**WORKING GROUP ON ARBITRARY DETENTION**

REFERENCE: WGAD/2017

28 February 2017

Dear Mr. Modvig,

I am addressing you in my capacity as Chair-Rapporteur of the Working Group on Arbitrary Detention.

In response to your call for submissions, it is my pleasure to present the Working Group’s comments on the draft revised general comment on the implementation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the context of article 22.

We remain at your disposal for further discussions on matters of common interest.

Yours sincerely,



Sètondji Roland Adjovi

Chair-Rapporteur

Working Group on Arbitrary Detention

Mr. Jens Modvig

Chairperson,

UN Committee Against Torture

Annex

**Subject: Call for written submissions to the Committee against Torture on the draft revised general comment "on the implementation of article 3 of the Convention in the context of article 22”**

**Submission by the UN Working Group on Arbitrary Detention**

The United Nations Working Group on Arbitrary Detention (WGAD) welcomes the transparent approach adopted by the UN Committee against Torture (CAT) in inviting the views of a broad range of stakeholders to its Draft General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22 (UN Doc CAT/C/60/R.2). The WGAD has carefully examined the Draft Comment prepared by the CAT and on the basis of its experience on the matters of arbitrary deprivation of liberty, would like to draw the attention of the CAT to the following points:

1. The need to avoid the risk of (indefinite) detention in cases of non- refoulement.

In para 12 of the Draft Comment the CAT notes that anyone at risk of torture should be allowed to remain in the country while the risk persists. The WGAD fully supports this position but would like to invite the CAT to consider further strengthening of this requirement by noting that this should not mean that the person in question may be detained without proper justification and safeguards. The practice of the WGAD indicates that in many countries the detention of migrants in irregular situations is mandatory and automatic[[1]](#footnote-1) which may lead to arbitrary deprivation of liberty. Noting that the cases of non-refoulement often arise in the contact of irregular migration, the WGAD feels that it is important to emphasize that also in expulsion cases, where expulsion is not possible, *inter alia*, due to non refoulement principle, detention of individuals must be an exceptional measure, based on an individual assessment and subject to due process guarantees and safeguards and regular review.

1. The right to challenge the legality of detention before a court.

The WGAD fully agrees with the conclusion of the CAT in Section III of the Draft Comment that there are number of preventive measures to guarantee the principle of non- refoulement which States must undertake. The experience of the WGAD dictates that due process guarantees and the ability of everyone in a situation of deprivation of liberty to challenge the continued detention before a competent judicial authority is crucial, a point shared by the CAT in para 18 of the Draft Comment. In order to further strengthen the importance of due process guarantees, the WGAD would like to invite the CAT to make an implicit or explicit reference to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (UN Doc A/HRC/30/37). The WGAD would like to suggest that para 47 of the Basic Principles and Guidelines specifically applies to cases of migration detention and detention for extradition and paras 56-59 list important guarantees in relation to the right to be informed while paras 67-71 provide for guarantees in relation to assistance by legal counsel and access to legal aid. The WGAD would also like to highlight that paras 108- 116 of the Basic Principles and Guidelines detail specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons and state that immigration-related detention is equally covered by the same guarantees.

1. The quality of the body considering the challenge.

Paras 13 and 18 of the Draft Comment make references to the competent administrative and/or judicial authorities which may be called upon to consider the cases of extradition. The practice of the WGAD however indicates that the quality of the body examining cases of expulsion and/or deportation, which may include potential cases breaching the principle of non- refoulement, may be of paramount importance to ensure compliance with, *inter alia*, Article 3 of the UN Convention against Torture (UNCAT). To this end, the WGAD would like to once again invite the CAT to make a reference to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (UN Doc A/HRC/30/37). Paras 51-55 in particular contain specific guidelines on the basic features of the judicial bodies which are to review the cases of detention and highlight the crucial importance of such bodies being competent, independent and impartial.

1. Special emphasis upon people belonging to certain vulnerable groups.

The experience of the WGAD indicates that the people facing the risk of torture and ill-treatment and thus in need of the protection through the non-refoulement principle, include broad range of vulnerable people. In para 42 the CAT notes some of such people who are particularly vulnerable by mentioning ‘an asylum seeker, an unaccompanied minor or a woman who has been subjected to violence’. The WGAD would like to invite the CAT to expand this paragraph and make a specific reference to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (UN Doc A/HRC/30/37). In particular, para 33 of the Principles and Guidelines provides for an extensive list of persons who might find themselves in particularly vulnerable position whilst in detention and who therefore should benefit from special measures in order to ensure their ability to challenge their detention. The Principles and Guidelines also list specific measures in relation to certain specific groups: children (Principle 18); women and girls (Principle 19); persons with disabilities (Principle 20); non-nationals (Principle 21).

The WGAD is grateful for the opportunity to present its comments to the CAT on the Draft Comment and remains at its further disposal for further discussions on matters of common interest.

1. See: A/HRC/13/30 at paras 62-3; see also WGAD Opinion 52/2014 (Papua New Guinea and Australia). [↑](#footnote-ref-1)