



# UNHCR

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

***UNHCR’s comments on the WGAD’s Draft Basic 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 court, 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***

UNHCR welcomes the opportunity to comment on the Working Group on Arbitrary Detention’s Draft *Basic Principles and Guidelines on Remedies and Procedures of the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court*.

## **1. UNHCR’s mandate**

As you are aware, UNHCR has supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”) and its 1967 Protocol. Under the 1950 Statute of the Office of the High Commissioner (annexed to UN General Assembly Resolution 428(V) of 14 December 1950) (“UNHCR Statute”), UNHCR has been entrusted with the responsibility for providing international protection to refugees, and together with governments, to seek permanent solutions to their plight. As set out in the Statute (paragraph 8(a)), UNHCR fulfils its mandate by, *inter alia*, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” UNHCR’s supervisory responsibility is also reflected in Article 35 of the 1951 Convention and Article II of the 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions, including in particular, to facilitate UNHCR’s duty of supervising the application of these instruments. UNHCR’s role is also reflected in the main regional refugee law instruments.

UNHCR has also been formally mandated by the UN General Assembly to prevent and reduce statelessness around the world, as well as to protect the rights of stateless people. UN General Assembly resolutions 3274 (XXIV) and 31/36 designated UNHCR as the body mandated to examine the cases of persons who claim the benefit of the 1961 Convention on the Reduction of Statelessness and to assist such persons in presenting their claims to the appropriate national authorities. In 1995, UN General Assembly resolution 50/152 conferred upon UNHCR a global mandate for the prevention and reduction of statelessness and for the protection of stateless persons.

As part of its mandate, UNHCR has a direct interest in the situation of asylum-seekers, refugees and stateless persons in detention. In fact, UNHCR has identified the detention of asylum-seekers, including children, as one of its corporate priorities, launching a 5-year Global Strategy – Beyond Detention on 3 July 2014 to address the range of practices not in conformity with international human rights standards. UNHCR has also intervened in the last few years in a number of court cases on the question of detention – including in arguing the right to an effective remedy. In particular, UNHCR has the right to access persons of concern in places of detention and such persons have the right to contact UNHCR.<sup>1</sup>

In 2012, UNHCR issued revised *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012 Detention Guidelines)<sup>2</sup> and in 2014, released *Monitoring Immigration Detention: Practical Manual* (UNHCR, APT

<sup>1</sup> For example, UNHCR, EXCOM Conclusion on *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII) - 1986, available at: <http://www.refworld.org/docid/3ae68c43c0.html>

<sup>2</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>

and IDC, Detention Monitoring Manual),<sup>3</sup> both guides drawing on international human rights law standards and applying them in the context of asylum-seekers. We believe they set out the current international legal standards applicable to detention of asylum-seekers and refugees. Alongside the other cited documents contained in the Draft Principles and Guidelines, UNHCR would welcome reference to the 2012 *Detention Guidelines*, and relevant Executive Committee Conclusions on International Protection, in particular No. 44 (XXXVII) – 1986 – Detention of Refugees and Asylum-Seekers and General Assembly resolutions 67/149, OP19 of 20 Dec 2012 and 68/141, OP22 of 18 Dec 2013.

## 2. General comments

We are pleased that the Draft Principles and Guidelines are consistent with UNHCR's 2012 *Detention Guidelines*; in particular, Guideline 7 provides that decisions to detain or to extend detention must be subject to minimum procedural safeguards, including:

- to be informed at the time of arrest or detention of the reasons for their detention, and their rights in connection with the order, including review procedures, and in a language and in terms which they understand;
- to be informed of the right to legal counsel;
- to be brought promptly before a judicial or other independent authority to have the detention decision reviewed;
- regular periodic reviews of the necessity of the continuation of detention by court or other independent body;
- and irrespective of whether independent administrative bodies are in place, the right to challenge the lawfulness of detention before a court of law at any time needs to be respected – either personally or through a representative;
- access to UNHCR [or to consular authorities for non-asylum-seeking persons], and preferably reflected in law;
- the court/reviewing body must be empowered to order immediate release, or to impose or vary any conditions of release, and be independent of the initial detaining authority.

The right to challenge the lawfulness of detention in a court of law applies irrespective of one's asylum-seeker or other immigration status.

Part 4.1.1 and 4.1.2 of the UNHCR, APT and IDC *Detention Monitoring Manual* set these principles out in more detail.

That said, while the right is to be enjoyed without discrimination, the particular circumstances of asylum-seekers and refugees need to be accommodated in order to ensure that the right is an effective one for such populations.

## 3. Specific comments on Draft Basic Principles

- **Introduction:** we would appreciate reference to international refugee law, alongside international human rights law in the Introduction. The 1951 Refugee Convention contains three relevant articles applicable to asylum-seekers and refugees, namely Articles 26 and 31 (freedom of movement and non-penalization for illegal entry or

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<sup>3</sup> UNHCR, *Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), Monitoring Immigration Detention: Practical Manual*, 2014, available at: <http://www.refworld.org/docid/53706e354.html>

stay, including through detention),<sup>4</sup> as well as Article 16 – the right of refugees to free access to the courts of law and the same treatment as nationals in relation to legal assistance.<sup>5</sup>

**Paragraph 1:** we would welcome reference in the text to *detention for immigration purposes* as part of the situations of deprivation of liberty encompassed by the Draft Basic Principles and Guidelines.

**Paragraph 9:** we welcome the inclusion of specific mention to the situation of asylum-seekers, refugees and internally displaced among the groups comprised by the Draft; however, we recommend including, as well, *stateless persons* within these categories, who are regularly subject to detention owing to their uncertain legal status or lack of documentation.

**Paragraph 11:** in fine, in section d), inclusion of *stateless persons* would, as well, be welcome as part of the groups for which prolonged administrative custody is regarded as *arbitrary* in nature. Stateless migrants who cannot be returned to their countries of origin are also affected by prolonged, and sometimes indefinite, detention.

- **Principle 5:** Explicit reference to asylum-seeker and migration status as a proscribed ground for discrimination in this area would emphasise the particular situation of asylum-seekers and migrants, later reflected in Guideline 21. Other relevant provisions that could be footnoted in this part properly reflecting the full extent of the non-discrimination principle include, for example, Articles 2(1),<sup>6</sup> 4(1)<sup>7</sup> and 26<sup>8</sup> of the

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<sup>4</sup> Article 26 – Freedom of Movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 31 – Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

<sup>5</sup> Article 16 - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

<sup>6</sup> Article 1(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>7</sup> Article 4(1): In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

<sup>8</sup> Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR and Article 3 of the 1951 Refugee Convention.<sup>9</sup> Articles 14 (first sentence, equality before the courts and tribunals) and 16 (reflecting the right to be recognised everywhere as a person before the law) of the ICCPR may also be relevant.

- **Principle 17:** in fine, within the categories of persons at particular risk in terms of access to this right, we suggest to include specific reference to *stateless persons* and *victims of human trafficking*.
- **Principle 21:** UNHCR welcomes the inclusion of this specific Principle including specific measures for refugees and asylum-seekers. We would welcome the following adjustments:
  - inclusion, as part of those non-nationals mentioned, of *stateless persons*.
  - specific footnote to be made for this principle to Guideline 7 of UNHCR’s 2012 *Detention Guidelines* cited in our General Comments above.
  - specific inclusion as footnote to paragraph 67 to Art. 31 (1) of the 1951 Refugee Convention, which explicitly prohibits the penalisation of asylum-seekers and refugees, including through the use of detention, for having entered or stayed in the territory illegally.
  - reference to asylum-seeking, refugee and stateless children in paragraph 68.
- **Recommended additional principle:** “accessibility” or “effectiveness” ought to be added as an additional Principle, reflecting the need for States to make the realisation of this right both accessible and effective. We welcome that this recommendation has been partially included in **Principle 17**, but consider that it ought to be a stand-alone Principle and given a more prominent position within the Draft.

#### 4. Specific comments on Draft Guidelines

- **Guideline 1: Scope of application** - We welcome the reference to “immigration detention” in paragraph 69(a) but would suggest that it read “migration detention” instead, which would thus include both the entry and returns phases.
- **Guideline 2: Prescription in national law** - In addition to what is included in paragraph 70, UNHCR would consider that maximum periods in detention be set in law. As noted above in the General Comments, UNHCR recommends that reviews of detention be automatic and in such cases, we would also encourage governments to include timeframes for such reviews in national law.
- **Guideline 5: Right to be informed** - paragraph 77(e), add reference to *stateless persons*.
- **Guideline 7: Timeframe for exercise of the right to bring proceedings before a court** – sub-paragraph a) we would recommend using alternative language to “multiple times” as it suggests repeated challenges [and raises questions about abuse of process], we would suggest “periodic” reviews.

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<sup>9</sup> Article 3 – Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

- **Guideline 8: Legal assistance** - sub-paragraph 81) we would recommend stating in clear and unambiguous language that access to legal counsel for all persons in detention needs to be *guaranteed* instead of *facilitated* as in the current Draft, to be consistent with Principle 9.
  
- **Guideline 21: Specific measures for non-nationals, including migrants regardless of their migration status, asylum-seekers and refugees** –
  - We would welcome the inclusion, as part of those non-nationals mentioned, of *stateless persons*.
  
  - We also recommend specific footnotes to be made, as appropriate, to Guideline 7 of UNHCR’s 2012 *Detention Guidelines* cited above, as sub-paragraphs a) to i) reflect principles contained in our Guidelines. We would strongly request that the specific situation of asylum-seekers and refugees be reflected in a separate sub-paragraph in 116, perhaps following j), stating that:
    - “In the case of asylum-seekers, the scope of judicial review needs to recognise that there is a right to seek asylum under international law and as it is neither an unlawful nor a criminal act, it cannot be the basis for their detention. Furthermore, asylum-seekers and refugees are to be protected from penalisation for their illegal entry or stay in accordance with international refugee law, including through the use of detention” (footnoting Article 31(1), 1951 Refugee Convention).
  
  - In sub-paragraph 116 c), we would welcome addition of “television monitors” as another good practice in relation to publicising information.
  
  - In sub-paragraph e), we would strongly encourage the WGAD to reflect the rights of asylum-seekers, refugees and stateless persons to contact and be contacted by UNHCR. UNHCR’s specific mandate (as outlined in 1. above) gives it the right to act in substitution of States for asylum-seekers, refugees and stateless persons who cannot obtain protection from their own governments. This is set out in Guideline 7 paragraph 47 (vii) of the 2012 *Detention Guidelines*, as supported by UNHCR Executive Committee Conclusion No. 85 (XLIX) (1998), and also reflected in WGAD, Report to the Fifty-Sixth session to the Commission on Human Rights, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 on the Situation regarding immigrants and asylum-seekers; and WGAD, Report to the Fifty-Fifth session of the Commission on Human Rights, E/CN.4/1999/63, 18 December 1998, paragraphs 69 and 70, referring to principles 3, 6, 7, 8, 9 and 10. It is also reflected in International Law Commission’s Articles on Diplomatic Protection (2006), Article 2(3) read together with Article 8. For those not seeking international protection, access to consular assistance should be made available.
  
  - In sub-paragraphs f) and g) we would suggest to change from *migrants* to *non-nationals*, as the issues highlighted affect as well asylum-seekers, refugees and stateless persons, who cannot be properly defined simply as “migrants” as per their recognised legal status and specific rights under international law, namely the Statute of the UNHCR annexed to UN General Assembly resolution 428(V) of 14 December 1950, the 1951 Refugee Convention and 1967 Protocol, and relevant regional refugee instruments. In sub-paragraph i), we would suggest a similar revision as this important principle should encompass *all non-national children*, not only those categorised as “migrants”.
  
  - It is UNHCR’s recommended practice that detention reviews be automatic, rather than requested – there is evidence to suggest, for example, that where

bail hearings are not automatic, they are not used by asylum-seekers and refugees because of their particularly vulnerable predicament and the challenges such as language, lack of access to legal counsel and trauma and other psychological problems. We'd welcome this to be reflected in Guideline 21.

- We also propose that good state practice indicates that the first detention decision be reviewed within 24-48 hours, and thereafter every 7 days until the 1 month mark, and thereafter monthly until the maximum period, which UNHCR considers ought to be set by law.

**UNHCR**  
**Division of International Protection**  
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