**COMMENTS BY SWITZERLAND**

 **Working Group on Arbitrary Detention**

***Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court***

The Permanent Mission of Switzerland presents its compliments to the Office of the United Nations High Commissioner for Human Rights and the United Nations Working Group on Arbitrary Detention and has the honour to refer 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 (hereinafter “Basic Principles and Guidelines”) adopted by the Working Group in April 2015.

Switzerland appreciates the work of the Working Group on Arbitrary Detention in promoting human rights and wishes to thank the Working Group for the opportunity to comment on the Basic Principles and Guidelines. In a collaborative and constructive spirit, Switzerland takes advantage of this opportunity to make the following remarks:

**General remarks:**

1. In the following comments, Switzerland wishes to highlight some of the most pressing issues regarding the Basic Principles and Guidelines adopted by the United Nations Working Group on Arbitrary Detention (WGAD). It would go beyond the scope of the present remarks to address every “Principle” and each “Guideline”. However, the fact that a “Principle” or “Guideline” is not addressed in these remarks does not constitute acquiescence with the wording of the WGAD’s text.
2. Switzerland notes that the WGAD has chosen a very wide scope of application. At the same time, the content of the Basic Principles and Guidelines is not limited to the minimal standards regarding the right of anyone deprived of their liberty by arrest or detention to take proceedings before court and in some respects goes far beyond current international standards. Further, as the sources used to establish the Principles and Guidelines are not limited to universal documents, a more careful formulation of the wording would have been more appropriate and adequate.
3. Even though the WGAD has stated that the Basic Principles and Guidelines are drawn from “international standards” and “recognized good practice”, the WGAD has not explicitly differentiated between States’ legal obligations and non-binding commitments and “good practices” regarding their implementation – not in terms of content, nor in terms of language. Switzerland is concerned that such an approach could blur the difference between legally binding obligations and non-binding principles, guidelines and the like. Noting that the Basic Principles and Guidelines “should not be interpreted as providing a lesser protection than provided under existing national laws and regulations and international and regional human rights conventions and covenants” does not sufficiently mitigate this problem.
4. For Switzerland, the difference between “Principles” and “Guidelines”, around which the document is structured, does not always become apparent. Some of the “Principles” seem to contain best practices or examples, while some content of some “Guidelines” constitutes elements of legally binding obligations. In order to provide useful guidance, Switzerland recommends keeping the Basic Principles and Guidelines clear, focused and short. Further, terminology should be streamlined throughout the text.

**Detailed remarks (non-exhaustive):**

***Definition of “arbitrary detention”:***

1. Switzerland notes that the definition applied by the WGAD (para. 10) is particularly broad and does not necessarily reflect common notions of when a detention is to be characterized as arbitrary. Such an approach lacks the necessary focus and risks impeaching the credibility of useful UN guidance on the subject matter.

***Expansion to “private relationships”:***

1. The direct application of the right to take proceedings before a court to challenge the arbitrariness and lawfulness of detention “in private relationships” in principle 2 (para. 20) leaves many questions unanswered and cannot be supported in such a broad and unclear formulation.

***Statute of limitations:***

1. Except for the most serious crimes, the statute of limitation is an essential element of the rule of law in Swiss legislation. The Swiss penal code does not consider violations of the right to bring proceedings before a court as a most serious crime which would not be subject to any statute of limitations, as the last sentence of principle 8 (para. 29) seems to suggest. The same holds true for the last sentence of principle 15 (para. 43).

***Persons able to bring proceedings before a court:***

1. Switzerland apprehends that the broad definition in principle 10 (para. 34) of persons able to bring proceedings before a court is counterproductive. While we recognize the need for persons with a legitimate interest to act on behalf of persons who, due to the circumstances, may lack the possibility to exercise their rights, the group of people should not exceed the formulation applied in the International Convention for the Protection of All Persons from Enforced Disappearance (art. 17, para. 2, lit. f). Any broad definition brings many problems, especially of a procedural nature, which are difficult to address.
2. The statement in principle 10 (para. 35) regarding the prohibition of restrictions is not in accordance with international standards and Swiss legislation. While communication with the legal representative has to be facilitated in principle, contact with other persons (including family members or “interested parties”) can be limited if this is precluded by the purpose of the investigation or the person concerned expressly so requests.

***Appearance before the court:***

1. The provision in guideline 10, lit. b (para. 94) that the court shall ensure communication between the detainee and the judge without the presence of any official in his or her deprivation of liberty seems hardly practicable. It should be reformulated along the wording of Rule 61 of the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR). Further, many domestic legal orders, including the Swiss one, do not foresee the sanctioning of “State authorities” in penal or administrative law, as suggested by guideline 10, lit. c.

***Situations of armed conflict:***

1. In situations of armed conflict, Switzerland reiterates the applicability of both international humanitarian law (IHL) and international human rights law, which are mutually reinforcing. Together, both bodies of law can guarantee the most effective and appropriate protection for those deprived of their liberty. Switzerland wishes to reiterate that a major difference between IHL and international human rights law regards the issue of derogation. While IHL cannot be derogated from, under the explicit terms of some human rights treaties States may derogate from their obligations provided therein subject to the fulfilment of the requisite conditions. As mentioned in the General Comment No 35 of the Human Rights Committee, derogating measures must however be non- discriminatory and consistent with a State party’s other obligations under international law, including provisions of IHL relating to deprivation of liberty[[1]](#footnote-1).
2. With regard to paragraphs 48 of principle 16 and 114 of Guideline 17, Switzerland emphasizes that the legal provisions of IHL applicable to detention and internment in international armed conflict have been deemed sufficiently detailed by States. Paragraphs 48 of principle 16 and 114 of Guideline 17 should therefore been interpreted in light of these provisions.
3. Regarding paragraph 73 of Guideline 4 pertaining to the characteristics of a court, Switzerland notes that in Switzerland, under certain conditions, civilians can be prosecuted by military courts.[[2]](#footnote-2) Moreover, Switzerland underlines that IHL allows – under very limited circumstances – military tribunals to review the lawfulness of the deprivation of liberty of both civilians and prisoners of war.[[3]](#footnote-3) Those bodies nonetheless have to comply with the fundamental requirements of independence and impartiality.
4. With regard to paragraph 49 of Principle 16 and 115 of Guideline 17, Switzerland recalls that deprivation of liberty is an ordinary and expected occurrence during armed conflicts, including those of non-international character, and that States are currently considering protections for persons deprived of their liberty in non-international armed conflict in accordance with Resolution 1 of the 31st International Conference of the Red Cross and the Red Crescent Movement.[[4]](#footnote-4)

The Permanent Mission of Switzerland avails itself of the opportunity to renew to the United Nations Working Group on Arbitrary Detention and the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 10 August 2015

1. Human Rights Committee, General comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 28 October 2014. [↑](#footnote-ref-1)
2. Article 3 Military Penal Code, accessible at https://www.admin.ch/opc/fr/classified-compilation/19270018/index.html#a3. [↑](#footnote-ref-2)
3. See articles 5 and 21 of Geneva Convention III (internment of prisoners of war); articles 64 and 66 of Geneva Convention IV (criminal detention of civilians in occupied territory). [↑](#footnote-ref-3)
4. Accessible at https://www.icrc.org/eng/assets/files/publications/icrc-002-1130.pdf. [↑](#footnote-ref-4)