

**Informative session on the
mandate of the United Nations
Working Group on Arbitrary
Detention (WGAD) in relation to
detention in migration context**

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What is the UN WGAD ?

- One of the Special Procedures of the Human Rights Council:
 - Distinction with from the UN treaty bodies;
 - Distinction between the thematic and country mandates.
- Composed of five members, each representing one geographical regions;
- Three working languages: English, French and Spanish;
- Supported by the Secretariat from the OHCHR;
- Holds three (private) sessions in Geneva per year;
- Revised Fact Sheet No. 26:
<https://www.ohchr.org/Documents/Issues/Detention/FactSheet26en.pdf>

The key questions about the mandate of the WGAD:

- 1. What is 'detention'?
- 2. When is detention 'arbitrary'?
- 3. What can the WGAD do about it?

Q1. What is 'detention'?

- Arts 9 of the UDHR and ICCPR protect the right to personal liberty and security;
- Therefore personal liberty is a principle, but it is not an absolute right;
- Restrictions are possible and permissible
- There is no uniform definition in international law of 'detention'.
- Criminal justice context is an obvious example of 'detention' but there are very many other contexts, including detention in the migration context, medical care, social care and education, for example.

Q1: What is detention?

2017 Annual Report (A/HRC/36/37) at para 52:

The Working Group is conscious of the increasing number of new regimes of deprivation of liberty that arise in different situations and contexts around the world. While prisons and police stations remain the most common places where an individual may be deprived of his or her liberty, there are a number of different places which an individual is not free to leave at will and which raise a question of de facto deprivation of liberty. It is paramount that, irrespective of what such places are called, **the circumstances in which an individual is detained are examined so as to determine whether he or she is in fact at liberty to leave such a place at will.** If not, it is paramount that all the safeguards applicable to situations of deprivation of liberty are in place so as to guard against any arbitrariness.

At para 56: The Working Group wishes to emphasize that **the deprivation of liberty is not only a question of legal definition, but also of fact.** If the person concerned **is not at liberty to leave,** then all the appropriate safeguards that are in place to guard against arbitrary detention must be respected and the right to challenge the lawfulness of detention before a court afforded to the individual.

See **Opinion 22/2020:** <https://undocs.org/en/A/HRC/WGAD/2020/22>

Q2: when is detention arbitrary?

- Arts 9 of the UDHR and ICCPR prohibit arbitrary detention;
- Categories of the WGAD:
- **Category I:** When it is clearly impossible to invoke any **legal basis** justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her);
- **Category II:** When the 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 and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant;

Q2: when is detention arbitrary?

- **Category III:** When the 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 accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character;
- **Category IV:** When asylum seekers, immigrants or refugees are subjected to **prolonged administrative custody without the possibility of administrative or judicial review or remedy**;
- **Category V:** When the deprivation of liberty constitutes a violation of international law on the grounds of **discrimination** based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings.

Q3: what can the WGAD do?

- Tools at the disposal of the WGAD to implement the mandate:
 - Urgent communications procedure: urgent appeals and allegation letters. These *can* lead to a public press statement.
 - Regular communications procedure: lead to the adoption of public Opinions of the WGAD;
 - Country visits which lead to public preliminary findings and subsequent country visit report with tailored recommendations;

Q3: what can the WGAD do?

- Annual reports (with thematic sections: e.g. right to legal assistance; human rights defenders);
- Deliberations:
 - Revised Deliberation No 5 on detention in the migration context:
<https://undocs.org/A/HRC/39/45>
 - Deliberation No 11 on prohibition of arbitrary detention during public health emergencies:
<https://undocs.org/A/HRC/45/16>

Opinions of the WGAD

- Tool available to anyone around the globe but **unique to the WGAD**-other SPs do not have this;
- The treaty obligations of the State(s) concerned does not matter;
- Submission about the circumstances of the alleged arbitrary detention-who detained, when, by what authority, under what circumstances etc.
- Not exceeding 20 pages, in one of the three WGAD's Working languages;
- CONSENT to be named in the communication to the Government, in the public Opinion of the WGAD and UN reports;
- Model Questionnaire and Model Consent Form:
<https://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>
- Written, quasi judicial proceedings that lead to the adoption of Opinion;
- Follow Up procedure.

How can the NGOs engage with the WGAD?

- Submission of requests for both urgent action and regular communications procedure (and their follow up);
- Engagement with the country visits: lobbying for invitations, supporting the WGAD during the visits with the information and following up the implementation of the recommendations made;
- Approaching the WGAD with suggestions for topics to address via the thematic sections of the annual reports and Deliberations.
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