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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Written statement* submitted by Commonwealth Human Rights Initiative, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[20 August 2020]

* Issued as received, in the language(s) of submission only.



Arbitrary Detention in The Commonwealth: Addressing The Elephant In The Room

Overview

At the 45th Session of the United Nations Human Rights Council (UNHRC), the Commonwealth Human Rights Initiative (CHRI) calls on Member States to take measures to effectively address the issue of arbitrary detention and deprivation of liberty and to ensure respect for the rule of law in consonance with their international human rights obligations. The prohibition on arbitrary deprivation of liberty is absolute and universal.¹ Arbitrary detention is a gross violation by itself and often serves as a starting point for other violations like extrajudicial executions, torture and ill-treatment.²

The global pandemic has posed a real threat to the realisation of human rights, including the right to liberty. Cases of arbitrary detention need to be looked at in a special context in the pandemic as they emphasise the increased vulnerability of those in closed facilities like prisons and detention centres. Certain individuals such as human rights defenders (HRDs) are more likely to be detained arbitrarily, despite appeals to the contrary by UN High Commissioner for Human Rights.³

Notwithstanding the responsive policies announced by many States, we urge Member States to respect the prohibition against arbitrary detention; release those detained without a sufficient legal basis, including “prisoners of conscience”; and take appropriate measures, including structural reforms, to address and reduce arbitrary detention.

Pretrial Detention

The proportion of unsentenced prison population to the total prison population is a key indicator marking progress of countries towards Sustainable Development Goal 16. However, pretrial detention is widely practised,⁴ with approximately 1.4 million detainees in the Commonwealth awaiting trial.⁵ Prolonged pretrial detention, both in criminal justice and administrative contexts, undermines international human rights law and the rule of law.

In India, the population of pretrial detainees in 2017 was approximately 280,000 accounting for 69% of the total prison population. The national average of the occupancy level of Indian prisons was 117% while some of the prisons were functioning with occupancy rates higher than 200%.⁶ Similarly, in Pakistan, the number of pretrial detainees in 2019 was 47,988, that is was 62.1% of the total prison population.⁷ In Bangladesh, the percentage of pretrial detainees in the total prison population was 81.3%. 71,612 out of the total 88,084 prisoners were reportedly pretrial detainees.⁸ In Nigeria, pretrial detainees constitute three-fourth of the total prison population: approximately 50,000 out of 73,726.⁹ Detention over petty offences is prevalent in Nigeria, contributing to congestion in prisons.¹⁰

In Australia, concerns have been raised over immigration detention policies allowing prolonged, arbitrary detention.¹¹ Similarly, the United Kingdom of Great Britain and

¹ <https://www.ohchr.org/Documents/Issues/Detention/DeliberationNo11.pdf>.

² https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en.

³ <https://news.un.org/en/story/2020/04/1061002>.

⁴ <https://unstats.un.org/sdgs/metadata/?Text=&Goal=16&Target=16.3> (last accessed 18 August 2020).

⁵ <https://www.humanrightsinitiative.org/publication/report-on-panel-discussion-on-reducing-pretrial-detention-in-the-commonwealth>.

⁶ https://drive.google.com/file/d/10_YCJ8RARz-32Z4mdWBvDwBzuCHN65ID/view.

⁷ <https://www.prisonstudies.org/country/pakistan>.

⁸ <https://www.prisonstudies.org/country/bangladesh>.

⁹ <https://www.today.ng/news/nigeria/70-nigerian-prisoners-held-trial-correctional-chief-291448>.

¹⁰ *ibid.*

¹¹ <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>; see also, <https://www.theguardian.com/commentisfree/2019/oct/28/our-immigration-detention-system-is-cruel-and-damaging-by-its-very-nature>.

Northern Ireland is one of only a handful of countries without a time-limit on immigration detention.¹² While the Home Office states that the policy does not mean indefinite detention and that it must be used sparingly,¹³ thousands of people are reportedly detained every year and some for lengthy periods.¹⁴

Incommunicado Detention

Incommunicado detention is ‘arbitrary’ in its very essence:

In Cameroon, in July-August 2019, authorities reportedly held over 100 detainees incommunicado at a detention facility in Yaounde.¹⁵ On 2 August 2019, journalist Samuel Wazizi was arrested¹⁶; he was never presented before the court, nor were his family and lawyer informed of his whereabouts.¹⁷ In June 2020 — 10 months later — the military confirmed that he had died on 17 August 2019.¹⁸ In Tanzania, lawyer Tito Magoti and Theodory Giyani were arrested without a warrant, held incommunicado for four days before being charged, and have been in detention since December 2019.¹⁹

In Pakistan, activist Idris Khattak disappeared in November 2019 and the Government disclosed his whereabouts only in June 2020 after he was held incommunicado for seven months.²⁰ 12 students in Bangladesh were arrested in August 2018, held in an unknown location, and officially remanded only after they were produced before a Magistrate Court in Dhaka after six days.²¹ The Committee Against Torture had also raised concerns about unacknowledged detention in Bangladesh.²²

Vulnerability of human rights defenders to arbitrary deprivation of liberty

HRDs and activists, among other vulnerable groups, are often at the risk of being arbitrarily detained, especially during the COVID-19 crisis when access to justice is already limited.

In Malaysia, Sarasvathy Muthu and four activists were detained in June 2020 for silently protesting for the rights of hospital workers. They were released on bail since the police could not procure a remand order.²³ In Sri Lanka, Hejaaz Hizbullah, a human rights lawyer, was held without charge and without being produced before a magistrate for over 90 days. He was subsequently charged under the Prevention of Terrorism Act, limiting his access to his lawyers and family.²⁴

In India, several activists and student leaders were arrested and detained for protesting against the amendment to India’s citizenship laws.²⁵ Akhil Gogoi, an activist leader, was arrested in March 2020 in relation to such protest.²⁶ He tested positive for COVID-19 while in jail and

¹² <https://www.unhcr.org/uk/59dddae4.pdf>.

¹³ <https://homeofficemedia.blog.gov.uk/2020/06/29/media-factsheet-detention-time-limits/>.

¹⁴ <https://bit.ly/30Rpmpq>.

¹⁵ <https://www.hrw.org/news/2019/08/20/cameroon-detainees-tortured>.

¹⁶ <https://www.ubuntutimes.com/press-advocacy-body-implores-un-to-investigate-cameroonian-journalists-death/>.

¹⁷ <https://monitor.civicus.org/updates/2020/07/06/Military-forced-admit-journalist-Samuel-Wazizi-died-custody-10-months-after-his-death/>.

¹⁸ <https://rsf.org/en/news/cameroonian-journalist-samuel-wazizi-died-detention>.

¹⁹ https://www.americanbar.org/groups/human_rights/reports/tanzania--preliminary-analysis-of-the-criminal-case-against-tito/.

²⁰ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26010>.

²¹ <https://www.dhakatribune.com/bangladesh/court/2018/09/11/missing-for-six-days-12-youths-finally-shown-arrested-remanded>.

²² https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/BGD/CO/1&Lang=En.

²³ <https://www.frontlinedefenders.org/en/case/woman-human-rights-defender-sarasvathy-muthu-charged>.

²⁴ <https://www.amnesty.org/en/latest/news/2020/07/sri-lanka-on-hejaaz-hizbullah-and-the-prevention-of-terrorism-act/>.

²⁵ <https://www.fidh.org/en/issues/human-rights-defenders/india-arbitrary-detention-of-several-defenders-for-protesting-against>.

²⁶ <https://thewire.in/rights/akhil-gogoi-bail-rearrest>.

was shifted to a hospital for treatment.²⁷ 11 prominent activists were imprisoned for unfounded charges in the Bhima Koregaon case.²⁸ They remain detained,²⁹ while one of them, Varavara Rao, had to be shifted to hospital to be treated for COVID-19.³⁰ Most of them were charged under the anti-terror law.³¹ A pregnant student leader, Safoora Zargar, was held in prison for five months before being granted bail on ‘humanitarian grounds’.³² She had been earlier denied bail three times.³³ In August 2020, the detention of Dr. Kafeel Khan, detained since December 2019, under the National Security Act was extended by three months.³⁴

In Nigeria, Omoyele Somore, a pro-democracy activist, was detained and charged with treason, cybercrime and money laundering in August 2019.³⁵ Even after meeting the bail conditions ordered by the Court in October 2019,³⁶ the Department of State Security (DSS) rearrested him soon after he was freed.³⁷ Agba Jalingo was also charged with treason for criticising the Governor of the Cross River state.³⁸ His bail was repeatedly rejected³⁹ and he was finally granted bail in February 2020.⁴⁰ In Rwanda, authorities reportedly detained journalists and bloggers covering the violations and abuse by security forces while enforcing lockdown measures.⁴¹ In Cameroon, Akumbom Elvis McCarthy was arrested in March 2018⁴² and was detained for three weeks before being brought before the military tribunal — on charges of “disseminating secessionist propaganda”. He was remanded for a renewable six-month period while police investigate the charges against him.⁴³ He was finally released in December 2018.⁴⁴

Recommendations

CHRI reiterates that the notion of ‘arbitrariness’ need not essentially mean ‘against the law’ and should be interpreted more broadly to include elements of inappropriateness, injustice, absence of due process of law, and lack of predictability, reasonableness, necessity and proportionality.⁴⁵

We, thereby, urge Member States to:

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- ²⁷ <https://www.hindustantimes.com/india-news/gauhati-hc-grants-bail-to-peasant-leader-akhil-gogoi-who-tested-positive-for-covid-19/story-vksM1T5kJECDSOtVcJESNL.html>.
- ²⁸ <https://www.thehindu.com/opinion/editorial/shock-arrests/article24813620.ece>; see also, <https://amnesty.org.in/news-update/india-must-put-an-end-to-the-unjust-cruel-and-continued-incarceration-of-bhima-koregaon-activists/>.
- ²⁹ <https://www.thehindu.com/news/national/other-states/bhima-koregaon-demand-to-release-arrested-activists/article30261064.ece>.
- ³⁰ <https://theprint.in/india/varavara-rao-moved-to-nanavati-hospital-for-neurological-treatment-for-delirium/464005/#:~:text=Lodged%20in%20the%20Taloja%20jail,citing%20his%20deteriorating%20health%20condition.>
- ³¹ Ibid.
- ³² <https://www.livemint.com/mint-lounge/features/the-curious-case-of-humanitarian-grounds-in-safoora-zargar-s-bail-order-11592916696953.html>.
- ³³ <https://scroll.in/latest/963851/delhi-violence-pregnant-jamia-student-safoora-zargar-denied-bail-for-third-time>.
- ³⁴ <https://thewire.in/rights/kafeel-khans-nsa-detention-extended-by-three-months>.
- ³⁵ <https://www.hrw.org/news/2019/08/07/nigeria-activists-detention-sign-growing-intolerance>.
- ³⁶ <https://guardian.ng/news/court-varies-bail-conditions-for-sowore/>.
- ³⁷ <https://edition.cnn.com/2019/12/06/africa/sowore-arrested-after-bail/index.html>.
- ³⁸ <https://cpj.org/2019/09/nigerian-publisher-agba-jalingo-charged-with-treas.php>.
- ³⁹ <https://www.amnesty.org/en/latest/news/2019/11/nigeria-sowore-bakare-and-jalingo-declared-prisoners-of-conscience/>.
- ⁴⁰ <https://www.amnesty.org/en/documents/afr44/1866/2020/en/>.
- ⁴¹ <https://www.hrw.org/news/2020/04/24/rwanda-lockdown-arrests-abuses-surge>.
- ⁴² <https://cameroonnewsagency.com/abakwa-fm-pidgin-news-caster-akumbom-mccarthy-spends-second-night-bamenda-central-prison/>.
- ⁴³ <https://cpj.org/2018/05/cameroon-military-court-orders-radio-journalist-to/>.
- ⁴⁴ <https://www.dailynewscameroon.com/anglophone-crisis-i-spent-a-month-on-the-floor-at-the-bamenda-judicial-police-journalist-akumbom-elvis-mccarthy/>.
- ⁴⁵ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en.

- Refrain from violating the prohibition against arbitrary detention; condemn abuses by enforcement agencies; and ensure effective investigation into all allegations of incommunicado detention to provide justice, protection and adequate compensation to victims.
 - Take concrete measures to reduce and gradually eliminate pretrial detention, which jeopardises the principle of presumption of innocence, and prioritise the release of detainees who have not been charged and explore other alternatives to incarceration, such as rehabilitation, admonition, restitution, fines, bail, and probation.
 - Ensure that access to legal counsel shall not be impeded at any point in time and that other rights of detainees outlined in the Nelson Mandela Rules are fully respected and upheld.
 - Immediately and unconditionally release all HRDs and “prisoners of conscience” detained for their legitimate human rights work, for expressing critical or dissenting views, or exercising of the rights guaranteed under international human rights law.
 - In the context of the COVID-19 pandemic:
 - (a) Ensure the availability and access to adequate and quality health care in the penitentiary services;
 - (b) Provide temporary or alternative accommodations, temporary release on parole and other alternatives to detention to address the problem of overcrowding which impedes physical distancing and other health and hygiene guidelines necessary to prevent and curb the spread of the virus in prisons;
 - (c) Make provisions for release of children in conflict with the law and pretrial detainees suspected of or charged with minor or non-violent criminal offences, who pose no grave threat to public safety, and those who face heightened risk of illness or death due to age or underlying medical conditions.
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