Lawyer's Rights Watch Canada - LRWC

3220 West 13th Avenue

Vancouver, BC CANADA, V6K 2V5

Email: lrwc@portal.ca

Website: www.lrwc.org

Date: 03/13/2015

Re: WGAD Draft Principles and Guidelines on the Right to Bring Proceedings Before Court

Generally, we find the draft Principles and Guidelines to be comprehensive and a valuable additional tool for use in arguing for release from arbitrary detention. We do, however, have some concerns with the draft provisions concerning the right to bring proceedings before the court for persons accused of terrorism. For ease, the provisions which explicitly mention the terms “terrorism” or “counter-terrorism” are set out below:

46. Domestic legislative frameworks should not allow for any restrictions on the safeguards of persons deprived of their liberty under counter-terrorism, emergency legislation or drug-related policies, concerning the right to bring proceedings before a court to challenge the lawfulness and arbitrariness of detention and receive appropriate remedy.60

50. Where counter-terrorism measures require the adoption of specific measures limiting certain rights and guarantees in a very limited manner, including those relating to the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy, they must remain consistent with the norms of international law.66

69. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of detention and receive appropriate remedy applies:

(a) to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings, but also to situations of detention under administrative and other fields of law, including military detention, security detention, counter-terrorism detention,91 involuntary hospitalization, immigration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, administrative detention, detention for vagrancy or drug addiction, detention of children for educational purposes and other forms of administrative detention.92

102. Where persons accused of acts of terrorism are deprived of their liberty:128

(i) They shall be immediately informed of the charges against them, and shall be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time period;

(ii) They shall enjoy the effective right to judicial determination of the arbitrariness and lawfulness of their detention;

(iii) The exercise of the right to judicial oversight of their detention does not impede on the obligation of the law enforcement authority responsible for the decision to detain or to maintain the detention, to present the detainee before a competent and independent judicial authority within a reasonable time period. Such person shall be brought before a competent and independent judicial authority, which then evaluates the accusations, the basis of the deprivation of liberty, and the continuation of the judicial process;

(iv) In the development of judgements against them, they shall have a right to enjoy the necessary guarantees of a fair trial, access to legal assistance and representation, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process.

We are pleased that the draft Principles and Guidelines expressly apply to individual's accused of acts of terrorism. We are concerned that the provisions, as drafted, do not provide sufficient precision to ensure that the rights of persons accused of terrorism are fully protected and that the rights of such people to equality and non-discrimination are fully respected. Specifically, we note the following:

1. The terms “terrorism” and “counter-terrorism” are not defined in the draft Principles and Guidelines. We appreciate that the word terrorism refers to the detaining state's characterization of the charges or allegations against the individual and therefore should stand with no further definition. The use of the word 'counter-terrorism' is problematic. As the WGAD is aware, 'counter-terrorism' is currently used by states around the world, as an unimpeachable excuse for exceedingly repressive laws that criminalize protected rights to expression, association, assembly and right to participate in government, restrict or suspend rights to judicial review, prevent remediation of rights violations and allow arbitrary deprivation of liberty through arbitrary arrests, prosecutions that can't be defended and long prison sentences.

2. Accordingly we suggest that the Principles and Guidelines avoid the use of the word counter-terrorism except to refer to the detaining state's characterization such as in paragraph 46 copied above. We suggest the first sentence of paragraph 46 be amended to include the word measures as follows, "...under counter-terrorism measures...".

2. Section 50 of the draft appears to be unnecessarily vague, particularly the reference to "counter-terrorism and “norms of international law”. We suggest this paragraph be deleted. We know of no example where such laws limiting rights to serve the needs of 'counter-terrorism' were necessary. We know of no instance where such laws have been applied so as to minimize arbitrary detention. It is almost a cliché to say that such laws have provided enacting states with sweeping powers to punish people arbitrary and to deny judicial review and the protection of law. We fear such a provision would undermine the purpose of the Principles and Guidelines by authorizing laws or practices "limiting certain rights and guarantees" to serve the unidentified needs of counter-terrorism.

\*\*\*

Lawyers Rights Watch Canada (LRWC) is a committee of lawyers who promote human rights and the rule of law internationally by protecting advocacy rights. LRWC campaigns for advocates in danger because of their human rights advocacy, engages in research and education and works in cooperation with other human rights organizations. LRWC has Special Consultative status with the Economic and Social Council of the United Nations.