



# IMMIGRATION DETENTION AND ALTERNATIVES TO DETENTION

*Building upon the New York Declaration for Refugees and Migrants adopted on 19 September 2016, the Global Compact for Safe, Orderly and Regular Migration (GCM) will set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions. The GCM should make an important contribution to global governance and enhance coordination on international migration. For the consideration of Member States, the “Thematic Papers”, developed by IOM, outline core topics and suggestions to inform actors involved in the broad 2017 consultation process that will lead to the inter-governmental negotiations and final adoption of the GCM.*

## INTRODUCTION

Many States consider immigration detention as an unavoidable and necessary migration management tool. States have the right to control their borders and determine their migration policies. However, in doing so they must ensure respect for international law and standards. Detention of migrants is usually for the purpose of identifying persons and determining nationalities, preventing persons from gaining unauthorized entry, and expelling or ensuring the enforcement of a deportation order. Some transit countries also detain migrants to prevent them from leaving the country irregularly. In some instances, asylum seekers are detained pending a decision on their asylum application.

Immigration detention is often an administrative measure, but in States where unauthorized entry is a criminal act, detention can be imposed pursuant to criminal law. Most international bodies consider the criminalization of irregular entry as disproportionate and recommend that it be considered an administrative infringement. In many cases, however, the detention of migrants lacks regulation altogether and falls into a legal vacuum, leaving migrants with little to no safeguards or remedies for any abuse suffered while in detention or for arbitrary or extended detention.

As the New York Declaration recognizes, deprivation of liberty should be a measure of last resort and States should always first explore the possibility of using less restrictive options and apply these when possible.

## EXISTING PRINCIPLES

### **Normative Framework**

Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR) provides: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”<sup>1</sup>. The Working Group on Arbitrary detention further states that immigration detention should gradually be abolished, because migrants in an irregular situation have not committed any crime.<sup>2</sup>

The Human Rights Committee has interpreted the right to liberty and the prohibition of arbitrary arrest/detention of Article 9 (1) of the ICCPR as requiring that any measure imposing a restriction on this right “must be justified as reasonable, necessary and proportionate in light of the circumstances”<sup>3</sup>. As a



consequence, the legal basis in domestic legislation for any detention should establish the permissible grounds for detention and “define them with sufficient precision to avoid overly broad or arbitrary interpretation or application<sup>4</sup>.” Given the prerequisites of necessity and proportionality, detention of asylum seekers, refugees and migrants in an irregular situation should be used as a measure of last resort<sup>5</sup> and its necessity and proportionality should be evaluated in each individual case<sup>6</sup>. In order to establish that detention is necessary, and not arbitrary within the meaning of the ICCPR, States should consider less invasive means of achieving the same ends, i.e. whether alternatives to detention exist and can be applied. Automatic, mandatory or collective detention is considered arbitrary and contrary to international law<sup>7</sup>.

When detention is undertaken, international standards contain a number of procedural safeguards that should be guaranteed. According to the Working Group on Arbitrary Detention, migrants’ “detention must be ordered and approved by a judge and there should be automatic, regular and judicial, not only administrative, reviews of detention in each individual case<sup>8</sup>.” Furthermore, according to Article 9 (4) of the ICCPR, anyone who is deprived of his or her liberty is entitled “to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful<sup>9</sup>.” A maximum period of detention must be established by law and this may in no case be unlimited or of excessive length<sup>10</sup>. Upon expiry of this period, the person should be automatically released.<sup>11</sup>

International law also requires conditions of detention to be humane and dignified. According to Article 10 of the ICCPR: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person<sup>12</sup>.” Another human right that enshrines one of the most fundamental values of democratic societies is the prohibition of torture and inhumane or degrading treatment or punishment, irrespective of the circumstances and of the person’s conduct. The prohibition of torture is a long-standing principle of customary international law and is reaffirmed in several international<sup>13</sup> and regional<sup>14</sup> human rights treaties. It also holds relevance for the conditions of detention such as length of detention and the quality of the detention facility.<sup>15</sup>

For more information on the existing normative framework on detention and alternatives to detention, please see the Annex.

### ***Sustainable Development Goals***

The centrepiece for migration in the 2030 Agenda for Sustainable Development is target 10.7: “facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.” This target encompasses the international aspiration for well-managed policies concerning States’ detention practices. The promotion of “rule of law at the national and international levels” and “equal access to justice for all” as mentioned in target 16.3 reiterates the need for States to regulate and monitor their national detention practices to comply with international law and standards. Indeed, Recommendation 1 in the Sutherland Report calls specifically on States to end “the detention of migrant children and their families for reasons of their migration status”.



## ISSUES

In many countries, detained migrants face obstacles preventing full and effective access to justice in the courts.<sup>16</sup> National legislation varies widely in the extent to which migrants' rights to challenge detention or to remedies for violations suffered during detention are recognized. Detention centres often fail to satisfy international standards, and migrants who lack access to judicial review are unable to seek legal remedies for any inhumane or degrading conditions of detention or abuses suffered.

In 2014, the UN High Commissioner for Refugees launched a global strategy called 'Beyond Detention' to address challenges and concerns around states' immigration detention policies and practices. Many other organizations, such as IOM, the Office of the High Commissioner for Human Rights, the UN Children's Fund, the International Committee of the Red Cross and the Association for the Prevention of Torture have worked on the issue of detention in the immigration context, from the point of view of their respective mandates. A campaign to end the detention of children was launched in 2012 by the International Detention Coalition and is supported by numerous international organizations and NGOs<sup>17</sup>. The main priorities identified by international bodies have been children in detention, advocating for and promoting alternatives to detention and, where this is not feasible, ensuring decent standards in detention facilities.

## SUGGESTED ACTION

The New York Declaration provides that States will consider reviewing policies that criminalize cross-border movements; will pursue alternatives to detention; and that detention of children should be implemented "in the least restrictive setting, for the shortest possible period of time, and under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice". Additionally, in the proposed content of the Global Compact for Safe, Orderly and Regular Migration, the "effective protection of the human rights and fundamental freedoms of migrants" features heavily. This makes immigration detention and alternatives to detention an important focus for future international cooperation and commitments within the framework of the Global Compact.

Action on immigration detention could involve training, assistance, and capacity building across a range of spheres:

- 1) Develop better understanding of the international legal framework relating to detention, including on alternatives to detention;
- 2) Explore and pilot alternatives to detention, such as open or semi-open service/reception centres, bail, bond and surety options, centres for special support to vulnerable migrants, and community-based alternatives;
- 3) Provide technical assistance and training for immigration/border officials, staff at immigration detention centres, specialised service providers, and health care workers on migrants' rights, provision of culturally sensitive services, and occupational health and safety issues for staff;
- 4) Focus on migrants in a situation of vulnerability through effective case management services, appropriate screening, and the development of identification and referral mechanisms;



- 5) Develop or enhance services that contribute to long-term solutions for migrants, including assisted voluntary return and reintegration counselling;
- 6) Build capacity of health facilities in and outside immigration detention centres and establish referrals between centres and health facilities to ensure timely access of migrants to quality health services;
- 7) Improve detention infrastructure and services as required for ensuring a humane living environment, according to international standards and best practices and accounting for gender- and age-specific requirements;
- 8) Ensure that existing detention facilities meet international standards, if necessary through immediate infrastructural and other upgrades;
- 9) Conduct, consolidate and share research on immigration detention and alternatives to detention for a solid empirical foundation on which policy development and practical interventions can be based.
- 10) Develop and reform policies and laws relating to immigration detention;
- 11) Where detention of migrant children is considered not optional, development of best practices to ensure safety, security and best interests of the child;
- 12) Facilitate dialogue, exchange of effective practices, and information-sharing, among relevant partners and stakeholders as well as among countries;
- 13) Monitor detention facilities to help prevent human rights violations at either an individual or systemic level, and to improve detention conditions.



## ANNEX

### **Broader Normative Framework**

Asylum seekers:

For asylum seekers, if necessary, detention may be resorted to only on grounds prescribed by law to 1) verify identity; 2) determine the elements on which the claim to refugee status or asylum is based if detention for that is necessary; 3) to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; 4) to prevent likely absconding; or 5) to protect national security or public order.<sup>18</sup>

Children:

The Convention on the Rights of the Child (CRC)<sup>19</sup> provides that:

Article 9 - a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.<sup>20</sup>

Article 37 (b) - No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.<sup>21</sup>

Women:

It is important to recognise that women in detention facilities may be particularly vulnerable to sexual abuse. The UN Special Rapporteur on the human rights of migrants has recognised 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>22</sup>

International Borders:

OHCHR Recommended Principles and Guidelines on Human Rights at International Borders (‘Recommended Principles and Guidelines’) recognize that States have legitimate interests in implementing border controls in order to enhance security, to protect human rights, and to respond to transnational organized crime. The aim of the Recommended Principles and Guidelines is to assist States in identifying practical ways to ensure that human rights are at the centre of all border governance measures.<sup>23</sup>

With regard to migrants’ detention, the key recommendations set forth in the Recommended Principles and Guidelines on avoiding detention are the following:

Amending legislation to establish a presumption against detention in law, and legally prescribing human rights-compliant alternatives to detention, so that detention is a last resort imposed only



where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes.

Preventing arbitrary detention by ensuring that any deprivation of liberty that takes place at international borders (including transportation at or around border zones) is a measure of last resort and that the reasons for any detention are clearly defined in law, of limited scope and duration, necessary and proportionate, and that reasons for such detention are explained to migrants. Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.

Individually screening and assessing migrants at international borders to ensure that detention is only imposed for limited lawful objectives in accordance with international human rights law, and only when no alternatives to detention are available.

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<sup>1</sup> United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

<sup>2</sup> A/HRC/13/30/Add.1 at para. 58: “It [the Working Group] considers that administrative detention as such of migrants in an irregular situation, that is to say migrants crossing the border of a country in an irregular manner or without proper documentation, or having overstayed a permit of stay, and hence being liable for removal, is not in contravention of international human rights instruments. 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. Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.”

<sup>3</sup> International Covenant on Civil and Political Rights, General Comment No.35, para. 18.

<sup>4</sup> *Ibid*, para. 22.

<sup>5</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>6</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 Looor 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>7</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 Looor v. Panama*, *op. cit.*, para. 171.

<sup>8</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, *op. cit.*, para. 61.

<sup>9</sup> International Covenant on Civil and Political Rights, General Comment No. 35, para. 39.

<sup>10</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, Principle 7.

Working Group on Arbitrary Detention, Annual Report of 15 January 2010, *op. cit.*, para. 61.

<sup>11</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, *op. cit.*, para. 61.

<sup>12</sup> United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.

<sup>13</sup> See for example: Art. 7 (1) ICCPR; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

<sup>14</sup> See for example Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)



<sup>15</sup> The European Court of Human Rights held in the case of *Dougoz v. Greece* (2001), for example, that the conditions of detention of the applicant in the police headquarters and the Drapetsona detention centre, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of his detention, had amounted to degrading treatment contrary to Article 3 ECHR.

<sup>16</sup> E.g., lack of right to litigate, lack of legal assistance, lack of access to a lawyer (as opposed to an employee of the immigration authorities who is not independent and faces conflict of interest), lack of information, lack of interpretation etc.

<sup>17</sup> Office of the High Commissioner for Human Rights (OHCHR). (2012). Global Campaign to End Immigration Detention of Children. Retrieved from End Immigration Detention of Children: <http://endchilddetention.org>.

<sup>18</sup> See UNHCR, detention Guidelines, 2012, guideline 4.1

<sup>19</sup> United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> United Nations General Assembly. (2007). Report of the Special Rapporteur on the Human Rights of Migrants.

<sup>23</sup> United Nations Human Rights Office of the High Commissioner (OHCHR). (2014). Recommended Principles and Guidelines on Human. OHCHR.