initiate a process of reform of the international refugee status in order so that the said status shall protect a wanted person from arrest on the request of the State from which he or she has fled. In particular, a person who has been granted international protection in an EU state should not be subjected to arrest in another EU member state.
- Since Interpol rules merely define a methodology for the verification of whether requests have an underlying political component, but do not prescribe criteria for evaluation and decision-making, it is advisable to consider the possibility of participation of UN agencies in the development of comments on Article 3 of the Interpol Constitution in order to specify and detail the provisions of this article and

[1] http://en.odfoundation.eu/a/5947,the-report-the-interpol-system-is-in-need-of-reform
[2] http://www.huffingtonpost.com/the-center-for-public-integrity/international-police-agen_b_901385.html

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prevent its selective or arbitrary interpretation. This document could be adopted in the form of a resolution with reference to the examples of high-profile cases.

– Based on the fact that Interpol is working on collaborative projects with various UN agencies, it is recommended to initiate a more detailed project on prevention of groundless arrests of refugees. The purpose of the project could be to create mechanisms to protect the rights of persons who have been granted refugee status, yet are still listed as wanted in the Interpol database.

Technical remarks:

– Footnote 5, 67 and 68 are missing;

– In the paragraph 7 it would be useful to add as a footnote the list of States, which provided the Working Group with an overview of current practice in implementing substantive and procedural obligations to ensure the meaningful exercise of the right to bring proceedings before a court.