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United States of America: arbitrary detention remains embedded in immigration, civil and military detention systems

WRITTEN STATEMENT ITEM 3: INTERACTIVE DIALOGUE WITH THE WORKING GROUP ON ARBITRARY DETENTION

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Amnesty International welcomes the preliminary findings of the Working Group on Arbitrary Detention on its visit to the United States of America (USA) in October 2016.¹ This written statement focuses on Amnesty International's concerns regarding mandatory detention, the detention bed mandate, confinement of pregnant women and the Guantánamo Bay detention centre.

Mandatory detention and family detention

The findings related to mandatory detention, the need for individualized assessment and the lack of access to representation mirror the findings of Amnesty International's own research.² Furthermore, the preliminary findings of the Working Group highlighted the expansion of family detention in response to the flow of asylum seekers from El Salvador, Guatemala and Honduras, and led to the opening of two family detention centres at the border in Texas in 2014, increasing capacity to more than 3500 bed spaces in which families can be detained.³

Amnesty International has highlighted the issue of family detention through the stories of four families who fled violence and instability in El Salvador and Honduras. Antonio (7), Carlos (4), Josué (3) and Michael (16) and their mothers Marlene (24), Lorena (34), Teresa (28) and Maribel (41)⁴ are seeking asylum in the U.S. after escaping horrific violence in their home

¹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E>

² USA: Jailed Without Justice: Immigration detention in the USA, Amnesty International, 2009, available at: <https://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>

³ See GEO Group website, <https://www.geogroup.com/FacilityDetail/FacilityID/58>; see also Corrections Corporation of America website, <http://www.cca.com/facilities/south-texas-family-residential-center>.

⁴ Pseudonyms were used to protect the identity of all children and mothers.

countries. They were held in detention for nearly two years, the majority of that time at the Berks County Residential Center in Pennsylvania. Each family fled traumatic and life-threatening events, including kidnapping threats and severe physical and sexual violence. For instance, Michael was targeted for gang recruitment and threatened if he refused to join. After his friends were killed for refusing to join gangs, Michael and his mother Maribel fled to the U.S. while three-year old Josué spent more than half of his life in detention.

Despite these compelling grounds for asylum, the families were detained and subject to removal after their claims were denied following a cursory, expedited review at the border. These families have never had a full opportunity to present their claim to an immigration judge. Authorities granted all four children Special Immigrant Juvenile Status (SIJS) in late 2016 after a state court determined that it was not in the minors' best interests to return to their home country. Regardless, Immigration and Customs Enforcement authorities refused to release these families as they sought legal relief to prevent their removal. Only after a July 2017 US Ninth Circuit Court of Appeals decision found that children in detention must be provided access to bond hearings⁵ were the children ordered to be released along with their mothers as their custodial parent until a final determination of their cases.⁶

Recommendations:

- In accordance with the fundamental human right of any person to be presumed innocent, the US Congress should pass legislation creating a presumption against the detention of immigrants and asylum seekers and ensuring that it be used as a measure of last resort and in exceptional cases;
- The US government should ensure that alternative non-custodial measures, such as reporting requirements or an affordable bond, are always explicitly considered before resorting to detention. Reporting requirements should not be unduly onerous, invasive or difficult to comply with, especially for families with children and those of limited financial means. Conditions of release should be subject to judicial review.
- The US Congress should pass legislation to ensure that all immigrants and asylum seekers have access to individualized hearings on the lawfulness, necessity, and appropriateness of detention, as well as the right to challenge their results.
 - Detention should be used only if the US government demonstrates in each individual case that it is a necessary and proportionate measure. No-one should be subject to “mandatory detention.”
 - Decisions to detain should be subject to formal and regular review by a judicial body.

Detention bed mandate

While the statutory framework that allows for mandatory detention in immigration enforcement violates international law and standards, the US Congress' inclusion of the detention bed mandate in funding for the US Department of Homeland Security, described below, requires

⁵ Flores v. Sessions, et al, No. 17-55208, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/07/05/17-55208.pdf>, see also, Maura Dolan, 9th Circuit Judges: Minors who enter U.S. illegally may not be confined without court hearings, LA Times, 5 July 2017, available at <http://www.latimes.com/local/lanow/la-me-ln-minor-immigrants-9th-circuit-20170705-story.html>

⁶ See Amnesty International USA Press Releases, 7 August 2017, available at <https://www.amnestyusa.org/press-releases/amnesty-international-usa-child-held-at-berks-immigration-center/> and 14 August 2017, available at <https://www.amnestyusa.org/press-releases/family-fleeing-violence-ordered-released-from-berks-immigration-center/>

immigration authorities to fill those bed spaces on a nightly basis, rather than be based on need.

In 1996, immigration authorities had a daily detention capacity of less than 10,000.⁷ In the years following the 11 September 2001 terror attacks in the United States, immigration enforcement became a greater priority for the government, leading to increased funding for detention bed space for immigration enforcement purposes.⁸ In 2009, Congress passed a law that required no fewer than 33,400 immigrant detention beds to be “active” every night, which is treated as a mandate.⁹ Those detention bed levels have been roughly maintained, with some slight fluctuations over the past eight years, however 2016 saw an upsurge of the number of daily detentions by immigration authorities to more than 37,000¹⁰ by July and more than 41,000 by October.¹¹ The current administration is seeking to expand that level through requests for the 2018 budget for the Department of Homeland Security to increase funding to \$2.7 Billion USD “for more than 51,000 detention beds to accommodate expected increases in interior arrests of criminal and fugitive aliens.”¹² This detention bed mandate, or quota, together with the mandatory detention statutory framework, increases the risk that large numbers of migrants and asylum seekers will be arbitrarily detained in the USA.

Recommendations:

- Amnesty International encourages the Working Group on Arbitrary Detention to analyse the way that the detention bed mandate and funding may work in tandem with the mandatory detention laws to increase the arbitrary detention of migrants and asylum seekers;
- The US Congress should rescind the detention bed mandate from the funding legislation for the US Department of Homeland Security.

Confinement of pregnant women

Amnesty International welcomes the Working Group’s preliminary findings recognizing human rights concerns surrounding the confinement of pregnant women suspected of drug use. A 2017 report by Amnesty International analysed the unique forms of regulation imposed on pregnant women who use drugs in the USA, including forced state intervention and criminalization.¹³ Amnesty International concluded that criminalization and other punitive

⁷ Office of the Inspector General, US Department of Justice, Audit Report 97-05 (1/97), Immigration and Naturalization Service Contracting for Detention Space, January 1997, page 2, available at: <http://www.usdoj.gov/oig/reports/INS/a9705/index.htm>.

⁸ Department of Homeland Security Appropriations Act, 2007, PL 109-295, 4 October 2006, available at <https://www.congress.gov/109/plaws/publ295/PLAW-109publ295.pdf>

⁹ Department of Homeland Security Appropriations Act, 2010, PL 111-83, 28 October 2009, available at <https://www.gpo.gov/fdsys/pkg/PLAW-111publ83/pdf/PLAW-111publ83.pdf>

¹⁰ Caitlin Yoshiko Kandil, Jails serve inmates and immigrants, Los Angeles Times, 29 July 2016, available at <http://www.latimes.com/socal/weekend/news/tn-wknd-et-0731-orange-county-detainees-20160723-story.html>

¹¹ Devlin Barrett, Record immigrant numbers force Homeland Security to search for new jail space, The Wall Street Journal, 21 October 2016, available at <https://www.wsj.com/articles/record-immigrant-numbers-force-homeland-security-to-search-for-new-jail-space-1477042202>

¹² Written testimony of DHS Secretary John F. Kelly for a Senate Committee on Appropriations, Subcommittee on Homeland Security hearing titled “Review of the FY2018 Budget Request for the U.S. Department of Homeland Security”, U.S. Department of Homeland Security, 25 May 2017, available at <https://www.dhs.gov/news/2017/05/25/written-testimony-dhs-secretary-kelly-senate-appropriations-subcommittee-homeland>; see also Department of Homeland Security, Fiscal Year 2018 Budget in Brief, at p. 4., available at <https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf>

¹³ Amnesty International, Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA, (Index: AMR 51/6203/2017), Available at www.amnesty.org/en/documents/amr51/6203/2017/en/

approaches, such as using civil laws to confine pregnant women, deters them from seeking healthcare services, has a discriminatory impact on marginalized women and violates human rights. In particular, Amnesty International has found that 1997 Wisconsin Act 292, Wis.Stat. §48.193, a civil law that allows commitment of pregnant women, is neither reasonable nor proportionate, and violates the rights to liberty, privacy and equal protection.¹⁴

Recommendation:

- States should repeal civil commitment laws which result in arbitrary detention of pregnant women. Federal and state authorities should prioritize a human rights approach to drug use during pregnancy by expanding access to affordable, gender-appropriate drug dependence treatment services and non-discriminatory sexual and reproductive healthcare services.

Guantánamo Bay detention centre

There were 41 men held at the US naval base in Guantánamo Bay in Cuba at the time of the inauguration of President Donald Trump on 20 January 2017. Seven months later, all 41 are still there. Two have been there since day one of detention operations (11 January 2002); 15 since year one; 40 have been held there for more than 10 years. Thirty of the 41 are held in indefinite detention without charge. Others have faced, or are facing, unfair trial by military commission. At least 24 of the 41 were in secret CIA custody prior to transfer to Guantánamo, and subjected to enforced disappearance.

During the presidential campaign in 2016, Donald Trump pledged not only to keep the Guantánamo detention facility open but to “load it up with some bad dudes.” In March 2017, asked about the prospect of new detainees arriving at the base, US Attorney General Jeff Sessions said “[t]here’s plenty of space... It’s a perfect place for it... I see no legal problem whatsoever with doing that.”¹⁵

At its peak in 2003, there were more than 650 detainees held at Guantánamo. In the first month of his presidency, there were indications that President Trump was about to issue an executive order giving the go-ahead for new detentions at Guantánamo, but so far no such order has been signed and no new detainee has been brought to the base. It is crucial that every opportunity be taken to discourage the USA from doing so and reversing its previous commitment to close the detention facility.

Recommendation:

- The USA must desist from transferring any new detainees to Guantánamo, and ensure without further delay an end to existing detentions there in full compliance with international law. Any detainee - who has the fundamental right to challenge the lawfulness of detention - whom the USA intends to prosecute should be promptly charged and brought to trial in ordinary federal court without recourse to the death penalty.

¹⁴ See National Advocates for Pregnant Women, “Leading Medical and International Human Rights Groups File Amicus Briefs Opposing Wisconsin Act 292” Available at http://advocatesforpregnantwomen.org/blog/2017/08/leading_medical_and_internatio.php

¹⁵ <https://www.nytimes.com/2017/03/09/us/politics/guantanamo-bay-jeff-sessions.html>