

## Comments to the 10 February 2015 Draft Principles and Guidelines on remedies and procedures on the right to challenge detention in court

Following my participation at the universal consultation 1-2 September 2015, primarily to help ensure that the Working Group on Arbitrary Detention was aware of the work done on the African Commission Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, often referred to as the Luanda Guidelines as they were adopted in Luanda in May 2013, I was pleased to see the *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*, dated 10 February 2015. This is, undoubtedly, a scholarly and carefully drafted document with the capacity to substantially further the implementation of the right to *habeas corpus* worldwide.

Please find below some comments, mainly to the Introduction and the Principles; regrettably we did not have the time to sufficiently consider the Guidelines. Several of the comments originates from my colleague Karol Limondin, Special Advisor and representative of the Danish Institute for Human Rights in Zambia where he works on legal aid, including in criminal cases and to persons in pre-trial detention, and on community justice. Prior to this, Mr Limondin represented the Danish Institute first in Rwanda and later in Tanzania; consequently, his input is very much based on his experience and observations from the reality on the ground in Sub-Saharan Africa. He was also involved in the work on the Luanda Guidelines where he brought a similar perspective.

### Title

The title is very long; would it not be possible for the Working Group on Arbitrary Detention to find a shorter name, such as e.g. *Draft Principles and Guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to bring proceedings before a court?*

### Language

The language, not least in the Introduction but also in some of the Principles, is quite heavy with very long sentences. Would it not be possible to formulate in particular the Introduction in more accessible language?

### Paragraph 9

It could be considered to refer not only to 'persons living with HIV/AIDS and serious contagious diseases' but also to 'persons with other serious chronic diseases' that may not be contagious but still require special treatment and/or attention or could be stigmatising. In the (draft) national legal aid policy for Zambia, the drafting committee also added 'members of economically and socially disadvantaged groups' which would seem to go beyond the concept of 'minorities' as referred to in paragraph 9 in fine.

### Paragraph 10

The listing of the places where persons can be considered to be deprived of liberty is not completely clear: Why, for instance, the 'and' between 'psychiatric facilities' and 'international and transit

centres in ports or international airports' which could indicate that the 'psychiatric facilities' are also in 'ports or international airports'. This is, presumably, not intended. And why the 'or' between 'gathering centres' and 'hospitals'? Should one also mention quarantine facilities as well as certain facilities where children or the elderly are subject to constant supervision or to (in practice) deprivation of liberty?

### **Principle 2**

It does not seem clear what is meant by 'The right to bring proceedings before a court must also be protected in private relationships such that the duties apply to international organisations and under certain circumstances to non-State actors'. Especially the apparent link between 'private relationships' and 'international organisations' seems unclear.

### **Principle 3**

The text refers to any individual who is deprived of liberty in any situation, 'by or on behalf of a governmental authority at any level'. A question could be whether these principles and guidelines will be applicable to arrests / detention carried out by:

- Non-state / customary / traditional / informal authorities or institutions – depending on their status and attributions in the various countries;
- Private companies, e.g. security companies – and how this relates to the reference to 'private relationships' and 'non-state actors' in Principle 2;
- Community policing initiatives (again, depending on their status and attributions).

What exactly is meant by 'Participation in detention'?

### **Principle 7**

The formulation of the right to be informed could possibly be improved by taking into account the formulation of the Luanda Guidelines which seem to go beyond Principle 7; the Luanda Guidelines refer to the right to be informed 'orally and in writing' and not only in a language but also in a format that is 'accessible and .. understood'. See also how this issue has been dealt with in Paragraph 64 on non-nationals etc.

### **Principle 8**

The understanding of the terms 'arrest' and 'detention' might be interpreted in the national context in a way that gives rise to concern. Using the example of Zambia, the Police first 'apprehend' a suspect and only later on formally 'arrest' her/him. Maybe an alternative could be to mention that the right applies from the moment of 'deprivation of liberty' to ensure all such situations are captured. In the (draft) national legal aid policy for Zambia, the drafting committee referred to 'arrested persons or otherwise deprived from their liberty'.

### **Principle 9**

It would seem that the terminology used is not really consistent (there might, of course, be a reason for this seeming inconsistency that has escaped us):

- Title of principle 9 and paragraph 30 refer to 'legal assistance', paragraph 28 mentions 'legal representation', paragraph 31 'legal aid' – it should be considered to harmonise depending on which legal services are meant to be covered under principle 9.
- Paragraphs 27, 28 and 32 refer to 'legal representative', paragraph 28 mentions 'counsel' and later on 'suitably qualified legal representative', paragraph 30 refers to 'representative', paragraph 31 introduces the term of 'legal aid providers'. And Guideline 8 on Legal assistance introduces the terms 'legal counsel' and 'legal assistance providers' – again, there would be need to harmonise the terminology.

The Danish Institute had similar comments when reviewing the initial drafts of the Luanda Guidelines. The final version of the Luanda Guidelines refers to 'access to legal services' (section 8), mentioning that these services may be provided by a number of service providers including lawyers and other legal service providers (with a similar list to the one used in the present WGAD Guideline 8 'legal advisors, legal assistants, paralegals and those running legal clinics') but with a clear statement that access to service providers other than lawyers shall not in any way be a substitute for the right to access and assistance by a qualified lawyer etc. Something similar could be done in the WGAD Principles and Guidelines.

What is meant by 'in extraordinary circumstances' in Paragraph 28? It could be understood as if there is no obligation for the state to inform about the right to legal representation and to ensure legal representation, if an individual does not defend him- or herself etc. 'in ordinary circumstances'. Also, what is mean by the state securing 'another' independent counsel – 'another' as opposed to whom as the whole reason for the state to ensure counsel is that there is no counsel already?

In Paragraph 32 it is stated that persons deprived of liberty shall have adequate time and facilities to communicate with 'counsel of their own choosing'. Surely, the same right is accorded to persons using the service of counsel that they have not chosen but been provided with by state under Paragraph 28?

#### **Principle 11**

What is the purpose of the comma after 'guaranteed'? It would seem to confuse the meaning somewhat. There are other issues with punctuation in the document but this will presumably be solved in a final edit procedure.

#### **Principle 12**

The language in Paragraph 37 could maybe be made more accessible?

#### **Principle 14**

Is the 'to' in Paragraph 40 necessary?

#### **Principle 15**

According to Paragraph 43, 'Where a court determines that the deprivation of liberty is arbitrary or unlawful the court shall order the conditional or unconditional release from detention'. Would one not need a clarification regarding the meaning of 'conditional' release and its possible implications in

terms of the actual release of the person that the court determined to be arbitrarily or unlawfully detained? Surely, the conditions can be such that there is not, de facto, a proper release?

### **Principle 17**

For good reason the definition of vulnerable groups with respect to access in Principle 17 is not identical to the groups set out in Principles 9 and 11. Still, it is not obvious why, for instance, Principle 17 only refers to 'gender identity' while Principles 9 and 11 more generally refers to LGBT persons and sexual minorities.

### **Principle 18**

During the consultations on 1-2 September 2014, there was some discussion about the extent to which the state should have the responsibility to bring deprivation of liberty before a court as this will in many cases be difficult or even impossible for the person deprived of liberty. This obligation is now set out with respect to children in Principle 18 whereas Principle 17 gives the state the obligation to take special measures for particularly vulnerable detainees (and specific vulnerable groups are considered in Principles 19-21). Presumably, it has been considered whether the *ex officio* obligation should be broadened to other groups than children and non-nationals.

### **Principle 20**

During the consultations on 1-2 September 2014, institutionalisation of persons suffering from advanced and incapacitating dementia was discussed. This issue was somewhat contentious as certain experts focused on the obligation to keep its citizens safe, e.g. to prevent persons with advanced and incapacitating dementia from leaving the institution during the height of winter, whereas other participants focused on the principle of the right not to be detained. It is not really clear whether this issue (which is of great and growing practical importance, at least in certain parts of the world) is sufficiently dealt with in Principle 20.

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