

IML INFORMATION NOTE ON INTERNATIONAL STANDARDS ON ALTERNATIVES TO DETENTION (ATDs) AND IMMIGRATION DETENTION

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*Liberty is the rule, detention is the exception.*¹

INTRODUCTION AND PURPOSE

This Information Note aims to serve as a tool for practitioners working with the issue of migration detention and non-custodial alternatives to detention (thereafter alternatives to detention or ATDs) to acquaint them with international instruments and standards to be respected by States in this field.

The purpose of this Information Note is to provide an overview of the limits imposed by international law on States' competence to detain persons, as well as of States' obligations with respect to immigration detention and alternatives to detention. It is important to keep in mind that policies relating to detention and alternatives to detention represent specific and rather limited ways of dealing with irregular migration. Solutions for irregular migration movements require a much broader and comprehensive rights-based approach aimed at tackling the root causes of this phenomenon, including the promotion of pathways for safe, orderly and regular migration.²

Although the number of instruments and norms relating to the issue of immigration detention and non-custodial measures taken into account in the Information Note is far from being exhaustive, these instruments have been chosen in light of their scope of application (i.e. universal instruments, when existing, have been preferred to regional instruments) or 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 have also been included with a view to clarifying the exact meaning and scope of each principle. It should be noted that, while only treaties (conventions or charters) are binding upon States Parties, "soft law" instruments, such as declarations and guidelines, still prove very useful to interpret the provisions contained in international norms. Non-binding instruments can also be considered as indications of emerging hard law and sometimes provisions embodied in a declaration may become customary international law, i.e. legally binding upon all States.³

With regard to the scope of the Information Note, it includes principles applicable to both administrative and criminal detention of migrants for immigration purposes. Criminal detention of migrants is relevant when the irregular entry or stay in the territory of the State is considered a crime, sanctioned with detention, under the applicable domestic criminal law. Conversely, when irregular entry is simply contrary to domestic legislation on immigration, the deprivation of liberty is defined as "administrative detention". The term "migrant" is used in its most comprehensive meaning, including also asylum seekers and stateless persons.⁴

The Information Note is divided into three parts: **the first part** is aimed at providing an overview of the legal principles applicable to both restrictions and deprivations of liberty; **the**

¹ 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. Translation by the author.

² United Nations General Assembly, Resolution of 19 December 2018, Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195; IOM, International Dialogue on Migration 2008, Discussion Note on *Challenges of Irregular Migration: Addressing Mixed Migration Flows*, 7 November 2008, IOM Council Doc. No. MC/INF/294.

³ 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 specified 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.

⁴ IOM, Glossary on Migration, International Migration Law Series No. 34, 2019, p. 132.

second part focuses on the **specific standards applicable to the detention of migrants**; and the last part specifies **the legal principles relevant to non-custodial measures and provides a brief evaluation of the most common ones.**

I. GENERAL PRINCIPLES

i. Definitions: Deprivation of Liberty

IOM defines the detention of migrants, either criminal or administrative, as "[t]he deprivation of liberty for migration-related reasons."

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, establishes that deprivation of liberty is "any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority. Such deprivation of liberty begins at the time of arrest and extends until the person is released". Accordingly, any measure that results in a deprivation of liberty in which "migrants or their families are unable to leave at will" should be understood as a form of detention under Articles 16 and 17 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).⁵

The detention of migrants, either criminal or administrative, has thus been defined as a "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".⁶ The important point is that the person cannot or is unable to leave or abandon

at will the place or establishment where she or he has been placed, regardless of the specific name that it is given at the local level.⁷ Oftentimes States avoid using the term "detention" when they refer to immigrant deprivation of liberty. Instead, other terms such as "accommodation", "processing", "reception", "retention", and "placement" centers are used with the intention to avoid scrutiny for immigrant detention and to avoid procedural safeguards during detention procedures.⁸ However, detention for "reasons related to migration status" or "immigration detention" refers to **any situation in which a person is deprived of liberty on grounds related to their migration status**, regardless of the name or reason given for carrying out the deprivation of liberty, or the name of the facility or place where the person is being held while deprived of liberty.⁹

ii. Restriction of liberty

A distinction must however be drawn between a **deprivation of liberty**, which is relevant to **detention**, and a simple **restriction of liberty**, characterising **non-custodial measures**. The European Court of Human Rights (ECtHR) 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."¹⁰ 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."¹¹ 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.¹²

⁵ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), General Comment No. 5 (2021) on migrants' right to liberty, freedom from arbitrary detention and their connection with other human rights (hereinafter: General Comment No. 5), 21 July 2022, UN Doc. CMW/C/GC/5, paras. 13 and 14.

⁶ UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 1.

⁷ Inter-American Court of Human Rights (IACtHR), Advisory Opinion on Migrant Children, OC-21/14, 19 August 2014, para. 145.

⁸ General Comment No. 5, op. cit., para. 12.

⁹ Ibid, para. 15.

¹⁰ European Court of Human Rights (ECtHR), *Amuur v. France*, Application No. 19776/92, 25 June 1996, para. 42.

¹¹ Idem.

¹² 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.¹³

iii. Principles of legality, necessity and proportionality

Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) sets out the right to liberty as follows:

“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.”

According to this provision, any detention must respect the principles of 1) legality, 2) necessity and 3) proportionality. In other words, all deprivations of liberty, to be lawful, must have a a) legitimate aim provided by law, b) be necessary and c) be proportionate to the aim pursued.¹⁴

The Human Rights Committee 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.¹⁵ Detention prior to expulsion is considered a deprivation of liberty falling within the scope of Article 9 of the ICCPR.¹⁶

The Working Group on Arbitrary Detention

¹³ Ibid, para. 43.

¹⁴ See also IACTHR, *Velez Loor v. Panama*, Series C No. 218, 10 December 2010, para. 162.

¹⁵ 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 instrument (international or regional) explicitly referring to the admissibility of the detention of migrants to prevent them to enter the country without being authorised or with the view to their deportation or extradition. See Article 5, letter f, or 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*

(WGAD) expressed the following view regarding the detention of migrants in an irregular situation:

“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.**”¹⁷

a. Legality and legitimate grounds for detention

The possibility to deprive someone of their liberty has to be specified in the national legislation. 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, is foreseeable, and regulates the procedures to be observed, as well as the maximum period for how long a person can be detained.¹⁸

This means that detaining a person by an administrative act can only be allowed if it is enforcing a provision in law. In the same line, the Committee on the Protection of the Rights

Guinea v. Democratic Republic of Congo, 30 November 2010, para. 77.

¹⁶ See Human Rights Committee, *Hammel v. Madagascar*, Communication No. 155/1983, 3 April 1987, UN Doc. CCPR/C/OP/2, para. 19.4 and *V.M.R.B. v. Canada*, Communication No. 236/1987, 18 July 1988, UN Doc. Supp. No. 40 (A/43/40), paras. 4.4. and 6.3.

¹⁷ Working Group on Arbitrary Detention, Annual Report of 10 January 2008, UN Doc. A/HRC/7/4, para. 53. The CMW has also indicated that “the mere fact of entering or remaining in an irregular situation in a State is not sufficient reason to mandate the immigration detention of migrant workers and their families, since that exceeds the legitimate purpose or interest of States to control and regulate migration” (see General Comment No. 5, op. cit., para. 21).

¹⁸ See M. Nowak, U.N. Covenant on Civil and Political Rights, CCPR commentary, Kehl, 2005, p. 224.

of All Migrant Workers and Members of Their Families (CMW) has emphasized that immigration detention can be legal “**only when it is previously authorized by law and is in line with the procedures established by law.**”¹⁹ This condition must be fulfilled through the clear and exhaustive provision of detention in national law.²⁰

The WGAD has further affirmed that, while administrative detention is not *per se* in contravention of any international human rights instrument,²¹ the reasons justifying the detention of migrants, such as the **necessity of identifying migrants in an irregular situation**, the **risk of absconding**, or the **facilitation of the expulsion of an irregular migrant who has been served with a removal order**, “must be clearly defined and exhaustively enumerated in legislation.”²²

In its General Comment No. 5, the CMW has reiterated that any deprivation of liberty in a migration context must be based on a **legitimate objective** of the State, indicating that immigration detention can be justified only where there is a risk that the migrant will avoid immigration proceedings or to guarantee the implementation of a deportation order.²³

For example, according to Art. 15 of the EU Return Directive²⁴ during the removal procedure, detention can only be used, when there is a risk of absconding or when the migrant concerned avoids or hampers the preparation of the removal process, and unless less coercive measures can be applied effectively (see principle of necessity below). Therefore, within the European Union (EU), the issuing of a removal order does not justify *per se* the detention of the person.

In other words, the “grounds for detention must be clearly and exhaustively defined and the legality of detention must be open for challenge before a court and regular review within fixed time limits. Further guarantees include the fact that a maximum period of detention must be established by law and that upon expiry of this period the detainee must be **automatically released.**”

Detention must be ordered or approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. The procedural guarantee of Article 9(4) of the ICCPR requires that migrant detainees enjoy the right to challenge the legality of their detention before a court. All detainees must be informed as to the reasons for their detention and their rights, including the right to challenge its legality, in a language they understand and must have access to legal assistance and representation.²⁵

Established time limits for judicial review must even stand in “emergency situations” when an exceptionally large number of undocumented immigrants enter the territory of a State”.²⁶

The **legality of a detention must be verified against international law** and particularly against the provisions of the ICCPR.²⁷ The lack of legality 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

¹⁹ General Comment No. 5, op. cit., para. 23.

²⁰ *Idem*.

²¹ Working Group on Arbitrary Detention, Annual Report of 15 January 2010, UN Doc. A/HCR/13/30, para. 58.

²² *Ibid*, para. 59.

²³ General Comment No. 5, op. cit., para. 20.

²⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. 348/98, 24.12.2008. See also the European Court of

Justice (ECJ), Grand Chamber, Case C-329/11, *Achuchbabian*, 6 December 2011, para. 50.

²⁵ Working Group on Arbitrary Detention, United Nations Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2015, UN Doc. A/HRC/30/37, para. 109(a), (b).

²⁶ Working Group on Arbitrary Detention, Annual report, 16 February 2009, UN Doc. A/HRC/10/21, para. 67.

²⁷ Human Rights Committee, *Baban et al. v. Australia*, Communication No. 1014/2001, 6 August 2003, UN Doc. CCPR/C/78/D/1014/2001, para. 7.2.

‘retention.’”²⁸

The WGAD 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 does not lie within their sphere, 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.”²⁹ In other words, the detention becomes unlawful when there is no more legitimate reason to the detention, for example when there is no prospect of proper official identification or when there is no prospect of return.

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 national law must protect the individual from arbitrariness.

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.**³⁰ The CMW has stated that the principle of **non-arbitrariness of detention is a rule of *jus cogens***, pointing out that “the Convention prohibits arbitrary detention, understanding arbitrary detention to be any

deprivation of liberty that exceeds the limits of reasonableness”.³¹

b. Necessity and proportionality

In order to prevent the unlawfulness or arbitrariness of detention, the detention must not only be ordered according to the applicable national/local law (principle of legality above), but it must also respect both principles of necessity and proportionality.

In relation to alternatives to detention for migration purposes, both of these principles are fundamental in guiding the evaluation of, decision for, and application of, less restrictive measures in each particular case. The CMW considers that “States have an obligation to review [for potential implementation] all available alternative measures before resorting to detention, in accordance with the principles of necessity and proportionality.”³²

Under the principle of necessity, immigration detention can only be used as a last resort,³³ i.e. where it is strictly necessary (absolutely indispensable) to achieve the established legitimate purpose, taking into consideration that deprivation of liberty will always constitute the most harmful measure for individuals.³⁴ Under this principle, detention as a “measure of last resort” requires that there are no other measures which are less onerous, restrictive or invasive for the individual circumstances of the person in an irregular migration situation,³⁵ which can be applied to meet the purposes at stake (for example ensuring the return or compliance with the identification and

²⁸ Special Rapporteur on the human rights of migrants, Jorge Bustamante, Report to the Human Rights Council, 25 February 2008, UN Doc. A/HRC/7/12, para. 47.

²⁹ Working Group on Arbitrary Detention, Annual report, 16 February 2009, op. cit., para. 67.

³⁰ Human Rights Committee, *Alphen v. Netherlands*, Communication No. 305/1998, 15 August 1990, UN Doc. CCPR/C/39/D/305/1988, 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.

³¹ General Comment No. 5, op. cit., para. 22.

³² Ibid, para. 46.

³³ UNHCR, Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice, 4 June 1999, UN Doc. EC/49/SC/CRP.13, para. 26(e): “alternative and non-

custodial measures, such as reporting requirements, should always be considered before resorting to detention”. In Objective 13 of the Global Compact for Migration, the majority of UN Member States committed to “[u]se migration detention only as a measure of last resort and work towards alternatives.”. See also Working Group on Arbitrary Detention, Report of 2 July 2018, UN Doc. A/HRC/39/45, Annex, Revised deliberation No. 5 on deprivation of liberty of migrants, para. 23; Working Group on Arbitrary Detention, Annual Report of 10 January 2008, op. cit., para. 54.

³⁴ General Comment No. 5, op. cit., para. 24. In the words of the CMW, immigration detention is considered “an undesirable measure” that “should be an exceptional measure of last resort. Accordingly, the Committee has pointed out that there should always “be a presumption in law against detention and therefore in favour of freedom” (General Comment No. 5, para. 18).

³⁵ General Comment No. 5, op. cit., para. 25; Working Group on Arbitrary Detention, Revised deliberation No. 5, op. cit., para. 23.

migration status process), which points to the duty to consider alternatives.

The CMW also stated that, under the principle of exceptionality of immigration detention, a presumption of freedom should apply, and deprivation of liberty should be considered once all the less harmful alternatives have been considered and ruled out.³⁶ This means that the State must be able to demonstrate that it has looked into alternative measures, or even the absence of measures, before resorting to detention, as well as explain why it has been decided to detain the individual. The competent authority must therefore evaluate whether the detention of the migrant is necessary to prevent, for example, the risk of absconding or if another measure is sufficient to address that risk.³⁷

Moreover, **the necessity to have recourse to a detention measure must be evaluated in each individual case.**³⁸ Therefore mandatory or automatic detention must be considered arbitrary. The other international bodies that monitor the respect of human rights treaties have established that **the right to liberty stipulates that every restriction to this right be exceptional.**³⁹

Under the principle of proportionality, States are required to strike a balance between “the gravity of the measure taken, which is the deprivation of liberty of a person in an irregular situation, [...] and the situation concerned.”⁴⁰ This includes evaluating the potential impacts of detention on the physical and mental health of the individual,⁴¹ which entails a heightened duty of care by the State to provide effective

protection measures for migrants in vulnerable situations.⁴² Under this principle, States must therefore consider alternatives to detention first, before turning to detention.⁴³

The actual application of an alternative measure to detention is to be deemed proportionate or disproportionate, basing itself on the evaluation of the principle of necessity (whether detention has been deemed necessary or not for the legitimate aim pursued), for example, considering the particular circumstances of the case, evaluating the risk of absconding, evaluating the potential impacts of detention on the physical and mental health of the individual, taking into consideration human rights such as family unity and the best interests of the child, inter alia.⁴⁴

The principle of proportionality also means that detention is permissible only for the shortest period of time. There is no set time limit for how long an individual can be detained under international law. For instance, in the EU, immigration detention for return purposes can be up to 6 months, and in exceptional circumstances it can be prolonged up to 18 months in total.⁴⁵ Within this limit established by EU law, EU countries may legislate at their discretion and set other limits. For example, in Portugal, as part of the procedure of lawful forced returns, a migrant in an irregular situation can be deprived of their liberty at a temporary facility for up to 60 days, to allow for the enforcement of the coercive removal decision.⁴⁶ After the maximum period is up, the individual must be released from detention. An eighteen month duration has been criticized for

³⁶ General Comment No. 5, op. cit., para. 38.

³⁷ European Migration Network, Detention and Alternatives to Detention in International Protection and Return Procedures: Spain 2020, p. 7; M. Macovei, The right to liberty and security of the person: A guide to the implementation of Article 5 of the European Convention on Human Rights, Human rights handbooks, No. 5, 2002, p. 6; P. de Bruycker, A. Bloomfield, E. Tsourdi, J. Pétin, Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation, 2015, pp. 39-41 and 44.

³⁸ Ibid, para. 19; Working Group on Arbitrary Detention, Revised deliberation No. 5, op. cit., para. 19.

³⁹ Inter-American Commission of Human Rights, *Ricardo Canese v. Paraguay*, Series C No. 111, 31 August 2004, para. 129; *Chaparro Álvarez y Lapo Iñiguez v. Ecuador*, Series C No. 170, 21 November 2007, para. 93 and *Yvon Neptune v. Haiti*, Series C No. 180, 6 May 2008, para. 98.

⁴⁰ Working Group on Arbitrary Detention, Revised deliberation No. 5, op. cit., para. 24.

⁴¹ Ibid.

⁴² General Comment No. 5, op. cit., para. 25.

⁴³ Working Group on Arbitrary Detention, Revised deliberation No. 5, op. cit., para. 24.

⁴⁴ With regard to the detention of migrant children, see European Court of Human Rights, *Popov v. France*, Applications No. 39472/07 and 39474/07, 19 January 2012, para. 147; Human Rights Committee, *Stefan Lars Nystrom v. Australia*, 18 July 2011, UN Doc. CCPR/C/102/D/1557/2007, para. 7.3.

⁴⁵ European Union, Directive 2008/115/EC of the European Parliament and of the Council, op. cit., Article 15.5 and 15.6.

⁴⁶ Article 146 of Law No. 18/2022, adopted by the Assembly of the Republic, 25 August 2022, Portugal.

being excessively long.⁴⁷ It bears noting in this regard that not only does the initial order of detention have to be necessary and proportionate, but also each subsequent decision to prolong the detention.

iv. Procedural safeguards

II. SPECIFIC STANDARDS APPLICABLE TO IMMIGRATION DETENTION

i. Right to be informed and 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 WGAD in Principle 1 of the guarantees concerning persons held in custody set forth in its 1999 Deliberation No. 5, which was revised in 2018, 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.**”⁵⁶

Furthermore, in compliance with Article 9(4) of the ICCPR, everyone shall be promptly **informed of the grounds of their detention**⁵⁷ in writing;⁵⁸ this information should be complete and should be given in a language that the person

understands.⁵⁹

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.⁶⁰ Contact with **immigrant communities in destination countries** and civil society institutions should also be facilitated.⁶¹

ii. Consular Assistance

Migrants in detention face difficulties such as proceedings in a foreign language, a different legal system, lack of familiarity with resources for legal defense, fear of deportation, and isolation from their family and community, among others. Consuls are uniquely positioned to address the needs of migrants and provide them with information to allow them to exercise their rights.

In situations where a foreign national is detained in a foreign State, Article 36 of the Vienna Convention on Consular Relations guarantees the following rights to consular officers and to detained foreign nationals:⁶²

Rights of consular officials (of the sending State):

- To communicate with and visit their nationals who are detained.
- To be promptly informed of the

⁴⁷ I. Majcher and T. Strik, “Legislating without Evidence: The Recast of the EU Return Directive” in *European Journal of Migration and Law*, Vol. 23 (2021), pp. 103-26, where the authors note that the principles of necessity and proportionality, which entail the rule that immigration detention should be as short as possible, could become meaningless given the maximum time frame for detention of six months. The article also criticizes that there is no evidence that extended detention periods help removals, as removals tend to take place in initial phases of detention. See also Statewatch, “The revised Returns Directive: a dangerous attempt to step up deportations by restricting rights”, 11 September 2019, criticizing the lack of evidence for the Commission’s claim that the maximum duration of detention of 18 months “is needed to complete the return procedure successfully... short periods of detention are precluding effective removal.”

⁵⁶ Working Group on Arbitrary Detention, Annual Report of 28 December 1999, UN Doc. E/CN.4/2000/4, Deliberation No. 5, Annex II, Principle 1, revised by Working Group on Arbitrary Detention, Revised deliberation No. 5 on deprivation of liberty of migrants, op. cit.

⁵⁷ See Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7(4) of the American Convention on Human Rights (ACHR).

⁵⁸ Working Group on Arbitrary Detention, Deliberation No. 5, op. cit., Principle 8; Working Group on Arbitrary Detention, Revised deliberation No. 5, op. cit., para. 33.

⁵⁹ United Nations General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, op. cit., Principle 14. See also Article 16(5) of the ICRMW.

⁶⁰ Ibid, Principle 2. See also Article 16(7) of the ICRMW. 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).

⁶¹ Report of the Special Rapporteur on the human rights of migrants, 4 August 2010, op. cit., para. 87(e).

⁶² Lists modified from: A. James and M. Warren, “A Universal Safeguard: Providing Consular Assistance to Nationals in Custody: An Introductory Guide for Consular Officers”, *The International Justice Project*, 2008, pp. 2-3.

detention, at the request of the national.

- To be forwarded communications addressed to the consulate from the detained foreign national without delay.
- To arrange for the detainee's legal representation.
- To provide other forms of assistance with the permission of the detainee.
- To have any communication addressed to the consulate of the sending State forwarded right away.

Rights of detained foreign nationals:

- To communicate freely with the consulate of their sending State.
- To be informed without delay by the arresting authority of the right to consular notification and communication.
- To choose whether or not to have the consulate contacted by the detaining authorities.
- To accept or decline any offered consular assistance.

States of origin should take the necessary measures to ensure that their consulates effectively address the needs of their nationals when facing situations of detention in a foreign State.⁶³ Arranging legal representation to facilitate effective access to justice, assistance in securing evidence from abroad, and provision for legal aid are some of the ways in which consulates may address the needs of their nationals when detained abroad.

States of destination must ensure that detaining authorities in their territory are trained to promptly inform detained foreign

nationals of their rights to have their consular post informed of their detention and to communicate with consular officials. Such States must also ensure that detaining authorities are aware that the detained person should be consulted before notifying consulates of their detention, as this notification may place the migrant at risk (e.g. in the case of refugees and asylum seekers) and in such cases, notification would violate basic precepts of international protection by exposing them to the State that has persecuted them or tolerated their persecution.⁶⁴ If the person detained would like their consulate to be notified, this should be done as quickly as possible.

The right to access consular assistance as a human right is well-established for those individuals subject to the jurisdiction of States that have ratified the ICRMW. Article 23 of the ICRMW provides migrant workers and members of their families with a right to have "recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin" whenever any of the rights recognized in the ICRMW are impaired. Article 16(7) of the ICRMW reiterates the above-mentioned rights to information on consular protection and assistance, consular notification and consular communication with respect to migrant workers.⁶⁵

iii. Registration at detention facilities

The Principles laid out in the Deliberation No. 5 and Revised Deliberation No. 5 of the WGAD,⁶⁶ in line with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁶⁷ clearly affirm **the importance of registering the presence of any persons placed either in custody or in**

without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay; (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation."

⁶⁶ Working Group on Arbitrary Detention, Deliberation No. 5, op. cit. and Revised Deliberation No. 5, op. cit.

⁶⁷ 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.

⁶³ OHCHR, Principles and Guidelines Supported by Practical Guidance on the Human Rights Protection of Migrants in Vulnerable Situations, 2018, Principle 8.

⁶⁴ Idem.

⁶⁵ Article 16(7) stipulates that "[w]hen a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner: (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefore; (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded

detention.⁶⁸ Principle 4 establishes that “any asylum seeker or immigrant, when placed in custody, must enter their 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.**”⁶⁹ Registers in detention facilities must also report the prescribed maximum duration of detention, date and time of transfer to another detention facility, if applicable, and authority responsible, as well as the date the prisoner is eligible for early release on probation.⁷⁰

iv. 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.⁷¹ For example in the EU law, a maximum length of 6 months of migration detention, renewable up to 18 months maximum, is prescribed.⁷² Upon expiry of this period, the **detainee should be automatically released.**⁷³ If the maximum detention period has been attained, the migrant must be provided with a document **protecting against renewed detention**, as “renewed detention [would] contravene the legally defined maximum detention period.”⁷⁴ The ECtHR 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.”⁷⁵

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 lack of means of transportation to the home country, or the obligation to respect the principle of *non-refoulement*. The WGAD considers that “where the obstacle to the removal of the detained migrants does not lie within their sphere of responsibility, the detainee should be released to avoid potentially indefinite detention from occurring, which would be arbitrary.”⁷⁶

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.**”⁷⁷ 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 should be considered arbitrary, even if the entry in the territory of the State was irregular. In addition, the detention will be justified only for **as long as deportation proceedings are in progress**⁷⁸ or **as long as a real and tangible prospect of removal exists.**⁷⁹ If proceedings are not carried out with due diligence the detention becomes arbitrary.⁸⁰

v. 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

⁶⁸ 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.

⁶⁹ Working Group on Arbitrary Detention, Deliberation No. 5, op. cit. Emphasis added.

⁷⁰ Working Group on Arbitrary Detention, Annual Report of 10 January 2008, op. cit., para. 84.

⁷¹ Working Group on Arbitrary Detention, Deliberation No. 5, op. cit., Principle 7 and Revised Deliberation No. 5, op. cit., paras. 25-26.

⁷² This duration has been criticized for being excessively long by authors. See above fn 47.

⁷³ Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit., para. 61.

⁷⁴ General Comment No. 5, op. cit., para. 52.

⁷⁵ European Court of Human Rights, *Amuur v. France*, op. cit., para. 43.

⁷⁶ Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit., para. 63.

⁷⁷ Human Rights Committee, *A v. Australia*, Communication No. 560/1993, 30 April 1997, UN Doc. CCPR/C/59/D/560/1993, para. 9.4.

⁷⁸ European Court of Human Rights, *Chahal v. United Kingdom*, Application No. 22414/93, 15 November 1996, para. 113 and European Court of Human Rights, *Tabesh v. Greece*, Application No. 8256/07, 26 November 2009, para. 56.

⁷⁹ Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit., para. 64.

⁸⁰ European Court of Human Rights, *Tabesh v. Greece*, op. cit., para. 56.

dignity of the human person.” Article 10 provides that States may not treat a person inhumanely and that they are obliged to take positive measures to ensure a minimum standard for humane conditions of detention, **regardless of economic or budgetary difficulties of the State**.⁸¹ These standards must 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, meaning that the migrant in custody must be separated from persons imprisoned under criminal law.⁸² States are responsible for ensuring humane conditions of detention even in **privately-run detention facilities**.⁸³

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.⁸⁴ More specifically, the CMW has established that States must ensure, among others, that:

- migrant workers are **not detained with persons prosecuted for or convicted of crimes**;
- **men and women remain separated**, taking into consideration the particular needs of persons with diverse sexual orientation, gender identity, gender expression and sex characteristics;
- **sufficient space** is provided and overcrowding is avoided at all costs;
- facilities have **open spaces for coexistence and recreation**;
- adequate **cleaning and lighting** is provided;
- **other measures** are taken that enable

detainees to have an **adequate standard of living**, which includes appropriate clothing and bedding, heating, sufficient food in line with the physical and health conditions of the migrants and their religious beliefs, and the rights to access to safe water and sanitation and to health care, including health care professionals, independent from detaining authorities.⁸⁵

In addition to the above, the Parliamentary Assembly of the Council of Europe in its Resolution on Europe’s boat people⁸⁶ recognized that States should ensure that all reception centres or detention centres provide **adequate furniture**, such as beds, chairs and tables, as well as lockers to allow private items to be stored and kept safely, and sufficient **recreational activities** (television, reading, exercise, games, etc.).⁸⁷

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.”**⁸⁸ 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 needs that arise in vulnerable situations; in addition, disciplinary rules should be markedly different from those in place in prison facilities. In addition, migrant women in detention must be attended by women personnel and special protection measures must be in place for migrant persons with diverse SOGIESC.⁸⁹

⁸¹ Human Rights Committee, *Womah Mukong v. Cameroon*, Communication No. 458/1991, 10 August 1994, UN Doc. CCPR/C/51/D/458/1991, para. 9.3. See also M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR commentary*, op. cit., p. 188.

⁸² Working Group on Arbitrary Detention, Annual Report of 18 December 1998, UN Doc. E/CN.4/1999/63, para. 69, Guarantee 8, Deliberation No. 5, op. cit., Principle 9, and Revised Deliberation No. 5, op. cit., para. 44.

⁸³ Human Rights Committee, *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v. Australia*, Communication No. 1020/2001, 19 September 2003, UN Doc. CCPR/C/78/D/1020/2001.

⁸⁴ 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, revised in UN General Assembly Resolution 70/175 of 17 December 2015, Annex.

⁸⁵ General Comment No. 5, op. cit., para. 85.

⁸⁶ Parliamentary Assembly of the Council of Europe, Resolution 1637 (2008), Europe’s boat people: mixed migration flows by sea into southern Europe, 28 November 2008.

⁸⁷ 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.

⁸⁸ Report of the Special Rapporteur on the human rights of migrants, 4 August 2010, op. cit., para. 87(a), (c) and (d).

⁸⁹ See IOM, International Migration Law Information Note on International standards on the protection of people with diverse sexual orientation, gender identity, gender expression and sex

Detention of migrants can particularly affect their health. Consequently, States are obliged to adequately secure the **health and well-being** of individuals in detention⁹⁰ by providing **regular medical attention and adequate specialised care**.⁹¹ In the most serious cases relating to health conditions, release from detention should be ordered. In case of failure to adopt this measure, the State may be held responsible for violation of Article 7 of the ICCPR, which prohibits torture and cruel, inhumane and degrading treatments.⁹²

vi. Monitoring and transparency

A monitoring system should apply to all detention facilities for migrants. This implies that, where specialized monitoring bodies do not exist, **they should be created**.⁹³ In this respect, the authority responsible for monitoring places of detention must be **independent and impartial**.⁹⁴ In consequence, the authority in charge of implementing the immigration policy or responsible for detention centres must be different and independent from the one to carry out that task.⁹⁵ Particularly, monitoring entities of immigration facilities should be allowed to:

- **visit any place** where immigration detention might occur, and do so unannounced;
- **choose the places they want to visit** and the persons they want to interview;
- **obtain any information they need**, request

characteristics (SOGIESC) in the context of migration, 2021, p. 17, promoting, inter alia, the consultation of migrants with diverse SOGIESC for measures appropriate for their protection, training of detention staff and other detainees, provision of health care, welfare services, and contact with their community, and in some cases the placement in separate facilities in agreement with the migrant concerned.

⁹⁰ See, *ex multis*, European Court of Human Rights, *Tehrani and others v. Turkey*, Applications No. 32940/08, 41626/08, 43616/08, 13 April 2010, para. 83.

⁹¹ Inter-American Court of Human Rights, *Velez Loor v. Panama*, op. cit., para. 220.

⁹² Human Rights Committee, *Mr. C. v. Australia*, Communication No. 900/1999, 28 October 2002, UN Doc. CCPR/C/76/D/900/1999, para. 8.4.

⁹³ Parliamentary Assembly of the Council of Europe, Resolution 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, 28 January 2010, 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

reports **before, during, and after** their monitoring visits, and receive a prompt response;

- **make public the results of their inspections and recommendations** – while preventing the disclosure of information that might put a migrant at risk ;
- ensure that **migrants or staff** who were **interviewed** by the monitoring entities **are not subjected to reprisals**.⁹⁶

National human rights institutions and civil society organizations have also an essential and relevant role when monitoring places of detention. In this vein, the CMW has indicated that, even if there exist an authority or body responsible for the supervision of places of detention, States should authorize them access to detention facilities, including privately run facilities.⁹⁷

Furthermore, it is important that **access to the centres is also granted to the media** to ensure transparency and accountability, without encroaching on detainees’ right to privacy.⁹⁸

vii. 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 concerned. In some national legislation⁹⁹, such characteristics include physical or mental health, a history of

that:” *inter alia* “9.2.15. independent inspection and monitoring of detention centres and of conditions of detention shall take place.”

⁹⁴ General Comment No. 5, op. cit., para. 86.

⁹⁵ *Idem*.

⁹⁶ *Ibid*, para. 88.

⁹⁷ *Ibid*, para. 87; 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.”, see Parliamentary Assembly of the Council of Europe, Resolution 1637, op. cit., para. 9.14. See also Parliamentary Assembly of the Council of Europe, Resolution 1707, op. cit., paras. 9.2. and 9.2.15.

⁹⁸ *Idem*.

⁹⁹ See, for example, Estonia, Estonia/Riigikohus/3-3-1-2-07, 22 March 2007, paras. 20-21; Poland, Poland/Dz.U.03.128.1175, para. 103; UK Border Agency, *Operational Enforcement Manual*, para. 55.3.1.; Bulgaria, Law for Foreigners, Prom. SG. 153/23 Dec 1998, and following amendments until 2007, para. 44.2; Ireland, Immigration

torture, family, age, duration of residence, pregnancy, dependency status, as well as the character or the conduct of the individual.¹⁰⁰

In addition, given the particular negative effects of detention on **vulnerable persons**, they should not be detained. This includes victims of trafficking, unaccompanied and separated children, elderly persons, victims of torture or trauma, persons with disability, pregnant women, victims of sexual violence, persons with diverse SOGIESC etc.¹⁰¹ Where vulnerable persons are detained, there should be an **enhanced requirement to ensure that conditions of detention are appropriate** and protective and that they are provided with adequate **health care** and **skilled professional support** as needed.¹⁰²

a. Children

The detention of children on grounds related to their immigration status or that of their parents is not governed by the principle of exceptionality. Consequently, every child, at all times, has a fundamental right to liberty and freedom from immigration detention. This is the conclusion of the Committee on the Rights of the Child (CRC) and the CMW in their General Comments of 2017 and 2021, based on Article 37 of the Convention on the Rights of the Child.¹⁰³

As early as 2005, the CRC spoke against immigration detention of unaccompanied and separated migrant children by stating that “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”.¹⁰⁴ The CRC further stated in 2012 that the detention of migrant children for reasons linked to their migration status or that of their parents was never in the best interests of the child.¹⁰⁵ Therefore, the possibility of detaining children as a measure of last resort based on Article 37 (b) of the CRC may apply in other contexts such as juvenile criminal justice but is not applicable in immigration proceedings. Several special procedures mandate holders have also stressed that immigration detention of children should be prohibited.¹⁰⁶ Both the CRC and the CMW have also reaffirmed that offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime.¹⁰⁷

Immigration detention of children conflicts not only with the principle of the best interests of the child, but also with the right to life, survival, development, participation, liberty and security of the person, non-discrimination, and family

Act 1999, Section 3(6) (a)-(b) and (g); Germany, General Administrative Regulations to the Residence Act [Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz], 26 October 2009, para. 62.0.5.

¹⁰⁰ European Union Agency for Fundamental Rights (FRA), Detention of third-country nationals in return procedures, Thematic Report, September 2010, p. 41.

¹⁰¹ See 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, Principle IX, in particular, para. 46.

¹⁰² Idem. See also UNHCR, Revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, Guideline 7.

¹⁰³ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (hereinafter: JGC), 16 November 2017, UN Doc. CMW/C/GC/4-CRC/C/GC/23, paras. 5 and 7; General Comment No. 5, op. cit., para. 40.

¹⁰⁴ Committee on the Rights of the Child, General comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, UN Doc. CRC/GC/2005/6, para. 61.

¹⁰⁵ Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration, November 2012, para. 78.

¹⁰⁶ Working Group on Arbitrary Detention, Revised deliberation No. 5, op. cit., para. 11; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer of 23 November 2018, UN Doc. A/HRC/37/50, para. 73; Working Group on Arbitrary Detention, United Nations Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, op. cit., para. 46.

¹⁰⁷ CMW, General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, 28 August 2013, UN Doc. CMW/C/GC/2, para. 24. See also Committee on the Rights of the Child, Report of the 2012 Day of General Discussion, op. cit., para. 78. Along the same lines, see the report of the Working Group on Arbitrary Detention, 18 January 2010, UN Doc. A/HRC/13/30, para. 58; and Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 2 April 2012, UN Doc. A/HRC/20/24, paras. 31 and 38.

life.¹⁰⁸ Detention contributes to discrimination and exclusion against migrants, breeding xenophobia and mistrust in the society.¹⁰⁹ **Even a short period of migration detention is a violation of child rights and can constitute cruel, inhuman or degrading treatment.** The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has also stated that ‘..the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.’¹¹⁰ Various studies have indeed shown the negative impact detention has on the health and development of children, including risks of violence and ill-treatment, self-harm and even suicide.¹¹¹

Furthermore, given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied child would comply with the requirements stipulated in Article 37 (b), clause 2, of the Convention on the Rights of the Child, according to which detention can be used only as a measure of last resort.¹¹²

When the child’s best interests require keeping the family together, the requirement not to deprive the child of liberty extends to the child’s parents and guardians and requires the authorities to choose non-custodial solutions for the entire family.¹¹³

Child and family immigration detention should thus be prohibited by law and its abolishment ensured in policy and practice.¹¹⁴ States should ‘adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that **allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved** and the children’s best interests are assessed, as well as before return.’¹¹⁵ The non-custodial solutions should meet all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children’s holistic development, as well as be carried out by competent child protection actors engaging with the child and, where applicable, their family.¹¹⁶

Unaccompanied and separated children should be placed in an appropriate care arrangement under the national/local child protection or alternative care system, preferably in family-type care with their own family when available, foster family care, or in community care when family is not available.¹¹⁷ UN Guidelines on Alternative Care¹¹⁸ provide further valuable guidance on the protection and well-being of all children deprived of parental care, including unaccompanied and separated migrant children.

Many States have banned immigration detention of children in law or as a policy and practice, in accordance also with their

¹⁰⁸ JGC, op. cit., paras. 5 and 9; General Comment No. 5, op. cit., para. 39.

¹⁰⁹ Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, Ending immigration detention of children and providing adequate care and reception for them, 20 July 2020, UN Doc. A/75/183, para. 80; UNICEF, A home away from home for refugee and migrant children, August 2016, p. 2.

¹¹⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 March 2015, UN Doc. A/HRC/28/68, paras. 59-62.

¹¹¹ See among others: A. Lorek, K. Ehntholt, A. Nesbitt, E. Wey, C. Githinji, E. Rossor, et al., The mental and physical health difficulties of children held within a British immigration detention center: A pilot study, *Child Abuse & Neglect*, 2009; Z. Steel, S. Momartin, C. Bateman, A. Hafshejani, D.M. Silove et al., Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia. *Australian and New Zealand Journal of Public Health*, 2004; International Detention Coalition, *Captured Childhood*, 2012, p. 49.

¹¹² Working Group on Arbitrary Detention, Annual report, 16 February 2009, op. cit.

¹¹³ JGC, op. cit., para. 11, quoting the Report of the Special Rapporteur on the human rights of migrants, 2 April 2012, op. cit., para. 40; IACtHR, Advisory Opinion OC-21/14, op. cit., para. 160; and Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 March 2015, op. cit., para. 80.

¹¹⁴ JGC, op. cit., para. 12.

¹¹⁵ Ibid, para 11.

¹¹⁶ Idem; Committee on the Rights of the Child, Report of the 2012 Day of General Discussion, op. cit., para. 79.

¹¹⁷ JGC, op. cit., para 11; General Comment No. 5, op. cit., para. 44.

¹¹⁸ UN General Assembly, Resolution adopted on 18 December 2009, Guidelines for the Alternative Care of Children, UN Doc. A/RES/64/142.

commitments taken in the Global Compact for Safe, Orderly and Regular Migration.¹¹⁹ Some, however, continue to criminalize irregular border crossing and stay and sentence migrants to criminal detention, including children. Other States still allow immigration detention of children as a last resort and for the shortest appropriate time.¹²⁰ Moreover, the jurisprudence of the ECtHR is not unequivocal, as it had found that “the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children”, and that it can “only constitute a measure of last resort and if no other measures less restrictive of liberty can be put in place”.¹²¹ When children are placed in detention, the ECtHR has taken into account elements such as the age of the children, the length of their detention, the material conditions in the detention facilities and their appropriateness for accommodating children, the particular vulnerability of children caused by previous stressful events and the effects of detention to the children’s psychological condition to determine if a violation has occurred.¹²² Conversely, the Inter-American Court of Human Rights has spoken unequivocally against immigration detention of children, stating that the deprivation of liberty of a child migrant, solely based on its migration status is arbitrary and contrary to the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man.¹²³

b. Women

Women must be detained in separated facilities¹²⁴ and guarded by female warders.¹²⁵ Privacy for certain personal activities (such as changing clothes, sanitary activities) should be ensured.¹²⁶

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.”¹²⁷ In addition, if these women in a vulnerable situation cannot be released from custody, “the authorities should develop alternative programmes such as intense supervision or electronic monitoring.”¹²⁸ Even though trafficked persons, regardless of their gender, must not, in any circumstances, be held in immigration detention or other forms of custody,¹²⁹ unidentified victims of human trafficking may be subject to such detention. In these situations, given the particular vulnerability of women, especially girls and young adult women, to being re-trafficked after leaving the trafficking situation, service providers and lawyers need improved access to detention centres prior to their deportation in order to ensure the provision of legal advice and allow detainees to be identified as victims of human trafficking to provide adequate protection.

c. Sexual violence

States must set up effective mechanisms for dealing with **complaints of sexual violence**,

¹¹⁹ UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, op. cit., Objective 13(h).

¹²⁰ The Global Campaign to End Child Detention has developed the NextGen Index, which is a comparative tool that ranks States and seeks to give an overview of where a State stands on its progress in ending child immigration detention.

¹²¹ See ECtHR, *Popov v. France*, op. cit., para. 147; ECtHR, *G.B. and Others v. Turkey*, Application No. 4633/15, 17 October 2019, para. 168; ECtHR, *Nikoghosyan and Others v. Poland*, Application No. 14743/17, 3 March 2022, para. 86.

¹²² See ECtHR, *M.H. and Others v. Croatia*, Applications No. 15670/18 and 43115/18, 18 November 2021, para. 186.

¹²³ IACtHR, Advisory Opinion OC-21/14, op. cit., paras. 144 -160.

¹²⁴ See, for example, Committee against Torture, Conclusions and recommendations on the report from Bosnia and Herzegovina, 15 December 2005, UN 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.

¹²⁵ 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, Inhumane or Degrading Treatment or Punishments. See, *ex multis*, Conclusions and recommendations of the Committee against Torture on the report of Togo, 28 July 2006, UN Doc. CAT/C/TGO/CO/1, para. 20.

¹²⁶ IOM, Guidelines for border management and detention procedures involving migrants, op. cit., para. 1.1.1.

¹²⁷ Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, Mission to the United States of America, Addendum, 5 March 2008, UN Doc. A/HRC/7/12/Add.2, para. 121.

¹²⁸ *Idem*.

¹²⁹ Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Recommended Principles and Guidelines on Human Rights and Human Trafficking, 20 May 2002, UN Doc. E/2002/68/Add.1, Guideline 2, para. 6 and Guideline 6, para. 1; Working Group on Arbitrary Detention, Revised Deliberation No. 5, op. cit., para. 41; General Comment No. 5, op. cit., para. 45.

including within the detention system, and should also provide **victims with protection, psychological and medical assistance**.¹³⁰ Moreover, measures must be set up to prevent the occurrence and recurrence of such acts, thus enhancing the protection of detainees, including women and persons with diverse SOGIESC.¹³¹ With regard to diverse SOGIESC detainees, these measures include, for instance, that States ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity, and to provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity.¹³²

d. Long-term residents

III. ALTERNATIVES TO DETENTION

i. Obligation to provide alternatives to detention

The “exceptional” character of detention for migration purposes, which has been repeatedly set forth by different human rights bodies, entails the obligation of States to ensure that alternatives to detention (ATDs), are available and applied before recurring to custodial measures. The exceptional nature thus implies the application of ATDs first, while exceptionally, detention would be “imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes”.¹³⁴ This is also reflected in Objective 13 of the Global Compact for Safe, Orderly and Regular Migration, to “use

immigration detention only as a measure of last resort and work towards alternatives”. Under Objective 13, States committed “to prioritize non-custodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only”.¹³⁵

Alternatives to immigration detention are ‘any legislation, policy or practice, formal or informal, aimed at preventing the unnecessary detention of persons for reasons relating to their migration status’.¹³⁶ They are measures that can be applied by States for migrants on their territory where some form of control is deemed necessary until their migration case is resolved. These non-custodial measures can range from community-based and casework-oriented models and open centers, to more restrictive options such as residence in semi-open centres. Examples of ATDs include measures ranging from policy or legislative developments that have an impact on preventing unnecessary detention, effective screening and identification procedures, community-based or casework-oriented models, bail, bond and surety options, open or semi-open centres, reporting requirements and case resolution options.¹³⁷

In its General Comment No. 5, the CMW has defined ATDs as “all community-based care measures or non-custodial accommodation solutions – in law, policy or practice – that are less restrictive than detention.” The Committee has also stated that ATDs “must be considered in the context of lawful detention decision procedures to ensure that detention is necessary and proportionate in all cases, with

¹³⁰ Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, 14 May 2009, UN Doc. A/HRC/11/7, para. 125.

¹³¹ 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, UN Doc. CEDAW/C/ARG/CO/6, para. 27; IOM, International Migration Law Information Note on International standards on the protection of people with diverse sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) in the context of migration, 2021, p. 19; CEDAW, Concluding observations on the

combined eighth and ninth periodic reports of Guatemala, 22 November 2017, UN Doc. CEDAW/C/GTM/CO/8-9, para. 45(c).

¹³² The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2006, Principle 9.

¹³⁴ General Comment No. 5, *op. cit.*, para. 16.

¹³⁵ UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, *op. cit.*, para. 29.

¹³⁶ Adapted from International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, revised edition, 2015; see also IOM, *Glossary on Migration*, *op. cit.*, p. 9.

¹³⁷ IOM, *Quick Guide on Alternatives to Detention (ATD)*, p. 4.

the aim of respecting the human rights and avoiding arbitrary detention of migrants, asylum seekers, refugees and stateless persons.”¹³⁸

The WGAD has stated that “immigration detention should gradually be abolished,”¹³⁹ and “alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.”¹⁴⁰ In that regard, the CMW has considered that States have an **obligation to review and implement all available alternative measures**, in accordance with the principles of necessity and proportionality.¹⁴¹ In the same vein, the Human Rights Committee has also recognized the existence of an obligation for States to provide non-custodial measures when the detention is no longer justified in light of the passage of time, of intervening circumstances such as the hardship of prolonged detention¹⁴² or in consideration of the particular conditions of the person detained.¹⁴³

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 favour of liberty under national law**.¹⁴⁴ Many States have established this presumption in their national laws or in their immigration policies or practices.¹⁴⁵

ii. Specific principles applicable to ATDs

ATDs must be in accordance with international law and human rights standards, both in law and in practice.¹⁴⁶ The CMW has emphasized that ATDs are intended to be “**more humane**, to

have **less harmful physical and psychological impacts on individuals** – particularly individuals in a vulnerable situation – and to be designed to protect people’s health, well-being and human rights.”¹⁴⁷

The UN Special Rapporteur on the human rights of migrants has 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.”¹⁴⁸ According to the CMW, ATDs should have legal and procedural safeguards that should be “**as stringent as those applied to detention situations**.”¹⁴⁹

Accordingly, 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** and **non-arbitrariness** in the choice and application of the measure must be ensured;
- the measure should be **limited in duration**;
- the measure should be subject to **legal review** and **independent supervision** 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 assistance**;
- the measure should protect **rights** and

¹³⁸ General Comment No. 5, op. cit., para. 48.

¹³⁹ 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 Report of the Special Rapporteur on the human rights of migrants, 4 August 2010, op. cit., para. 90. The European Court of Justice recognised that even the recourse to alternative measures should be justified by the particular circumstances of the case, such as the risk of absconding, see European Court of Justice, Case C-61/11 PPU, *Mr. El Dridi*, 29 April 2011, para. 37.

¹⁴⁰ Working Group on Arbitrary Detention, Annual Report of 15 January 2010, op. cit., para. 58.

¹⁴¹ General Comment No. 5, op. cit., para. 47.

¹⁴² Human Rights Committee, *Baban et al. v. Australia*, op. cit., para. 7.2.

¹⁴³ Human Rights Committee, *Mr. C. v. Australia*, op. cit., para. 8.2.

¹⁴⁴ Parliamentary Assembly, Resolution 1707, op. cit., para. 9.3.1.

¹⁴⁵ R. Sampson, G. Mitchell and L. Bowring, *There are alternatives: A handbook for preventing unnecessary immigration detention*, The International Detention Coalition, Melbourne, 2011, p. 21 quote the following States: Argentina, Venezuela, Peru, Uruguay, Brazil, Austria, Germany, Denmark, the Netherlands, Slovenia and the United Kingdom.

¹⁴⁶ Report of the Special Rapporteur on the human rights of migrants, 4 August 2010, op. cit., para. 90.

¹⁴⁷ General Comment No. 5, op. cit., para. 50.

¹⁴⁸ Report of the Special Rapporteur on the human rights of migrants, 4 August 2010, op. cit., para. 92 (a).

¹⁴⁹ General Comment No. 5, op. cit., para. 50.

dignity of the individual.¹⁵⁰

iii. Examples of alternatives to detention

In order to identify the best ATD measure, the effects of such alternative on the rights of migrants should be taken into consideration and it should be verified that no unnecessary restrictions are imposed on migrants and that migrants can still have access to other human rights (health, education, food, water, legal support, social protection, information, other basic services) while the ATD is being applied until their case is resolved. This would help ensure that the least invasive alternative measure to detention is found and that the measure is human rights compliant. From this rights-based perspective, the CMW "recommends that States emphasize community-based non-custodial measures that include case management and other forms of support, are adapted to the specific needs and vulnerabilities of each person or family and allow people to live freely within communities".¹⁵¹

In particular, States must opt for appropriate ATDs and care arrangements adequate for families with children, unaccompanied or separated children, victims of human trafficking, and other persons in vulnerable situations. The detention of persons in vulnerable situations or at risk should be completely avoided, and instead, appropriate culturally, gender and age sensitive arrangements should be sought. Regarding children, in particular, States must opt for their placement in other forms of appropriate accommodation, for example, under the respective national child protection system, foster family care, or other alternative-care systems.¹⁵²

Below is a brief overview of existing non-custodial ATDs. This list is not exhaustive, and

these measures could be applied in combination with case management support.

a) Options for living in the community without restrictions to freedom of movement: this requires governments to strengthen reception or longer-term accommodation and support arrangements in the community, including for migrants in vulnerable situations, until case resolution.

b) Case management: case management aims at supporting migrants through the process of their status determination. Case managers ensure that migrants have access to services, reliable information, and legal assistance on all available options. Case management should also ensure effective referral mechanisms to asylum procedures. It helps migrants explore all options to remain in the country regularly or to leave with dignity, informing them of consequences of non-compliance.

c) Screening, identification, and decision making: to avoid unnecessary detention, it is critical to develop screening, identification procedures and assessment of the situation of individual migrants, which enables authorities to make informed decisions about referrals for asylum seekers or other migrants in vulnerable situations, options for admission (temporary or longer term) and for living in the community, application of restrictions to liberty when justified, and return decisions.

d) Open or semi-open centres: this is one of the most common non-custodial measures. In semi-open centres, for example, migrants hosted there are allowed to leave the centre during the day but have to return at night. These centres must fully respect the human rights of the persons hosted there, in particular, their rights to liberty and freedom of

¹⁵⁰ Report of the Special Rapporteur on the human rights of migrants, 4 August 2010, op. cit., para. 92 (b) and 95.

¹⁵¹ General Comment No. 5, op. cit., para. 50.

¹⁵² For a detailed explanation of ATDs, IOM has developed a series of tools for policy makers and practitioners, among other relevant stakeholders, see IOM, Road Map on Alternatives to Migration Detention (ATD), Tools Series No. 1, 2019; IOM, Quick Guide on Alternatives to Detention (ATD), 2020; IOM, Advocating for

Alternatives to Migration Detention, Tools Series No. 2, 2021; For more resources on ATDs, refer to the [United Nations Network on Migration Working Group on ATDs](#). For more information on the effectiveness of certain ATD measures, please consult: E. Ohtani, Alternatives to detention: building a culture of cooperation – Evaluation of two-year engagement-based alternative to immigration detention pilot projects in Bulgaria, Cyprus and Poland, July 2020, European Programme for Integration and Migration.

movement.¹⁵³

e) 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.¹⁵⁴

f) Reporting requirements: this measure imposes on migrants the duty to report regularly, in person, over the telephone or in writing to the police, immigration office or other special agency.¹⁵⁵ The frequency of such reporting can vary from daily to weekly or less frequently.¹⁵⁶ 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).¹⁵⁷ Reporting requirements should be tailored to the particular situation of the individual.

g) Release with the duty to reside in a specific administrative area or municipality:¹⁵⁸ 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.

h) Release on bail, bond or surety:¹⁵⁹ 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 their 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. The possibility for individuals to avail themselves of these measures is often limited due to financial difficulties or 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.¹⁶⁰

i) 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 their obligation under the relevant immigration law.

j) Electronic monitoring: is a system whereby an electronic magnetic device is attached to a person's wrist or ankle.¹⁶¹ 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 for their privacy.¹⁶² Accordingly, the use of this measure

¹⁵³ 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.

¹⁵⁴ See Amnesty International, Irregular migrants and asylum-seekers: Alternatives to immigration detention, April 2009, p. 11.

¹⁵⁵ 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. 44.

¹⁵⁶ Amnesty International, Irregular migrants and asylum-seekers: Alternatives to immigration detention, op. cit. p. 12.

¹⁵⁷ Idem.

¹⁵⁸ 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. 46.

¹⁵⁹ Amnesty International, Irregular migrants and asylum-seekers: Alternatives to immigration detention, op. cit. p. 13.

¹⁶⁰ 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. 47.

¹⁶¹ O. Field, Alternatives to Detention of Asylum Seekers and Refugees, Legal & Protection Policy Research Series, POLAS/2006/03, UNHCR, April 2006, para. 127.

¹⁶² See Amnesty International, Irregular migrants and asylum-seekers: Alternatives to immigration detention, op. cit., p. 15.

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.¹⁶³ The authorities should also pay full attention to the need to respect the dignity of the individual concerned.

¹⁶³ Idem.

SUMMARY OF THE KEY PRINCIPLES

General principles

1. Grounds for detention must be established by law and exhaustively detailed in legislation.
2. Immigration detention is a measure of last resort, which must have a legitimate aim, be proportionate to the aim pursued and have fair balance struck between the conflicting interests. This also means that alternatives to detention must be available and applied first.
3. Detention must be ordered and approved by a judge and subject to automatic regular judicial review in each individual case.
4. Migrant children should never be detained for reasons linked to their migration status or that of their parents as this is never in their best interests. Migrant parents with children must not be detained either by application of the principle of family unity and best interests of the child. Alternatives to detention that are non-custodial and appropriate for children must be sought for children and families.
5. States should avoid detaining migrants in vulnerable situations, and appropriate culturally and gender sensitive arrangements should be sought.
6. Since migration detention is a measure of last resort, States must provide for alternatives to detention in their legislation.

Specific rights and standards applicable to migrants in detention

1. Right to be informed upon entry in the territory and while in detention.
2. Right to communicate with the outside world.
3. Obligation of registering the presence of any migrant placed either in custody or in detention.
4. Obligation to establish a maximum period of detention in national legislation.
5. Obligation to establish in the law a periodic judicial review of the detention, and every time the detention may be prolonged.
6. Right to contact consular authorities for consular assistance.
5. Right to human detention conditions and obligation to respect the inherent dignity of every human person.
6. Obligation to allow monitoring of detention facilities by an independent body.
7. Prohibition of detaining migrant children, parents with children, and persons in vulnerable situations, including victims of human trafficking, among others.

Specific standards applicable to alternatives to detention (ATDs)

1. Obligation to establish a presumption in favour of migrants' right to liberty in national

legislation.

2. Obligation to first apply ATDs for migrants in national legislation.
3. Obligation to conduct individual assessments and have appropriate referral mechanisms for migration management.
4. Prohibition of discrimination in the application of ATDs.
5. Obligation to choose the least intrusive or restrictive alternative measure, which also allows access to other human rights, e.g. community-based non-custodial measures that include case management and other forms of support, which are adapted to the specific needs and vulnerabilities of each person or family and allow people to live freely within communities.
6. ATDs should comply with human rights standards, including the right to liberty and the right to humane conditions and obligation to respect the inherent dignity of every human being at all times.

SELECTED INSTRUMENTS AND DOCUMENTS

- Universal Declaration of Human Rights, 1948;
- Vienna Convention on Consular Relations, 1963;
- International Covenant on Civil and Political Rights, 1966;
- Convention on the Elimination of all Forms of Discrimination against Women, 1979;
- Human Rights Committee, General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), 30 June 1982;
- United Nations General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, UN Doc. A/RES/43/173;
- International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families, 1990;
- Working Group on Arbitrary Detention, Annual Report of 18 December 1998, UN Doc. E/CN.4/1999/63;
- Working Group on Arbitrary Detention, Annual Report of 28 December 1999, UN Doc. E/CN.4/2000/4;
- Convention on the Rights of the Child, 2000;
- Committee on the Rights of the Child, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005;
- Convention on the Rights of Persons with Disabilities, 2006;
- Working Group on Arbitrary Detention, Annual Report of 10 January 2008, UN Doc. A/HRC/7/4;
- United Nations Special Rapporteur on the human rights of migrants, Jorge Bustamante, Report to the Human Rights Council, 25 February 2008, UN Doc. A/HRC/7/12;
- Working Group on Arbitrary Detention, Annual Report of 16 February 2009, UN Doc. A/HRC/10/21;
- United Nations Special Rapporteur on the human rights of migrants, Jorge Bustamante, Report to the Human Rights Council, 14 May 2009, UN Doc. A/HRC/11/7;
- Working Group on Arbitrary Detention, Annual Report of 15 January 2010, UN Doc. A/HCR/13/30;
- United Nations Special Rapporteur on the human rights of migrants, Jorge Bustamante, Report to the General Assembly, 4 August 2010, UN Doc. A/65/222;
- United Nations Special Rapporteur on the human rights of migrants, François Crépeau, Report to the Human Rights Council, 2 April 2012, UN Doc. A/HCR/20/21;
- Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration, November 2012;
- Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights at International Borders, 2014;
- Human Rights Committee, General comment No. 35: Article 9 (liberty and security of person), 16 December 2014, UN Doc. CCPR/C/GC/35;
- United Nations General Assembly, The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 17 December 2015, UN Doc. A/RES/70/175;
- Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on the Right

of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2015, UN Doc. A/HRC/30/37;

- Office of the High Commissioner for Human Rights, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, 2018;
- Working Group on Arbitrary Detention, Revised Deliberation No. 5 on deprivation of liberty of migrants, 2 July 2018, UN Doc. A/HRC/39/45;
- United Nations General Assembly, Global Compact for Safe, Orderly and Regular Migration, 19 December 2018, UN Doc. A/RES/73/195;
- Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, UN Doc. CMW/C/GC/4-CRC/C/GC/23;
- Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, Ending immigration detention of children and providing adequate care and reception for them, 20 July 2020, UN Doc. A/75/183;
- Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, General Comment No. 5 (2021) on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights, 21 July 2022, UN Doc. CMW/C/GC/5.

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