



IOM International Organization for Migration

# **International standards on immigration detention and non-custodial measures**

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“Freedom is the rule, detention is the exception”<sup>1</sup>

## **Purpose and scope of the Information Note**

The Information Note is meant to be a tool to make those who are dealing with the issue of detention of migrants and non-custodial measures aware of the existing international instruments setting the standards to be respected by States. Although the list of the instruments and norms relating to the issue of immigration detention and non-custodial measures which are included in this Information Note is far from exhaustive, they have been chosen in light of the scope of their application (i.e. universal instruments, when existing, have been preferred to regional instruments) or taking into account their binding force (i.e. binding instruments, when existing, have been preferred to non-binding ones). Elements of interpretations by judicial or semi-judicial bodies and UN special procedures of the Human Rights Council of the relevant principles are also included, with a view to clarifying the exact meaning and scope of each principle. It should be noted that only treaties (conventions or charters) are binding upon States Parties, whereas declarations and guidelines are “soft law” instruments, which are not binding but prove very useful to interpret the provisions contained in binding instruments. Non binding instruments can also be indications of *emerging hard law* and sometimes norms embodied in a declaration may become *customary international law*, i.e. legally binding upon all States.<sup>2</sup>

The final aim of the Information Note is to provide the readers with an overview of the limits imposed by international law on the jurisdiction of States as well as of States positive obligations with respect to the issue of immigration detention and non-custodial measures. In dealing with this matter, the actors involved should constantly keep in mind that policies relating to detention or non-custodial measures represent ways of dealing only with the *consequences* of irregular migration. Solutions for irregular migration movements require a much broader and comprehensive approach aimed to tackling the root causes of this phenomenon and to promote regular channels of migration.<sup>3</sup>

With regard to the scope of the Information Note, it includes principles applicable to both the administrative and criminal detention of migrants. The term “migrant” here is

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<sup>1</sup> C. Teitgen-Colly, “La détention des étrangers et les droits de l’homme”, in V. Chetail (dir.) *Globalisation, Migration and Human Rights, International Law under Review*, Brussels, 2007, p. 571.

<sup>2</sup> In the same way, judgements or decisions by international or regional judicial bodies (i.e. International Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights and African Court of Human and Peoples’ Rights – which will soon become the African Court of Justice and Human Rights, when the relevant Protocol will enter into force) are binding, while views by international semi-judicial bodies (i.e. United Nations Treaty Bodies, such as the Human Rights Committee) are not binding *per se*. However, the Human Rights Committee precised that a duty to cooperate with it arises from an application of the principle of good faith to the observance of all treaty obligations (Human Rights Committee, *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, General Comment No. 33, 5 November 2008, U.N. Doc. CCPR/C/GC/33, in particular para. 15). Reports and documents by the Charter-Based Bodies (including the special procedures such as special rapporteurs and working groups) are not binding. This distinction applies to States but should not be overstated with regard to IOM activity. It is clear, in fact, that IOM in its activity should try as much as possible to promote the highest standards set at the international level, not only through binding instruments but also through non-binding ones.

<sup>3</sup> For this approach see Discussion Note on “Challenges of Irregular Migration: Addressing Mixed Migration Flows”, IOM Council doc. No. MC/INF/294, 7 November 2008.

used in its most comprehensive meaning, including also asylum seekers and stateless persons. Criminal detention of migrants comes into account when the irregular entry in the territory of the State is considered a crime under the applicable domestic criminal law. This is in contrast to “administrative detention” when the irregular entry constitutes an infraction of an immigration law or regulation.

The Information Note is divided into three parts: the first part is aimed at providing an overview of the legal principles applicable to both restriction and deprivation of liberty; the second part focuses on the specific standards applicable to the detention of migrants; and the last part details the legal principles relevant to non-custodial measures and provides a brief evaluation of some of those which are most common.

## General Principles

### *1. Definitions: deprivation of liberty vs. restriction of liberty*

IOM defines the detention of migrants, either criminal or administrative, as the “**restriction on freedom of movement through confinement that is ordered by an administrative or judicial authority.**”<sup>4</sup> Detention prior to expulsion is considered a deprivation of liberty falling within the scope of Article 9 of the International Covenant on Civil and Political Rights (ICCPR).<sup>5</sup>

A distinction must, however, be drawn between a **deprivation of liberty**, coming into account with respect to **detention**, and a simple **restriction of movement**, characterising **non-custodial measures**. The European Court of Human Rights affirmed that: “the difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.”<sup>6</sup> As a consequence, “in order to determine whether someone has been ‘deprived of his liberty’...the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.”<sup>7</sup> For instance, restriction of movement may be placed on a migrant within an international zone in an airport; however, if it is prolonged then a restriction of movement may turn into a deprivation of liberty.<sup>8</sup>

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<sup>4</sup> IOM, *Glossary on Migration*, International Migration Law Series No. 25, 2<sup>o</sup> edition, 2011, p. 27. See also the definition proposed by UNHCR according to which detention should be understood as the “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory”. UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to Detention of Asylum Seekers*, February 1999, available at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>. This definition is based upon the note of the Sub-Committee of the Whole on International Protection of 1986, 37<sup>th</sup> Session, U.N. Doc. EC/SCP/44, para. 25.

<sup>5</sup> See Human Rights Committee, *Hammel v. Madagascar*, Communication No. 155/1983, views 3 April 1987, U.N. Doc. CCPR/C/OP/2 at para. 179 (1990) and *V.M.R.B. v. Canada*, Communication No. 236/1987, paras. 4.4. and 6.3, decision on admissibility 18 July 1988, U.N. Doc. Supp. No. 40 (A/43/40) at para. 258 (1988).

<sup>6</sup> European Court of Human Rights, *Amuur v. France*, judgement 25 June 1996, para. 42.

<sup>7</sup> *Idem*.

<sup>8</sup> *Idem*.

The safeguards in place with respect to simple restrictions of liberty correspond in large part to those imposed upon States by international law in the case of deprivation of liberty. Moreover, if States exceed the limits of a lawful and non arbitrary restriction of liberty, the same may turn into a deprivation of liberty.<sup>9</sup>

## **2. Legality and legitimate grounds for detention**

Article 9, paragraph 1, of the ICCPR states that “No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.” The Human Rights Committee (HRC) in its General Comment No. 8 clarified that this provision is applicable to all deprivations of liberty, whether in criminal cases or in other cases, including as a measure for immigration control.<sup>10</sup> The other international bodies that monitor the respect of human rights treaties have established that **the right to liberty postulates that every restriction to this right be exceptional.**<sup>11</sup>

The Working Group on Arbitrary Detention also affirmed that **administrative detention is not *per se* in contravention of any international human rights instrument.**<sup>12</sup> **However, the reasons justifying the detention of migrants,** such as the necessity of identification of migrants in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, **“must be clearly defined and exhaustively enumerated in legislation.”**<sup>13</sup>

Additionally, restrictions to liberty based on an administrative act are admissible under international law, but the measure must be based on a law that provides sufficient clarity and regulates the procedures to be observed.<sup>14</sup> This means that detaining a person by an administrative act (for example, an immigration regulation) can only be allowed if it is enforcing a provision in legislation. The legislation itself must provide for the detention clearly, and must regulate the relevant procedures to be observed. **The legality of a detention must be verified also against international law and particularly against the provisions of the ICCPR.**<sup>15</sup> The lack of legality

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<sup>9</sup> *Ibid.*, para. 43.

<sup>10</sup> Human Rights Committee, *Right to liberty and security of persons (Article 9)*, General Comment No. 8, 30 June 1982, para. 1. The European Convention on Human Rights (ECHR) is the only international instrument explicitly referring to the admissibility of the detention of migrants to prevent them to entry the country without being authorised or with the view to his or her deportation or extradition. See Article 5, letter f, of the ECHR. The International Court of Justice has also recognised the applicability of Article 9 of the ICCPR, as well as of Article 6 of the African Charter of Human and Peoples Rights to administrative procedures aimed to forcibly remove a migrant from the territory of the State. See also International Court of Justice, *Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of Congo*, judgement 30 November 2010, para. 77.

<sup>11</sup> Inter-American Commission of Human Rights, *Ricardo Canese v. Paraguay*, judgement 31 August 2004, Series C No. 111, para. 129, *Chaparro Álvarez y Lapo Ñíguez v. Ecuador*, judgement 21 November 2007, Series C No. 170, para. 93 and *Yvon Neptune v. Haiti*, judgement 6 May 2008, Series C No. 180, para. 98.

<sup>12</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, U.N. Doc. A/HCR/13/30, para. 58.

<sup>13</sup> *Ibid.*, para. 59.

<sup>14</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR commentary*, Kehl, 2005, p. 224.

<sup>15</sup> Human Rights Committee, *Baban et al. v. Australia*, Communication No. 1014/2001, views 6 August 2003, U.N. Doc. CCPR/C/78/D/1014/2001 (2003), para. 7.2.

from an international perspective often derives from the fact that some States, in the absence of legislation authorising deprivation of liberty for migrants, “label migration detention centres as ‘transit centres’ or ‘guest houses’ and ‘detention’ as ‘retention.’”<sup>16</sup>

The Working Group on Arbitrary Detention has also recognised that “provisions should always be made to render **detention unlawful if the obstacle for identifying immigrants in an irregular situation or carrying out removal from the territory [is unfeasible]**, for example, when the consular representation of the country of origin does not cooperate or legal considerations - such as the principle of *non-refoulement* barring removal if there is a risk of torture or arbitrary detention in the country of destination - or factual obstacles - such as the unavailability of means of transportation - render expulsion impossible.”<sup>17</sup>

### ***3. Necessity, proportionality and prevention from arbitrariness***

It is not enough for deprivation of liberty to be provided by law. **The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.** The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to **include elements of inappropriateness, injustice, and lack of predictability.**<sup>18</sup>

All deprivations of liberty must have a **legitimate aim**<sup>19</sup>, **be proportionate to the aim pursued and have a fair balance struck between the conflicting interests.**<sup>20</sup> The Working Group on Arbitrary Detention affirmed that the detention of asylum seekers, refugees and migrants in an irregular situation is a **measure of last resort**<sup>21</sup> and that the necessity to have recourse to a detention measure must be **evaluated in each individual case.**<sup>22</sup> According to the Working Group mandatory or automatic detention must be considered arbitrary.<sup>23</sup>

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<sup>16</sup> Special Rapporteur on the human rights of migrants, Jorge Bustamante, Report to the Human Rights Council, U.N. Doc. A/HRC/7/12, 25 February 2008, para. 47.

<sup>17</sup> Working Group on Arbitrary Detention, Annual report, 16 February 2009, U.N. Doc. A/HRC/10/21, para. 67.

<sup>18</sup> Human Rights Committee, *Alphen v. Netherlands*, Communication No. 305/1998, views 15 August 1990, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8. See also S. Vohra, ‘Detention of irregular migrants and asylum seekers’, in R. Cholewinski, R. Perruchoud and E. MacDonald (editors), *International migration law: developing paradigms and key challenges*, The Hague, 2007, p. 54.

<sup>19</sup> See also Inter-American Court of Human Rights, *Velez Loo v. Panama*, judgement 10 December 2010, Series C No. 218, para. 162.

<sup>20</sup> Working Group on Arbitrary Detention, Report on the visit to Australia, 24 October 2002, U.N. Doc. E/CN.4/2003/8/Add.2, para. 12.

<sup>21</sup> See the Opinions adopted by the Working Group on Arbitrary Detention, 2 March 2010, U.N. Doc. A/HRC/13/30/Add.1 and in particular the Opinion No. 5/2009 (Lebanon), p. 280, para. 12.

<sup>22</sup> The Working Group on Arbitrary Detention, in fact, considers that “*Arbitrariness must be assessed in the light of all the relevant circumstances of a given detention*”, Annual report, 1 December 2004, U.N. Doc. E/CN.4/2005/6 at para 54. The same principle was reiterated by the Inter-American Court of Human Rights *Velez Loo v. Panama*, op. cit., para. 171. See also more recently European Court of Justice, Judgement 28 April 2011 (Reference for a preliminary ruling), *M. El Dridi*, case n. C-61/11 PPU, para. 39.

<sup>23</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit, para. 62. and Working Group on Arbitrary Detention, Report on the visit to Australia, 24 October 2002, op. cit., para. 12. See also Inter-American Court of Human Rights, *Velez Loo v. Panama*, op. cit., para. 171.

In addition, the Working Group on Arbitrary Detention expressed the view that “**criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.**”<sup>24</sup>

#### ***4. Procedural safeguards***

Principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in 1988 provides for the necessity of a detention order or of an effective control by a judicial authority or by another authority giving sufficient guarantees of impartiality and independence for any form of detention affecting the human rights of a person.<sup>25</sup> The Working Group on Arbitrary Detention stated that in the case of a deprivation of liberty of migrants “**detention must be ordered and approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case.**”<sup>26</sup> Everyone shall also have the right to **challenge the legality of his or her detention before a court**<sup>27</sup> and **have access to a lawyer.**<sup>28</sup> The Human Rights Committee expressed the view that judicial review of the lawfulness of detention must include the possibility to **order release if the detention is incompatible with the requirements of the Covenant.**<sup>29</sup>

The **judicial decision must intervene “without delay”**; in the Human Rights Committee’s case-law, this generally means that the decision has to be taken within several weeks.<sup>30</sup> In any case, the established time-limit for judicial review must also apply “in emergency situations” when an exceptional number of irregular migrants enter the territory.<sup>31</sup>

Migrants who have been victims of arbitrary arrest or detention shall also have an **enforceable right to compensation.**<sup>32</sup>

### **Specific standards applicable to the detention of migrants**

#### ***1. Right to be informed and to communicate with the outside world***

The right of migrants to be informed does not only relate to the grounds for detention but is applicable also at the previous stage upon **entry of the territory of a State**. The Working Group on Arbitrary Detention in Principle 1 of the guarantees concerning

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<sup>24</sup> Working Group on Arbitrary Detention, Annual Report of 10 January 2008, U.N. Doc. A/HRC/7/4, para. 53.

<sup>25</sup> United Nations General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 9 December 1988, U.N. Doc. A/RES/43/173, Principle 4.

<sup>26</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit., para. 61.

<sup>27</sup> Article 9 para. 4 of the ICCPR. See also Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit., para. 61.

<sup>28</sup> *Ibid.*, para. 61 *in fine*.

<sup>29</sup> Human Rights Committee, *Baban et al. v. Australia*, No. 1014/2001, views 18 September 2003, U.N. Doc. CCPR/C/78/D/1014/2001 (2003), § 7.2.

<sup>30</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR commentary*, op. cit., p. 236.

<sup>31</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit., para. 61.

<sup>32</sup> Article 9, para. 5, ICCPR and Article 16, para. 9, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), 18 December 1990.

persons held in custody, established that “any asylum seeker or immigrant, when held for questioning at the border, or inside national territory in case of illegal entry, **must be informed at least orally, and in a language which he or she understands, of the nature of and the grounds for the decision refusing entry at the border, or permission for temporary residence in the territory**, that is being contemplated with respect to the person concerned.”<sup>33</sup>

In addition, in compliance with Article 9, paragraph 4 of the ICCPR, everyone shall be promptly **informed of the grounds for his or her detention<sup>34</sup> in writing<sup>35</sup>**; this information should be complete and should be given in a language that the person understands.<sup>36</sup>

Migrants should also have the possibility, while in custody, of **communicating with the outside world**, including by telephone, fax or electronic mail, and of contacting a **lawyer, a consular representative and relatives** both in the country of destination and country of origin.<sup>37</sup> Contact with **immigrant communities in destination countries** and civil society institutions should also be facilitated.<sup>38</sup>

## **2. Registration at detention facilities**

The Principles laid out in the Deliberation No. 5 of the Working Group on Arbitrary Detention<sup>39</sup>, in line with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>40</sup>, clearly affirm **the importance of registering the presence of any persons placed either in custody or in detention<sup>41</sup>**. Principle 4 establishes that “any asylum seeker or immigrant, when placed in custody, must enter his or her signature in a **register which is numbered and bound**, or affords equivalent guarantees, indicating **the person’s identity, the grounds for the custody and the competent authority which decided on the measure as well as the time and date of admission and release from custody.**”<sup>42</sup> Registers in detention facilities must also report the prescribed maximum duration of detention, date and

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<sup>33</sup> Principle 1, Deliberation No. 5, Annex II of the Annual Report of the Working Group on Arbitrary Detention, 28 December 1999, U.N. Doc. E/CN.4/2000/4.

<sup>34</sup> See Article 9 para. 2 of the ICCPR, Article 5 para. 2 of the ECHR and Article 7 para. 4 of the American Convention on Human Rights (ACHR).

<sup>35</sup> Principle 8, Deliberation No. 5, Annex II of the Annual Report of the Working Group on Arbitrary Detention, 28 December 1999, op. cit.

<sup>36</sup> See Principle 14 of the United Nations General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, op. cit. See also Article 16, para. 5, of the ICRMW, op. cit.

<sup>37</sup> *Ibid.*, Principle 2. See also Article 16, para. 7, of the ICRMW, op. cit. See also the Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, 4 August 2010, UN Doc. A/65/222, para. 87 (e).

<sup>38</sup> Report of the Special Rapporteur on the human rights of migrants, 4 August 2010, op. cit., para. 87 (e).

<sup>39</sup> Deliberation No. 5, Annex II of the Annual Report of the Working Group on Arbitrary Detention, 28 December 1999, U.N. Doc. E/CN.4/2000/4.

<sup>40</sup> United Nations General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, op. cit., see in particular Principle 12.

<sup>41</sup> The Working Group reiterated this recommendation with respect to detention facilities in general in its Annual Report of 10 January 2008, op. cit., para. 84.

<sup>42</sup> Deliberation No. 5, Annex II of the Report of the Working Group on Arbitrary Detention, op. cit. Emphasis added.

time of transfer to another detention facility, if applicable, and authority therefore, as well as the date the prisoner is eligible for early release on probation.<sup>43</sup>

### 3. *Maximum length of detention*

A maximum period of detention must be established by law and this may in no case be unlimited or of excessive length.<sup>44</sup> Upon expiry of this period, the **detainee should be automatically released**.<sup>45</sup> The European Court of Human Rights pointed out that “account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.”<sup>46</sup>

Different causes may lead to potentially indefinite detention, such as the impossibility to execute the removal order for lack of cooperation of the country of origin of the detainee or the obligation to respect the principle of *non-refoulement*. The Working Group on Arbitrary Detention considers that “**where the obstacle to the removal of the detained migrants does not lie within [the destination State’s] sphere of responsibility, the detainee should be released** to avoid potentially indefinite detention from occurring, which would be arbitrary.”<sup>47</sup>

The Human Rights Committee further specified the obligations of States with regard to the detention of migrants by ruling that “every decision to keep a person in detention should be open to **review periodically**” and that “detention should **not continue beyond the period for which the State can provide appropriate justification**”.<sup>48</sup> In the absence of any specific factor justifying the detention in the particular case at stake (such as lack of cooperation, risk of absconding, etc.), such detention may be considered arbitrary, even if the entry in the territory of the State was illegal. In addition, the detention will be justified only for **as long as deportation proceedings are in progress**<sup>49</sup> or **as long as a real and tangible prospect of removal exists**.<sup>50</sup> If proceedings are not carried out with due diligence the detention becomes arbitrary.<sup>51</sup>

The European Union Directive 2008/115 (“Return Directive”) recognises that each Member States should set a limited period for detention. This period should not exceed six months.<sup>52</sup>

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<sup>43</sup> Working Group on Arbitrary Detention, Annual Report of 10 January 2008, op. cit., para. 84.

<sup>44</sup> *Ibid.*, Principle 7.

<sup>45</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit., para. 61.

<sup>46</sup> European Court of Human Rights, *Amuur v. France*, op. cit., para. 43.

<sup>47</sup> *Ibid.*, para. 63.

<sup>48</sup> Human Rights Committee, *A v. Australia*, Communication No. 560/1993, views 30 April 1997, U.N. Doc. CCPR/C/59/D/560/1993, para. 9.4.

<sup>49</sup> European Court of Human Rights, *Chahal v. United Kingdom*, judgement 15 November 1996, para. 113 and European Court of Human Rights, *Tabesh v. Greece*, judgement 26 November 2009, para. 56.

<sup>50</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit., para. 64.

<sup>51</sup> European Court of Human Rights, *Tabesh v. Greece*, op. cit., para. 56.

<sup>52</sup> Article 15.5 of the Directive 2008/115/EC of the European Parliament and Council on common standards and procedures in Member States for returning illegally staying third-country nationals (“Return Directive”) which can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>.

#### 4. Detention conditions

The fundamental principle applicable to standards of detention is enshrined in Article 10 of the ICCPR which states that “all persons deprived of their liberty shall be treated with **humanity** and with respect for the inherent **dignity** of the human person.” Article 10 not only provides for States not to treat a person inhumanely, but it also imposes on them the obligation to take positive measures to ensure a minimum standard for humane conditions of detention, **regardless of economic or budgetary difficulties of the State**.<sup>53</sup> These standards must also take into account the special **status of migrants and their needs**. In addition, custody should take place in public premises intended for the detention of migrants, otherwise the individual in custody should be separated from persons imprisoned under criminal law.<sup>54</sup> States are responsible for ensuring humane conditions of detention even in **privately-run detention facilities**.<sup>55</sup>

The UN Standard Minimum Rules for the Treatment of Prisoners, covering specific needs of detainees, such as clothing, bedding, food, personal hygiene, medical services, exercise and sport, book and religious worship, are also relevant to the detention of migrants.<sup>56</sup> More specifically, the Parliamentary Assembly of the Council of Europe in its Resolution on Europe’s boat people<sup>57</sup> recognised that States should ensure that all reception centres or detention centres provide:

- appropriate food and sufficient quantities of drinking water;
- adequate clothing and change of clothing, bedding, blankets, toiletries, etc.;
- adequate furniture, such as beds, chairs and tables, as well as lockers to allow private items to be stored and kept safely;
- separate accommodation and separate sanitation for men, women and unaccompanied minors;
- adequate sanitation facilities which are kept clean and in serviceable operation;
- regular access to the open air during substantial parts of the day;
- sufficient recreational activities (television, reading, exercise, games, etc.).<sup>58</sup>

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<sup>53</sup> Human Rights Committee, *Womah Mukong v. Cameroon*, Communication No. 458/1991, view 10 August 1994, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para. 9.3. See also M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR commentary*, op. cit., p. 188.

<sup>54</sup> Guarantee 8, para. 69, Annual Report of the Working Group on Arbitrary Detention, 18 December 1998, U.N. Doc. E/CN.4/1999/63 and Principle 9, Deliberation No. 5, Annex II of the Annual Report of the Working Group on Arbitrary Detention, 28 December 1999, U.N. Doc. E/CN.4/2000/4.

<sup>55</sup> Human Rights Committee, *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v. Australia*, Communication No. 1020/2001, views 19 September 2003, U.N. Doc. CCPR/C/78/D/1020/2001 (2003).

<sup>56</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>57</sup> Parliamentary Assembly of the Council of Europe, Resolution n. 1637 (2008), *Europe’s boat people: mixed migration flows by sea into southern Europe*, adopted by the Standing Committee, acting on behalf of the Assembly, on 28 November 2008 (see Doc. 11688, report of the Committee on Migration, Refugees and Population, Rapporteur: Mr Østergaard).

<sup>58</sup> More specifically, on the conditions to be insured by States to migrants in detention, see IOM, *Guidelines for border management and detention procedures involving migrants: a public health perspective*, 2010, which can be found at:

The UN Special Rapporteur on the human rights of migrants, Jorge Bustamante, in his 2010 report clarified that “**Migration-related detention centres should not bear similarities to prison-like conditions.**”<sup>59</sup> In particular, the authorities in charge of these facilities should **not be security forces**; the officials working in this type of facilities should be **trained in human rights, cultural sensitivity, and age and gender considerations**, particularly with respect to the need of vulnerable situations; in addition, **disciplinary rules** should be markedly different from those in place in prison facilities.

Detention of migrants can particularly affect their health. Consequently, States are obliged to adequately secure the **health and well-being** of individuals in detention<sup>60</sup> by providing **regular medical attention and adequate specialised care.**<sup>61</sup> In the most serious cases relating to health conditions caused by detention, release from detention should be provided. In case of failure to adopt this measure, the State may be held responsible for a violation of Article 7 of the ICCPR, which prohibits torture and cruel, inhumane and degrading treatments.<sup>62</sup>

### **5. Monitoring and transparency**

A monitoring system should apply to all detention facilities for migrants. The Parliamentary Assembly of the Council of Europe recognized that States should “allow, when applicable, the **monitoring of reception centres and detention centres by ombudspersons and national human rights commissions, parliamentarians and other national or international monitoring bodies.** Where specialized monitoring bodies do not exist, they should be created.”<sup>63</sup>

In addition, it is important that **access to the centres is also granted to the media** to ensure transparency and accountability, without encroaching, however, on detainees’ right to privacy.<sup>64</sup>

### **6. Personal characteristics and vulnerabilities**

In deciding to detain an individual or to extend the detention period, due weight should be given to the **personal characteristics and circumstances** of the persons

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<http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/health/Guidelines-Border-Management-and-Detention-Procedures-Public-Health-Perspective.pdf>.

<sup>59</sup> Report of the Special Rapporteur on the human rights of migrants, 4 August 2010, op. cit., para. 87, (a), (c) and (d).

<sup>60</sup> See, *ex multis*, European Court of Human Rights, *Tehrani and others v. Turkey*, judgement 13 April 2010, para. 83.

<sup>61</sup> Inter-American Court of Human Rights, *Velez Loor v. Panama*, op. cit., para. 220.

<sup>62</sup> Human Rights Committee, *Mr. C. v. Australia*, Communication No. 900/1999, views 28 October 2002, U.N. Doc. CCPR/C/76/D/900/1999 (2002), para. 8.4.

<sup>63</sup> Parliamentary Assembly of the Council of Europe, Resolution n. 1637 (2008), op. cit., para. 9.14. See also Parliamentary Assembly of the Council of Europe, Resolution 1707 (2010) on Detention of asylum seekers and irregular migrants in Europe, adopted by the Assembly on 28 January 2010 (7th Sitting), that encourages Member States of the Council of Europe in which asylum seekers and irregular migrants are detained to: “9.2. put into law and practice 15 European rules governing minimum standards of conditions of detention for migrants and asylum seekers to ensure that:” *inter alia* “9.2.15. independent inspection and monitoring of detention centres and of conditions of detention shall take place.”

<sup>64</sup> *Idem*.

concerned. In some national legislation,<sup>65</sup> such characteristics include physical or mental health, a history of torture, family, age, duration of residence, pregnancy, whether anyone is reliant on the person for support, as well as the character or the conduct of the individual.<sup>66</sup>

In addition, given the particular negative effects of detention on **vulnerable persons**, including victims of trafficking or smuggling, unaccompanied children, elderly persons, victims of torture or trauma, persons with disability, pregnant women or victims of sexual violence, should not be detained.<sup>67</sup> Where vulnerable persons are detained, there should be an **enhanced requirement to ensure that conditions of detention are appropriate** and that they are provided with **health care and skilled professional support** as needed.<sup>68</sup>

### 6.1. Long-term residents

Long-term resident migrants whose situation in the country becomes irregular and who are consequently subject to expulsion should not be detained. The Parliamentary Assembly of the Council of Europe expressed the view that it is “totally unacceptable that legal long-term immigrants who have been sentenced to expulsion are held in prison while awaiting expulsion.”<sup>69</sup>

### 6.2. Children

Article 37 (b) of the Convention on the Rights of the Child (CRC) affirms that the detention of children should be a **measure of last resort and to be used for the shortest appropriate period of time**. The Working Group on Arbitrary Detention has expressed the view that the detention of minors, particularly of unaccompanied minors, requires even further justification than the detention of adults.

On the basis of Article 37 (b) of the CRC, the Committee on the Rights of the Child has affirmed that: “**Unaccompanied or separated children should not, as a general rule, be detained**” and, in any case, “detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof”.<sup>70</sup> In compliance with Article 37 (b), the Committee also recalled that “**all efforts, including acceleration of relevant processes, should be**

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<sup>65</sup> See, for example, Estonia, Estonia/Riigikohus/3-3-1-2-07 (22 March 2007), at paras. 20-21, Poland, Poland/Dz.U.03.128.1175 at para. 103; UK Border Agency, *Operational Enforcement Manual*, at para. 55.3.1.; Bulgaria, Law for Foreigners, Prom. SG. 153/23 Dec 1998, and following amendments until 2007, at para. 44.2; Ireland, Immigration Act 1999, Section 3(6) (a)-(b); Germany, General Administrative Regulations to the Residence Act [Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz], 26 October 2009 at para. 62.0.5.; Ireland, Immigration Act 1999, Section 3(6) (g).

<sup>66</sup> European Union Agency for Fundamental Rights (FRA), *Detention of third-country nationals in return procedures, Thematic Report*, September 2010, p. 41.

<sup>67</sup> See Principle IX, of the Report of the Rapporteur on the detention of asylum seekers and irregular migrants in Europe of the Committee on Migration, Refugees and Population of the Council of Europe, Ana Catarina Mendonça, Doc. 12105, 10 January 2010, in particular, para. 46.

<sup>68</sup> *Idem*. See also UNHCR, Guideline 7, *Revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, February 1999.

<sup>69</sup> Parliamentary Assembly of the Council of Europe, Recommendation No. 1504 (2001), Non-expulsion of long-term immigrants, para. 9.

<sup>70</sup> Committee on the Rights of the Child, *Treatment of unaccompanied and separated children outside their country of origin*, General Comment n. 6, 1 September 2005, CRC/GC/2005/6, para. 61.

**made to allow for the immediate release of unaccompanied or separated children from detention** and their placement in other forms of appropriate accommodation.”<sup>71</sup>

Moreover, a child deprived of his or her liberty is to be **treated** with humanity and respect for the inherent dignity of the human person, **in a manner which takes into account the particular needs of the child’s age and his or her rights, among others, to be separated from unrelated adults** unless it is considered in the child’s best interests not to do so and to be allowed **contact with family**, through correspondence and visits, save in exceptional circumstances.<sup>72</sup> Children’s right to education, leisure and play should be respected and promoted also in case of detention.

The UN Special Rapporteur on the human rights of migrants recalled that deprivation of liberty of children in the context of migration should never have a punitive nature.<sup>73</sup>

Finally, in compliance with obligations under the CRC, States have to “ensure that a **child shall not be separated from his or her parents against their will.**”<sup>74</sup> The right to **family unity** is in fact recognised by different international and regional binding instruments, such as Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights (ECHR), Article 11, section 2 of the American Convention on Human Rights (ACHR) and Article 18 of the African Charter on Human and Peoples’ Rights (ACHPR). When parents are detained, the presumption against separating the children from their parents is in conflict with the use of the detention of children as a last resort. Non-custodial measures should thus be considered the best solution.<sup>75</sup> When detention of the parents cannot be avoided, the fate of the child should be determined by taking into consideration his or her best interest.<sup>76</sup> In case families with children are detained, they should not be kept in closed facilities.<sup>77</sup>

### 6.3. Women

Women in detention facilities are particularly vulnerable to sexual abuse. Therefore, **women should be detained in separated facilities**<sup>78</sup> and **guarded by female warders.**<sup>79</sup> Privacy for certain personal activities (such as changing clothes, sanitary activities) should also be ensured.<sup>80</sup>

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<sup>71</sup> *Idem, in fine.*

<sup>72</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 2002, p. 540.

<sup>73</sup> Special Rapporteur on the human rights of migrants, Jorge Bustamante, Report to the Human Rights Council, 14 May 2009, U. N. Doc. A/HRC/11/7; Report to the General Assembly, 3 August 2009, U.N. Doc. A/64/213.

<sup>74</sup> Article 9 § 1 of the Convention on the Rights of the Child.

<sup>75</sup> In this sense see Special Rapporteur on the human rights of migrants, Report to the General Assembly, 4 August 2010, op. cit., para. 93.

<sup>76</sup> See European Union Agency for Fundamental Rights (FRA), *Detention of third-country nationals in return procedures*, op. cit., p. 88.

<sup>77</sup> IOM, *Guidelines for border management and detention procedures involving migrants*, op. cit., para. 1.1.2.

<sup>78</sup> See, for example, Committee against Torture, Conclusions and recommendations on the report from Bosnia and Herzegovina, 15 December 2005, U.N. Doc. CAT/C/BIH/CO/1, para. 14. See also IOM, *Guidelines for border management and detention procedures involving migrants*, op. cit., para. 1.1.1.

<sup>79</sup> This principle has been recognised by the Committee against Torture as an obligation for State Parties deriving from Article 11 on the conditions of detention of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments. See, *ex multis*, Conclusions and

States should also set up and promote an effective mechanism for dealing with **complaints of sexual violence**, including within the detention system, and should provide **victims with protection, psychological and medical assistance**.<sup>81</sup> Measures should also be set up to prevent the recurrence of such acts, to enhance the protection of women detainees.<sup>82</sup>

The UN Special Rapporteur on the human rights of migrants has clearly affirmed that “**whenever possible, migrant women who are suffering the effects of persecution or abuse, or who are pregnant or nursing infants, should not be detained.**”<sup>83</sup> In addition, if these vulnerable women cannot be released from custody, “the authorities should develop alternative programmes such as intense supervision or electronic monitoring.”<sup>84</sup>

## Non-custodial measures

### *1. Obligation to provide non-custodial measures*

The exceptional character of the detention of migrants, which has been repeatedly affirmed by different human rights bodies, entails the existence of an obligation on States to ensure the availability of non-custodial measures. The guiding principles on detention of asylum seekers and irregular migrants adopted by the Parliamentary Assembly of the Council of Europe invite States to consider providing for a **presumption in favor of liberty under national law**.<sup>85</sup> Many States have established this presumption in their national laws or in their immigration policies or practices.<sup>86</sup>

The Working Group on Arbitrary Detention recommended that “**alternative and non-custodial measures**, such as reporting requirements, **should always be considered before resorting to detention.**”<sup>87</sup> In addition, the Working Group made the following

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recommendations of the Committee against Torture on the report of Togo, 28 July 2006, U.N. Doc. CAT/C/TGO/CO/1, para. 20.

<sup>80</sup> IOM, *Guidelines for border management and detention procedures involving migrants*, op. cit., para. 1.1.1.

<sup>81</sup> *Idem*.

<sup>82</sup> The Committee on the Elimination of Discrimination against Women (CEDAW) affirmed the existence of an obligation in this sense for State Parties by interpreting Article 16 on the right to an effective remedy, Article 29.1 on discrimination against women and Article 29.2 on gender-based violence. See, *ex multis*, CEDAW, Concluding observations on the report from Argentina, 16 August 2010, U.N. Doc. CEDAW/C/ARG/CO/6, para. 27.

<sup>83</sup> Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, Mission to the United States of America, Addendum, 5 March 2008, § 121.

<sup>84</sup> *Idem*.

<sup>85</sup> Parliamentary Assembly, *Detention of asylum seekers and irregular migrants in Europe*, Resolution 1707 (2010), para. 9.3.1.

<sup>86</sup> R. Sampson, G. Mitchell and L. Bowring, *There are alternatives: A handbook for preventing unnecessary immigration detention*, Melbourne: The International Detention Coalition, 2011 at p. 21 quote the following States: Argentina, Venezuela, Peru, Uruguay, Brazil, Austria, Germany, Denmark, the Netherlands, Slovenia and the United Kingdom.

<sup>87</sup> Working Group on Arbitrary Detention, Report on the visit to the United Kingdom on the issue of immigrants and asylum seekers, 18 December 1998, UN. Doc. E/CN.4/1999/63/Add.3, para. 33. See also Special Rapporteur on the human rights of migrants, Report to the General Assembly, 4 August 2010, op. cit., para. 90. The European Court of Justice recognised that even the recourse to alternative

statement that: “The Working Group is fully aware of the sovereign right of States to regulate migration. However, it considers that **immigration detention should gradually be abolished.**”<sup>88</sup> The Human Rights Committee has also recognized the existence of an obligation for States to provide non-custodial measures when the latter is no longer justified in light of the passage of time, of intervening circumstances such as the hardship of prolonged detention<sup>89</sup> or in consideration of the particular conditions of the person detained.<sup>90</sup>

## *2. Specific principles applicable to non-custodial measures*

Non-custodial measures must be in accordance, in law and in practice, with international law and human rights standards.<sup>91</sup> Some of the international legal standards applicable to detention should also be respected when having recourse to non-custodial measures. In particular, the UN Special Rapporteur on the human rights of migrants clarified that “recourse to alternative measures should be based on an **individual assessment** of the migrant’s particular circumstances and be available in practice **without discrimination.**” Additionally, the measure chosen must be “**the least intrusive and restrictive** in order to attain the same objectives of immigration-related detention.”<sup>92</sup>

Non-custodial measures should also always be accompanied by the following safeguards:

- the measure should be **established by law**;
- full compliance with the principle of **non-discrimination** in the choice and application of the measure must be ensured;
- the measure should be subject to **legal review** and migrants should be granted the possibility of challenging them before a judicial or other competent and independent authority or body;
- migrants must have access to **legal counsel.**<sup>93</sup>

## *3. Examples and brief evaluation of non-custodial measures*

**a) Open or semi-open facilities:** this is one of the most common non-custodial measures, often used for asylum seekers. In these types of centres, migrants are allowed to leave the facility during the day but have to return at night. These centres must fully respect the human rights of the persons placed in their confines recognized

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measures should be justified by the particular circumstances of the case, such as the risk of absconding. See European Court of Justice, judgement 29 April 2011, *Mr. El Dridi*, op. cit., para. 37.

<sup>88</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, U.N. Doc. A/HCR/13/30, para. 58.

<sup>89</sup> Human Rights Committee, *Mr. Baban v. Australia*, op. cit., para. 7.2.

<sup>90</sup> Human Rights Committee, *Mr. C. v. Australia*, op. cit., para. 8.2.

<sup>91</sup> Special Rapporteur on the human rights of migrants, Report to the General Assembly, 4 August 2010, op. cit., para. 90.

<sup>92</sup> Special Rapporteur on the human rights of migrants, Report to the General Assembly, 4 August 2010, op. cit., para. 92 (a).

<sup>93</sup> Special Rapporteur on the human rights of migrants, Report to the General Assembly, 4 August 2010, op. cit., para. 92 (b) and 95.

by international law and, in particular, their right to liberty and freedom of movement.<sup>94</sup>

**b) Release with registration requirements:** this measure entails the release from detention but with an obligation to register the individual's place of residence with the responsible authorities. Permission is required for all changes of address. Sometimes the migrant is also provided with official registration documents. The production of identity documents may be required as well.<sup>95</sup>

**c) Reporting requirements:** this measure imposes on migrants the duty to report regularly, in person or over the telephone or in writing at the police, immigration office or other special agency.<sup>96</sup> The frequency of such reporting can vary from daily to weekly or less frequently.<sup>97</sup> This measure is widely used. However, it is important for the State authorities to ensure that it is necessary and proportionate and that it does not impose an excessive burden on the individual in terms of time and financial resources (i.e. for the commuting when the individual has to report in person).<sup>98</sup> Reporting requirements should be tailored to the particular situation of the individual.

**d) Release with the duty to reside in a specific administrative area or municipality:**<sup>99</sup> migrants can be released from detention with the duty to reside in a specific area or at a specific address. This measure can also be an effective tool to ensure the burden sharing of the different regions of a given country.

**e) Release on bail, bond or surety:**<sup>100</sup> this type of measure requires the pledge of a sum of money in order to ensure the individual's appearance at an official appointment or hearing, organized in the context of processing the case of a migrant by competent authorities.

A bail is a deposit of a sum of money to guarantee the individual's future compliance with immigration procedures.

A bond is a written agreement with the authorities where the individual promises to fulfil his or her duties. Sometimes it requires the deposit of a sum of money by the individual or a third person.

A surety is the guarantee given by a third person that the individual will comply with the immigration procedures; to this end, the third person agrees to pay a set amount of money if the individual absconds.

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<sup>94</sup> Report of the Rapporteur on the detention of asylum seekers and irregular migrants in Europe of the Committee on Migration, Refugees and Population of the Council of Europe, op. cit., para. 43.

<sup>95</sup> See Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, Report April 2009, p. 11.

<sup>96</sup> Report of the Rapporteur on the detention of asylum seekers and irregular migrants in Europe, op. cit., para. 44.

<sup>97</sup> See Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, op. cit. p. 12.

<sup>98</sup> *Idem*.

<sup>99</sup> Report of the Rapporteur on the detention of asylum seekers and irregular migrants in Europe, op. cit., para. 46.

<sup>100</sup> See Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, op. cit. p. 13.

The possibility for individuals to avail themselves of these measures is often limited due to difficulties finding a third person willing to pay a sum of money or to provide a guarantee for the migrant. When these measures are applied, it is important to take into account the family ties available and the economic situation of those concerned.<sup>101</sup>

**f) Controlled release:** an individual may be released under the supervision of other persons like family members, relatives or members of non-governmental, religious or community organizations. The guarantors can be required to pay a penalty if the individual does not comply with his or her obligation under the relevant immigration law. This measure has been largely used in Canada and has a 92 % success rate.<sup>102</sup>

**g) Electronic monitoring:** is a system whereby an electronic magnetic device is attached to a person's wrist or ankle.<sup>103</sup> It is one of the most sensitive non-custodial measures as its use risks impinging on the individual's right to freedom of movement, liberty and respect of his or her privacy.<sup>104</sup> Accordingly, the use of this measure should be carefully verified against the principles of necessity and proportionality, should be applied in a non-discriminatory manner and be subject to judicial review.<sup>105</sup> The authorities should also pay full attention to the need to respect the dignity of the individual concerned.

#### **4. Voluntary Return**

In order to provide migrants with an alternative to detention, in cases in which they express the will to return to their country, States may consider establishing, besides non-custodial measures, voluntary return programmes. This type of programmes, if part of a comprehensive migration management system (complementing border management and timely and fair asylum processes), can play an important role in reducing the incidence of detention and, where a person has been detained, in reducing the period of that confinement. This type of programmes is often the only solution for the plight of migrants who seek, or need, to return home but lack the means to do so.

Voluntary return programmes can provide advantages to everyone involved throughout the migration process: for the migrant it is a humane alternative to detention and deportation; and allows for a prepared, dignified and sustainable return and reintegration. At the same time, for the country of destination it is more cost effective and administratively expedient than forced return; and for the country of origin, and its bilateral relations with the country of destination, it is politically more palatable and less sensitive than the forced return of migrants whilst it significantly facilitates the reintegration of their nationals.

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<sup>101</sup> Report of the Rapporteur on the detention of asylum seekers and irregular migrants in Europe, op. cit., para. 47.

<sup>102</sup> *Ibid.*, para. 48.

<sup>103</sup> O. Field, *Non-custodial measures of Asylum seekers and Refugees, Legal & Protection Policy Research Series*, POLAS/2006/03, UNHCR, April 2006, para. 127.

<sup>104</sup> See Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, op. cit., p. 15.

<sup>105</sup> *Idem.*

These programmes may include the following components: 1) outreach and counselling at pre-return stage, 2) return arrangements and where required transit assistance, escorts for vulnerable migrants and medical assistance, for those with particular medical needs, 3) reception, and post arrival and reintegration assistance and 4) monitoring and evaluation.

It is crucial that all programmes of this type ensure that the choice to return is fully **voluntary**<sup>106</sup>, which means that in taking the decision the migrant is free from any physical or psychological pressure and that he or she is enabled to make an informed decision. To achieve this objective it is necessary that migrants receive a thorough and independent counselling on return, allowing them to express their views clearly, irrespective of their status or location and enabling them to make an informed decision about returning to their country of origin. An informed decision can only be taken if the migrant is provided with information which is adequate, available, accurate, and objective.<sup>107</sup> In addition, migrants should have the right to change their mind before departure from the host country. Accordingly, they should be free from any coercion even at the time of the departure (i.e., for example, when they have to board a plane or a vessel).

The **confidentiality** of individual information should be observed at all times. Written consent should be obtained from the assisted individual for the disclosure of his or her personal data to a third party.

The **countries returning migrants** (destination/transit countries) should:

- ensure full respect of the right of migrants to return to their own country<sup>108</sup> through facilitation of voluntary return;
- avoid returning migrants to a country where they risk to be persecuted or to be submitted to torture or other inhumane or degrading treatment or where they would not have access to adequate protection<sup>109</sup>;
- avoid the use of force to secure removal.

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<sup>106</sup> Article 1 of the Constitution of the IOM provides that: “The function and purpose of the Organisation shall be: [...] to provide similar services as requested by States, or requested by other international organisations, for voluntary return migration, including voluntary repatriation”. For a more detailed analysis of the elements for the assessment of voluntariness see IOM, *Health, Hope and Home? The possibilities and constraints of voluntary return for African rejected asylum seekers and irregular migrants living with HIV in the Netherlands*, January 2009, available at <http://www.iom-nederland.nl/dsresource?objectid=2456&type=org>, in particular pp. 37-40. See also IOM, *Assisted Voluntary Return and Reintegration Handbook*, April 2010, p. 10-11.

<sup>107</sup> IOM, *Assisted Voluntary Return and Reintegration Handbook*, op. cit., p. 11.

<sup>108</sup> See Article 13, para. 2 of the Universal Declaration of Human Rights (UDHR); Article 12, para. 4 of the IC C PR; Article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

<sup>109</sup> The principle of *non-refoulement* is a well-established principle of international law having the binding force of a customary norm. Accordingly, it is applicable to all States of the international community. The principle is also codified in Article 33 of the Convention relating to the Status of Refugees and in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. International bodies have interpreted the principle of *non-refoulement* in a very broad manner referring to the concept of inhumane and degrading treatment. See, for example, European Court of Human Rights, *Sufi and Elmi v. United Kingdom*, judgement 28 June 2011 and *M.S.S. v. Belgium and Greece*, judgement 21 January 2011.

The **country of origin** should particularly:

- make use of their rights to contact and communicate with their nationals in case they are detained in the returning States;
- facilitate the issuance of travel documentation;
- allow their nationals to return in safety and with dignity without fear of harassment or discrimination or exposure to disproportionate punitive measures;
- readmit returning nationals.

Specific safeguards have to be ensured when the assisted voluntary return programme regards individuals belonging to a **vulnerable group**, including migrants with health needs<sup>110</sup>, unaccompanied migrant children, elderly migrants and victims of trafficking<sup>111</sup>.

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<sup>110</sup> See, IOM, *Health, Hope and Home? The possibilities and constraints of voluntary return for African rejected asylum seekers and irregular migrants living with HIV in the Netherlands*, op. cit.

<sup>111</sup> For more detailed information see IOM, *Assisted Voluntary Return and Reintegration Handbook*, op. cit.

## Annex I: Summary table of the key principles

<b>GENERAL PRINCIPLES</b>	
Deprivation of liberty (Detention)	↔ Restriction of liberty (Non-custodial measures)
<b>Principle 1</b>	→ Grounds for detention must be established by law and exhaustively enumerated in legislation
<b>Principle 2</b>	→ Detention is a measure of last resort which must have a legitimate aim, be proportionate to the aim pursued and have a fair balance struck between the conflicting interests
<b>Principle 3</b>	→ Detention must be ordered and approved by a judge and subject to automatic and regular judicial review in each individual case
<b>Specific rights and standards applicable to migrants in detention</b>	
<b>1</b>	→ Right to be informed upon entry in the territory and while in detention
<b>2</b>	→ Right to communicate with the outside world
<b>3</b>	→ Obligation of registering the presence of any migrant placed either in custody or in detention
<b>4</b>	→ Obligation to establish a maximum period of detention in national legislation
<b>5</b>	→ Right to humane detention conditions and obligation to respect the inherent dignity of every human person
<b>6</b>	→ Obligation to allow monitoring of reception centres
<b>7</b>	→ Prohibition to detain vulnerable individuals
<b>Specific standards applicable to non-custodial measures</b>	
<b>1</b>	→ Obligation to establish a presumption in favour of liberty in national law
<b>2</b>	→ Obligation to first consider non-custodial measures for migrants in national legislation
<b>3</b>	→ Obligation to proceed to an individual assessment
<b>4</b>	→ Prohibition of discrimination in the application of non-custodial measures
<b>5</b>	→ Obligation to choose the least intrusive or restrictive measure

## **Annex II: Selected instruments and documents**

Convention on the Elimination of all Forms of Discrimination against Women, 1979;

Convention on the Rights of Persons with Disabilities, 2006;

Convention on the Rights of the Child, 2000;

Committee on the Rights of the Child, *Treatment of unaccompanied and separated children outside their country of origin*, General Comment No. 6, 1 September 2005;

International Covenant on Civil and Political Rights, 1966;

Human Rights Committee, *Right to liberty and security of persons (Article 9)*, General Comment No. 8, 30 June 1982;

International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families, 1990;

Vienna Convention on Consular Relations, 1963;

United Nations General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 9 December 1988, A/RES/43/173;

United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977;

United Nations Special Rapporteur on the human rights of migrants, Jorge Bustamante, Report to the General Assembly, U.N. Doc. A/65/222, 4 August 2010;

United Nations Special Rapporteur on the human rights of migrants, Jorge Bustamante, Report to the Human Rights Council, U.N. Doc. A/HRC/11/7, 14 May 2009;

United Nations Special Rapporteur on the human rights of migrants, Jorge Bustamante, Report to the Human Rights Council, U.N. Doc. A/HRC/7/12, 25 February 2008;

Working Group on Arbitrary Detention, Annual Report of 15 January 2010, U.N. Doc. A/HCR/13/30;

Working Group on Arbitrary Detention, Annual Report of 16 February 2009, U.N. Doc. A/HRC/10/21;

Working Group on Arbitrary Detention, Annual Report of 10 January 2008, U.N. Doc. A/HRC/7/4;

Working Group on Arbitrary Detention, Annual Report of 28 December 1999, U.N. Doc. E/CN.4/2000/4;

Working Group on Arbitrary Detention, Annual Report of 18 December 1998, U.N. Doc. E/CN.4/1999/63;