

Global Detention Project submission to the Working Group on Arbitrary Detention (WGAD)

This submission is provided in response to the Working Group on Arbitrary Detention's March 2015 Call for Input on the revised "Draft 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 a court without delay, 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."

Global Detention Project (GDP) research findings indicate that immigration detention is mainly carried out as an administrative measure although there is trend for criminalization in some countries. However, the administrative nature of immigration detention often means that immigration detainees paradoxically enjoy a lower level of procedural guarantees than persons, including non-nationals, in criminal proceedings and often results in confusion in courts so as to the applicable jurisdiction when it comes to challenging the legality of detention.

The Global Detention Project welcomes the WGAD's inclusion in the current draft of many elements identified in the GDP's January 2014 Submission as pre-conditions to the possibility to challenge immigration detention in court. It also welcomes specific immigration detention language in "Principle 21. Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers and refugees" and "Guideline 21. Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers and refugees."

The WGAD' new Principles and Guidelines will be extremely useful. The draft document clearly frames the right to challenge the lawfulness of detention before a court as a human right, the absence of which constitutes a human rights violation. It also emphasizes that certain groups are more vulnerable when deprived of their liberty.

GDP input into the revised draft:

1. With reference to vulnerable groups, based on Human Rights Committee (HCR) General Comment No. 35, the GDP suggests including specific reference to "stateless persons" in the current grouping of "migrants regardless of their migration status, asylum seekers and refugees." According to the HRC. "The inability of a State party to carry out

the expulsion of an individual *because of statelessness* or other obstacles does not justify indefinite detention.”¹

In particular, we suggest adding the reference to the following paragraphs (see suggested language in bold):

“9. For the purposes of the draft Principles and Guidelines, the terms “everyone” or “anyone” means every human being without discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights. It particularly includes, but is not limited to: women (especially pregnant and breastfeeding women) and men; girls and boys; soldiers ; persons with disabilities; including psychosocial disabilities; lesbian, gay, bisexual, transgender and intersex persons; non-nationals, including migrants regardless of their migration status, refugees and asylum seekers, internally displaced persons; **stateless persons**;

“16. Recognizing that certain groups are entitled to additional protection or are more vulnerable when deprived of their liberty, the draft Principles and Guidelines also provide specific provisions for women, children, persons with disabilities and non-nationals, including migrants regardless of their migration status, refugees, ~~and~~ asylum seekers and **stateless persons** and other groups with special needs.”

“Principle 21. Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, ~~and~~ refugees **and stateless persons**”

“64. Non-nationals, including migrants regardless of their status, asylum seekers, and refugees, and **stateless persons**.”

“Guideline 21. Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, and refugees and stateless persons”

“116. Any restrictions on the freedom of non-nationals, including migrants regardless of their migration status, asylum seekers ~~and~~ refugees, and **stateless persons** must be justified, necessary and proportionate. “

Also add the reference to other paragraphs currently featuring the list “migrants regardless of their migration status, refugees and asylum seekers” including paras 11, 66, and 77 (f).

¹ HRC, General Comment No. 35, para 18. CCPR/C/GC/35

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

2. Guideline 21, paragraph 116. Suggestion for additional language (in bold):

“(d) Allowing monitoring **of all places of immigration detention** and public reporting **by relevant United Nations agencies, regional and international human rights mechanisms, national human rights institutions, non-governmental organizations and consular officials (conditional upon request by persons in immigration detention)** to ensure that access to legal provisions for procedural guarantees is effective;”

3. Principle 21, paragraph 66. Suggested clarification to avoid use of the term “vary”:

“Irrespective of the body responsible for their detention order, administrative or other, non-nationals, including migrants regardless of their migration status, asylum seekers and refugees deprived of their liberty, shall be guaranteed access to a court of law, empowered to order immediate release or **specify** conditions of release.