



IMMIGRATION  
DETENTION  
MONITORING



**MODULE 5  
ANNEX**

**COMPILATION OF INTERNATIONAL HUMAN RIGHTS  
LAW AND STANDARDS ON IMMIGRATION DETENTION**



**UNHCR**  
The UN Refugee Agency



## TABLE OF CONTENTS

Table of Contents is interactive.  
Click on Chapters to navigate!

<b>INTRODUCTION</b>	4	<b>Guideline 4.3: Alternatives to detention need to be considered</b> .....	18
<b>ACRONYMS AND SOURCES</b>	5	Consideration of ATDs.....	18
<b>GUIDELINE 1: THE RIGHT TO SEEK ASYLUM MUST BE RESPECTED</b>	9	<b>GUIDELINE 5: DETENTION MUST NOT BE DISCRIMINATORY</b>	19
Non-penalization .....	9	Prohibition of discrimination .....	19
Right to seek asylum.....	9	Statelessness .....	21
<b>GUIDELINE 2: THE RIGHTS LIBERTY AND SECURITY OF PERSONS AND FREEDOM OF MOVEMENT APPLY TO ASYLUM-SEEKERS</b>	10	Persons of a particular nationality, or ethnic, racial or religious group.....	21
Liberty and security .....	10	<b>GUIDELINE 6: INDEFINITE DETENTION IS ARBITRARY AND MAXIMUM LIMITS ON DETENTION SHOULD BE ESTABLISHED BY LAW</b>	21
Right to freedom of movement and choice of residence.....	12	Length of detention.....	21
Statelessness .....	14	<b>GUIDELINE 7: DECISIONS TO DETAIN OR TO EXTEND DETENTION MUST BE SUBJECT TO MINIMUM PROCEDURAL SAFEGUARDS</b>	24
<b>GUIDELINE 3: DETENTION MUST BE IN ACCORDANCE WITH AND AUTHORIZED BY LAW</b>	14	Right to be informed on arrival, to legal assistance and contact family members.....	24
Detention of asylum-seekers id exceptional and permissible only on grounds prescribed by law and in accordance with procedures authorized by law .....	14	Be brought promptly before a judicial or independent authority to have the detention decision reviewed .....	30
<b>GUIDELINE 4: DETENTION MUST NOT BE ARBITRARY, AND ANY DECISION TO DETAIN MUST BE BASED ON AN ASSESSMENT OF THE INDIVIDUAL'S PARTICULAR CIRCUMSTANCES, ACCORDING TO THE FOLLOWING</b>	16	Entitlement to take proceedings before a court (Non-derogability, Non- discrimination, Right to appear in person, Equality before the courts).....	30
Notion of “arbitrary detention” .....	16	Power to order release .....	34
Individual assessment .....	16	Access to international bodies .....	34
<b>Guideline 4.1: Detention is an exceptional measure and can only be justified for a legitimate purpose</b> .....	17	Indigenous people/Minorities/Stateless persons/Non-nationals/Internally displaced persons.....	36
Permissible restrictions.....	17	<b>GUIDELINE 8: CONDITIONS OF DETENTION MUST BE HUMANE AND DIGNIFIED</b>	36
<b>Guideline 4.2: Detention can only be resorted to when it is determined to be reasonable in all the circumstances and proportionate to a legitimate purpose</b> .....	17	Torture/Cruel, inhuman and degrading treatment.....	36
		Vulnerability of children to ill-treatment and torture.....	39
		Appropriate medical treatment/health screening .....	40





Registration of detainee's identity, location, time date and grounds of detention.....	43
Physical conditions of accommodation, hygiene and adequate clothing .....	45
Food and drinking water .....	49
Complaints.....	50
<b>GUIDELINE 9: THE SPECIAL CIRCUMSTANCES AND NEEDS OF PARTICULAR ASYLUM-SEEKERS MUST BE TAKEN INTO ACCOUNT</b> .....	<b>52</b>
Detention of persons in situation of vulnerability is exceptional .....	52
<b>Guideline 9.1: Victims of trauma or torture.....</b>	<b>52</b>
<b>Guideline 9.2: Children .....</b>	<b>53</b>
Best interest of the child .....	53
Right to life/survival and development .....	57
Right to liberty and ATDs.....	57
Right to bring proceedings before a court/Right to legal assistance/ Due process.....	60
Non-penalization .....	61
Stateless children.....	62
Right to private and family life/Family unity.....	62
Conditions of detention .....	64
Consular officers and training of officials.....	64
Use of force .....	64
Protection and support of children victims of trafficking.....	65
Independent monitoring and inspection .....	66
<b>Guideline 9.3: Women.....</b>	<b>66</b>
Non-discrimination .....	66
Health screening and gender-specific health care and assistance.....	66
Pregnant women and nursing mothers.....	67
Use of female and trained personnel .....	68
Right to bring proceedings before a court .....	69
<b>Guideline 9.4: Victims or potential victims of trafficking .....</b>	<b>69</b>
Right to seek asylum.....	69
Information on arrival and assistance .....	69
Protection, support and special needs .....	70
Children .....	71
<b>Guideline 9.5: Asylum-seekers with mental health or physical illness or disabilities .....</b>	<b>71</b>
Humane conditions of detention and special needs .....	71
Liberty and security .....	72
Freedom of movement.....	72
Living independently and be included in the community.....	72
Right to health.....	72
Right to bring proceedings before a court.....	73
<b>Guideline 9.6: Older asylum-seekers .....</b>	<b>74</b>
Allocation and accommodation.....	74
Health care and special needs.....	74
Right to bring proceedings before court .....	74
<b>Guideline 9.7: Lesbian, gay, bisexual, transgender or intersex asylum-seekers .....</b>	<b>75</b>
Non-discrimination .....	75
Access to appropriate medical care and counselling tailored to their specific needs.....	75
Protective measures are in place to prevent violence or abuse.....	75
Independent monitoring .....	75
Adequate training of detention personnel and other officials.....	76
Right to bring proceedings before court .....	76
<b>GUIDELINE 10: DETENTION SHOULD BE SUBJECT TO INDEPENDENT MONITORING AND INSPECTION</b> .....	<b>76</b>
Independent monitoring/national inspection mechanisms .....	76

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# INTRODUCTION

This table contains a compilation of international law sources and relevant interpretation standards relating to the detention, on immigration related grounds, of asylum-seekers and other persons of concern. It is intended as a practical advocacy tool for UNHCR staff and partners engaged in assisting persons of concern in detention and monitoring the conditions where deprivation of liberty occurs.

This compilation follows UNHCR's [\*Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention\*](#) principled approach, and it has to be read in conjunction with them. Each guideline is then sorted out per themes, accompanied by the relevant international human rights treaty obligations, including regional treaties, and the key interpretative human rights instruments, such as UN or other regional organizations' standards, guidelines, rules, and principles. While some of these instruments expressly apply only to persons deprived of their liberty following criminal procedures (such as, for instance, the European Prison Rules), they could be equally used by analogy for immigration detention cases, as they provide a useful and persuasive interpretation of the human rights treaty obligations.

February 2018  
Protection Policy and Legal Advice Section  
Division of International Protection, UNHCR



## ACRONYMS AND SOURCES

<u>ACHR</u>	Organization of American States (OAS) American Convention on Human Rights (1969)	<u>CCLEO</u>	UN Code of Conduct for Law Enforcement Officials (1979)
<u>ACHRP</u>	African Union (AU) African Charter on Human and Peoples' Rights (1981)	<u>CCPR</u>	UN Human Rights Committee
<u>ADRRM</u>	Inter-American Commission on Human Rights (IACmHR), American Declaration of the Rights and Duties of Man (1948)	<u>CCPR-GC</u>	General Comments to the International Covenant on Civil and Political Rights
<u>ASP</u>	UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Anti-Smuggling Protocol) (2000)	<u>CCPR-GC 15</u>	CCPR General Comment No. 15: The Position of Aliens under the Covenant (1986)
<u>ATP</u>	UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Anti-Trafficking Protocol) (2000)	<u>CCPR-GC 20</u>	CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992)
<u>BPP</u>	UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)	<u>CCPR-GC 21</u>	CCPR General Comment No. 21: Article 10 (Human Treatment of Persons deprived of Their Liberty) (1993)
<u>BPTP</u>	UN Basic Principles for the Treatment of Prisoners (1990)	<u>CCPR-GC 27</u>	CCPR General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9 (1999)
<u>BR</u>	UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the "Bangkok Rules") (2010)	<u>CCPR-GC 35</u>	CCPR General Comment No. 35: Article 9 (Liberty and security of person), CCPR/C/GC/35 (2014)
<u>CAT</u>	UN Committee against Torture	<u>CEDAW</u>	UN Convention on the Elimination of All forms of Discrimination against Women (1979)
		<u>CERD</u>	Committee on the Elimination of Racial Discrimination
		<u>CERD-GR 30</u>	CERD General Recommendation on Discrimination against Non-Citizens (2002)
		<u>CESCR-GC</u>	General Comments to the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities





<a href="#"><u>CESCR-GC 14</u></a>	CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2004/4 (2000)	<a href="#"><u>CoE-Protocol 4</u></a>	CoE, Protocol No. 4 to the ECHR, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No. 11 (1963)
<a href="#"><u>CFREU</u></a>	Charter of Fundamental Rights of the European Union (2000)	<a href="#"><u>EUAPUM</u></a>	EU Commission, Communication from the Commission to the European Parliament and the Council, "Action Plan on Unaccompanied Minors (2010-2014)", COM (2010)213 final
<a href="#"><u>CMW</u></a>	UN International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families (1990)	<a href="#"><u>CPT</u></a>	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
<a href="#"><u>CMW-GC</u></a>	General Comments to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	<a href="#"><u>CPT Standards</u></a>	CPT/Inf/E (2002) 1 – Rev. 2010 (2011)
<a href="#"><u>CMW-GC 2</u></a>	CMW General Comment No. 2 on the rights of migrant works in an irregular situation and members of their families, CMW/C/GC/2 (2013)	<a href="#"><u>CPT IDF</u></a>	Immigration detention – Factsheet, CPT/Inf(2017)3 (2017)
<a href="#"><u>CMW-CRC JGC 3/22</u></a>	Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3/CRC/C/GC/22 (2017)	<a href="#"><u>CRC</u></a>	International Convention on the Rights of the Child (1989)
<a href="#"><u>CMW-CRC JGC 4/23</u></a>	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, CMW/C/GC/4-CRC/C/GC/23 (2017)	<a href="#"><u>CRC-GC</u></a>	General Comments to the UN Convention on the Rights of the Child (1989)
<a href="#"><u>CoE</u></a>	Council of Europe	<a href="#"><u>CRC-GC 6</u></a>	CRC General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6 (2005)
<a href="#"><u>CoE-FR 2005</u></a>	CoE, Twenty Guidelines on Forced Return (2005)	<a href="#"><u>CRC-GC 10</u></a>	CRC General Comment No. 10 (2007) Children's rights in juvenile justice, CRC/C/GC/10 (2007)
		<a href="#"><u>CRPD</u></a>	UN Convention on the Rights of Persons with Disabilities (2006)
		<a href="#"><u>CSR</u></a>	UN Convention relating to the Status of Refugees (1951)
		<a href="#"><u>CSSP</u></a>	UN Convention relating to the Status of Stateless Persons (1954)



<u>DHRINN</u>	UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (1985)	<u>ICERD</u>	UN International Convention on the Elimination of All Forms of Racial Discrimination (1965)
<u>ECHR</u>	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)	<u>ICESCR</u>	UN International Covenant on Economic, Social and Cultural Rights (1966)
<u>EPR</u>	European Prison Rules (2006)	<u>OHCHR-TG</u>	OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (OHCHR Trafficking Guidelines) (2010)
<u>EUCN</u>	European Convention on Nationality (1997)	<u>PBPPDLA</u>	IACHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008)
<u>EU-RD</u>	European Union, Directive 2013/33/EU of the European Parliament and Council laying down standards for the reception of applicants for international protection (recast) (2013)	<u>RPJDL</u>	UN Rules for the Protection of Juveniles Deprived of their Liberty (1990)
<u>EC-RETD</u>	European Union, Directive 2008/115/EC of the European Parliament and Council on common standards and procedures in Member States for returning illegally staying third-country nationals (2008)	<u>SR-Migrants-2009</u>	Report of the UN Special Rapporteur on the human rights of migrants, Jorge Bustamante, “The protection of children in the context of migration”, A/HRC/11/7 (2009)
<u>HRC</u>	Human Rights Committee	<u>SR-Migrants 2012</u>	Report of the UN Special Rapporteur on the human rights of migrants, François Crépeau, “Detention of migrants in an irregular situation”, A/HRC/20/24 (2012)
<u>IACHR-Res03/08</u>	Inter-American Commission on Human Rights (IACHR), Resolution 03/08, Human Rights of Migrants, International Standards and the Return Directive of the EU, (2008)	<u>SR-Torture 2015</u>	Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, “Children Deprived of Liberty”, A/HRC/22/53 (2015)
<u>IACtHR-OC 18/03</u>	Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-18/03 on the Juridical Condition and Rights of Undocumented Migrants (2003)	<u>SR-Trafficking 2016</u>	Report of the UN Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, “Trafficking in persons in conflict and post-conflict situations: protecting victims of trafficking and people at risk of trafficking, especially women and children”, A/HRC/32/41 (2016)
<u>IACPPT</u>	OAS Inter-American Convention to Prevent and Punish Torture (1985)		
<u>ICCPR</u>	UN International Covenant on Civil and Political Rights (1966)		



<u>SMR</u>	UN Standard Minimum Rules for the Treatment of Prisoners (2016)	<u>WGAD-2008</u>	Report to the 7 <sup>th</sup> Session of the Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, A/HRC/7/4/Add.1 (2008)
<u>SMRAJJ</u>	UN Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”) (1985)	<u>WGAD-OP 45/2006</u>	<i>Mustafa Abdi v. United Kingdom</i> , Opinion No. 45/2006, A/HCR/7/4/Add.1 (2008)
<u>UDHR</u>	UN Universal Declaration of Human Rights (1948)	<u>WGAD-2009</u>	Report to the 10 <sup>th</sup> Session of the Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, A/HRC/10/21 (2009)
<u>UNCAT</u>	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	<u>WGAD-2010</u>	Report to the 13 <sup>th</sup> Session of the Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, A/HRC/13/30 (2010)
<u>UNSCPPHR-Res 2000</u>	UN Sub-Commission on the Promotion and Protection of Human Rights, Detention of asylum-seekers, Resolution 2000/21 (2000)	<u>WGAD-D9</u>	Report to the 22 <sup>nd</sup> Session of the Human Rights Council, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, A/HRC/22/44 (2012)
<u>VCCR</u>	UN Vienna Convention on Consular Relations (1963)	<u>WGAD-OP 4/2011</u>	<i>Zaza Yambala v. Switzerland</i> , Opinion No. 4/2011, A/HRC/WGAD/2011/4 (2012)
<u>WGAD</u>	UN Working Group on Arbitrary Detention	<u>WGAD/CRP.1/2015</u>	UN Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, WGAD/CRP.1/2015 (2015)
<u>WGAD-1998</u>	Report to the 5 <sup>th</sup> Session of the Commission on Human Rights, Civil and Political Rights, including questions of Torture and Detention, E/CN.4/1999/63 (1998)	<u>YP</u>	Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2007)
<u>WGAD-1998 Add3</u>	Report to the 55 <sup>th</sup> Session of the Commission on Human Rights, Visit to the United Kingdom on the issue of immigrants and asylum seekers, E/CN.4/1999/63/Add.3 (1998)		
<u>WGAD-D5</u>	Report to the 56 <sup>th</sup> Session of the Commission on Human Rights, Deliberation No. 5, Situation regarding immigrants and asylum-seekers, E/CN.4/2000/4 (1999)		
<u>WGAD-D5Revised</u>	Report to the 39 <sup>th</sup> Session of the Human Rights Council, Revised Deliberation No. 5 on Deprivation of Liberty of Migrants, A/HRC/39/Informal/1 (2018)		



## GUIDELINE 1

# THE RIGHT TO SEEK ASYLUM MUST BE RESPECTED

## Non-penalization

### CSR, Article 31:

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

### CMW, Article 17(2)

“2. Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.”

### CMW-GC 2, para. 24

“24. The Committee considers that crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime. Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security.”

### WGAD-2008, para. 53

“[C]riminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.”

### WGAD-D5Revised, paras. 10 and 11

11. The deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including of unaccompanied or separated children, is prohibited.

### SR-Migrants 2012, para. 70

“70. Administrative detention should not be applied as a punitive measure for violations of immigration laws and regulations, as those violations should not be considered criminal offences.”

### CPT IDF, page 1

“In line with its administrative nature, immigration detention must not be punitive in character: it is not a sanction or a punishment. Therefore, immigration detainees should be afforded both a regime and material conditions appropriate to their legal situation.”

## Right to seek asylum

### UDHR, Article 14

“(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”



### **CFREU, Article 18**

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”

### **ACHR, Article 22(7)**

“Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.”

### **ACHPR, Article 12(3)**

“Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.”

### **ASP, Article 19(1)**

“1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”

## **GUIDELINE 2**

# **THE RIGHTS LIBERTY AND SECURITY OF PERSONS AND FREEDOM OF MOVEMENT APPLY TO ASYLUM-SEEKERS**

## **Liberty and security**

### **UDHR, Article 3**

“Everyone has the right to life, liberty and security of person.”

### **ICCPR, Article 9(1)**

“1. Everyone has the right to liberty and security of person. [...]”

### **CCPR-GC 35, para. 3**

“Article 9 guarantees those rights [liberty and security] to everyone. “Everyone” includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.”





**CCPR-GC 15, para. 1**

“[e]ach State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction” (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”

**CMW, Article 16(1)**

“Migrant workers and members of their families shall have the right to liberty and security of person.”

**CRC, Article 37(b)**

“States Parties shall ensure that: [...]

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

**CRPD, Article 14(1)(a)**

“States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person.”

**ECHR, Article 5**

“Everyone has the right to liberty and security of person.”

**CFREU, Article 6**

“Everyone has the right to liberty and security of person.”

**ACHR, Article 7**

“Everyone has the right to personal liberty and security.”

**PBPPDLA, Principle III(1)**

“Principle III

1. Basic principle

Every person shall have the right to personal liberty and to be protected against any illegal or arbitrary deprivation of liberty. The law shall prohibit, in all circumstances, incommunicado detention of persons and secret deprivation of liberty since they constitute cruel and inhuman treatment. Persons shall only be deprived of liberty in officially recognized places of deprivation of liberty. [...]

**WGAD-D5Revised, para 8**

“8. The prohibition of arbitrary detention is absolute, meaning that it is a non-derogable norm of customary international law, or *jus cogens*. Arbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers. This extends both to the territorial jurisdiction and effective control of a State.”

**ACHPR, Article 6**

“Every individual shall have the right to liberty and to the security of his person.”

## Right to freedom of movement and choice of residence

### **ICCPR, Article 12**

- “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.”

### **CCPR-GC 27, paras. 1, 2, and 5**

- “1. Liberty of movement is an indispensable condition for the free development of a person.
2. The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant. [...]
5. The right to move freely relates to the whole territory of a State [...] persons are entitled to move from one place to another and to establish themselves in a place of their choice.”

### **CMW, Article 39(1)**

“Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.

### **DHRINN, Article 5(1)(a)**

“1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, in particular the following rights:

(a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.”

### **CSR, Article 26**

States “shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.”

### **CoE-Protocol 4, Article 2**

- “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public



safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.“

#### **EU-RD, Article 7(1)**

“Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive. [...]“

#### **ACHR, Article 22**

“1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.

2. Every person has the right to leave any country freely, including his own.

3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.

5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.

6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

9. The collective expulsion of aliens is prohibited.“

#### **ACHPR, Article 12**

“1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.“



## Statelessness

### **CSSP, Article 26**

States “shall accord to stateless persons lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”

## GUIDELINE 3

# DETENTION MUST BE IN ACCORDANCE WITH AND AUTHORIZED BY LAW

Detention of asylum-seekers is exceptional and permissible only on grounds prescribed by law and in accordance with procedures authorized by law

### **ICCPR, Article 9(1)**

“1. [...] No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

### **CMW, Article 16(4)**

“Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.”

### **BPP, Principle 2**

“Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.”





### **ECHR, Article 5(1)(f)**

“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

### **EU-RD, Recital (15)**

“The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention.”

### **ACHR, Article 7(2)**

“No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.”

### **PBPPDLA, Principle III(2)**

“Principle III

2. Exceptional use of preventive deprivation of liberty

The law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instruments. [...]

### **ACHPR, Article 6**

“No one may be deprived of his freedom except for reasons and conditions previously laid down by law.”

### **SR-Migrants 2012, para. 69**

“69. The reasons put forward by States to justify detention should be clearly defined and exhaustively enumerated in legislation. If, as a measure of last resort, a State resorts to detention for immigration-control purposes in an individual case, this should be considered only when someone presents a risk of absconding or presents a danger to their own or public security.”

## GUIDELINE 4

### DETENTION MUST NOT BE ARBITRARY, AND ANY DECISION TO DETAIN MUST BE BASED ON AN ASSESSMENT OF THE INDIVIDUAL'S PARTICULAR CIRCUMSTANCES, ACCORDING TO THE FOLLOWING

#### ICCPR, Article 9(1)

"1. [...] No one shall be subjected to arbitrary arrest or detention. [...]"

#### ACHR, Article 7(3)

"No one shall be subject to arbitrary arrest or imprisonment."

#### ACHPR, Article 6

"[N]o one may be arbitrarily arrested or detained."

### Notion of "arbitrary detention"

#### HRC, *Madani v. Algeria*, Communication No. 1172/2003, 28 March 2007, para. 8.4

"8.4 [...] The Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification."

#### WGAD-D9, paras. 38(d), 63, 82

"38. The Working Group regards cases of deprivation of liberty as arbitrary under customary international law in cases where: [...]"

(d) Asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review of remedy; [...]"

63. The notion of 'arbitrary detention' *lato sensu* can arise from the law itself or from the particular conduct of Government officials. A detention, even if it is authorized by law, may still be considered arbitrary if it is premised upon an arbitrary piece of legislation or is inherently unjust, relying for instance on discriminatory grounds. An overly broad statute authorizing automatic and indefinite detention without any standards or review is by implication arbitrary.

82. The Working Group recommends that States:

[...] (b) Ensure that the guarantees available against arbitrary arrest and detention are extended to all forms of deprivation of liberty, including house arrest; re-education through labour; prolonged periods of curfew; detention of migrants and asylum seekers; protective custody; detention for rehabilitation or treatment; detention in transit areas; border control checkpoints, etc. [...]"

### Individual assessment

#### CPT IDF, page 2

"Deprivation of liberty under aliens legislation should only be a measure of last resort, after a careful and individual examination of each case."





## GUIDELINE 4.1

### DETENTION IS AN EXCEPTIONAL MEASURE AND CAN ONLY BE JUSTIFIED FOR A LEGITIMATE PURPOSE

#### 4.1.1 TO PROTECT PUBLIC ORDER

#### 4.1.2 TO PROTECT PUBLIC HEALTH

#### 4.1.3 TO PROTECT NATIONAL SECURITY

### Permissible restrictions

#### CCPR-GC 27, para. 11

“Article 12, paragraph 3, [CCPR] provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes, and must be consistent with all other rights recognized in the Covenant.”

#### CMW, Article 39(2)

“2. The rights mentioned in paragraph 1 of the present article [right to liberty of movement and freedom to choose their residence] shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.”

#### EU-RD, Article 8(3)(e)

“3. An applicant may be detained only: [...]

(e) when protection of national security or public order so requires.”

## GUIDELINE 4.2

### DETENTION CAN ONLY BE RESORTED TO WHEN IT IS DETERMINED TO BE REASONABLE IN ALL THE CIRCUMSTANCES AND PROPORTIONATE TO A LEGITIMATE PURPOSE

#### CCPR-GC 35, para. 18

“18. Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; [...].”





**WGAD-D9, paras. 62 and 83**

“62. [...] The legal basis justifying the detention must be accessible, understandable, non-retroactive and applied in a consistent and predictable way to everyone equally. Moreover, according to the Human Rights Committee, an essential safeguard against arbitrary arrest and detention is the “reasonableness” of the suspicion on which an arrest must be based.

83. All measures of detention should be justified; adequate; necessary and proportional to the aim sought.”

**GUIDELINE 4.3**

**ALTERNATIVES TO DETENTION  
NEED TO BE CONSIDERED**

**Consideration of ATDs**

**CCPR-GC 35, para. 15**

“15. [...] If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.”

**WGAD-OP 45/2006, page 44**

“[...] 25. Where the chances of removal within a reasonable delay are remote, the Government’s obligation to seek for alternatives to detention becomes all the more pressing.”

**WGAD-1998 Add3, para. 33**

“33. Alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.”

**WGAD-1998, para. 69, Guarantee 13**

“In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees: [...] 13. Possibility for the alien to benefit from alternatives to administrative custody.”

**WGAD-2010, para. 65**

“65. [...] Alternatives to detention can take various forms: reporting at regular intervals to the authorities; release on bail; or stay in open centres or at a designated place. Such measures are already successfully applied in a number of countries. They must however not become alternatives to release.”

**SR-Migrants 2012, para. 73**

“73. The Special Rapporteur would like to remind Governments that alternatives to detention should not become alternatives to unconditional release, whenever such release is a possibility. Governments should put in place safeguards to ensure that those eligible for release without conditions are not diverted into alternative measures. Alternatives to detention should have a human rights-based approach, be established by law, be non-discriminatory and be subject to judicial review and independent monitoring and evaluation. In designing alternatives to detention, Governments should pay attention to the specific situation of particular groups of migrants, such as children, pregnant women and persons with disabilities, and use the least intrusive measure possible.”

### **EC-RETD, Article 15(1)**

“Unless other sufficient but less coercive measures can be applied effectively in a specific case [...]”

### **CoE-FR 2005, Guideline 6.1**

“A person may only be deprived of his/her liberty with a view to ensuring that a removal order will be executed [...] if, after a careful examination of the necessity of deprivation in each individual case, the authorities of the host state have concluded that compliance with a removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.”

### **UNSCPPHR-Res 2000, para. 6**

Encourages “States to adopt alternatives to detention such as those enumerated in the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers”.

### **PBPPDLA, Principle III(4)**

“Principle III

4. Alternative or substitute measures for deprivation of liberty

The Member States of the Organization of American States shall establish by law a series of alternative or substitute measures for deprivation of liberty, duly taking into account the international human rights standards on the topic.

When applying alternative or substitute measures for deprivation of liberty, Member States shall promote the participation of society and the family in such a way as to complement the intervention by the State, and shall also provide the necessary and appropriate resources to ensure their availability and effectiveness.”

## **GUIDELINE 5**

# **DETENTION MUST NOT BE DISCRIMINATORY**

## **Prohibition of discrimination**

### **UDHR, Article 2**

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political other opinion, national or social origin, property, birth or other status.”

### **ICCPR, Article 2**

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

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,



notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

#### **CCPR-GC 27, para. 18**

“The application of the restrictions permissible under article 12, paragraph 3, [CCPR] needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

#### **BPTP, paras. 1, 2, 3, and 9**

“1. All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require. [...]

9. Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.”

#### **ECHR, Article 14**

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

#### **ACHR, Article 24**

“All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

#### **ADRD, Article XXIV**

“Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.”

#### **ACHPR, Article 2 and 3**

“Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Article 3

1. Every individual shall be equal before the law

2. Every individual shall be entitled to equal protection of the law.”



### **CSR, Article 3**

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

## Statelessness

### **CSSP, Article 3**

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

## Persons of a particular nationality, or ethnic, racial or religious group

### **CERD, Article 1(3)**

“Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.”

### **CERD-GR 30, para. 19**

States parties should “[e]nsure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards.”

## GUIDELINE 6

# INDEFINITE DETENTION IS ARBITRARY AND MAXIMUM LIMITS ON DETENTION SHOULD BE ESTABLISHED BY LAW

## Length of detention

### **CCPR-GC 35, para. 15**

“States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases.”

### **HRC, *F.J. et al v. Australia*, Communication No. 2233/2013, 22 March 2016, para. 10.3**

“[A]sylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case by case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review. The



decision must also take into account the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion. The inability of a State party to carry out the expulsion of an individual does not justify indefinite detention.”

**WGAD/CRP.1/2015, Principle 7**

“Principle 7: A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.”

**WGAD-2010, para. 61**

“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.”

**WGAD-2009, para. 66**

“The Working Group has also publicly expressed, together with other mandate holders of special procedures, its concern regarding a law-making initiative of a regional organization comprising mainly receiving countries which would allow concerned States to detain immigrants who are in an irregular situation for a period of time of up to 18 months, pending removal.”

**WGAD-1998, para. 69, Guarantee 10**

“69. In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees: [...]

Guarantee 10: Not to be held in custody for an excessive or unlimited period, with a maximum period being set, as appropriate, by the regulations.”

**WGAD-OP 45/2006, page 43**

“25. With regard to duration, the Working Group notes that Mr. Abdi has been detained for four-and-a-half years as of today. The Working Group finds it difficult to think of circumstances under which this duration would not be excessive. It certainly is in the present case, where the prospects of Mr. Abdi’s removal actually taking place were dim from the beginning and have been deteriorating since then, particularly since 2004. Where the chances of removal within a reasonable delay are remote, the Government’s obligation to seek for alternatives to detention becomes all the more pressing. Looking forward, the possibility of Mr. Abdi’s removal would appear to be currently as remote as it was ever before. His continued detention therefore has assumed an indefinite character.”

**WGAD-OP 4/2011, para. 19**

“[A] maximum duration must be specified, at the end of which the detained person shall be freed. Such detention should never be used as a dissuasive measure. It must be ordered by a judge and be subject to regular judicial review of its lawfulness and reasonableness as required by the provisions of article 9, paragraph 4, of the International Covenant on Civil and Political Rights. The detention of a person pending expulsion should never be indefinite or of excessive or unreasonable duration.”

**WGAD-D9, para. 67**

“67. Any extension of the period of deprivation of liberty detention must be based on adequate reasons setting out a detailed justification, which must not be abstract or general in character.”





### **WGAD-D5Revised, para 25 & ss**

25. A maximum detention period in the course of migration proceedings must be set by legislation, and such detention shall be permissible only for the shortest period of time. Excessive detention in the course of migration proceedings is arbitrary. Upon the expiry of the detention period set by law, the detained person must automatically be released.

26. Indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.

### **SR-Migrants 2012, para. 72(c)**

“72. The Special Rapporteur calls on States to consider progressively abolishing the administrative detention of migrants. In the meantime, Governments should take measures to ensure respect for the human rights of migrants in the context of detention, including by: [...]

(c) Ensuring that the law sets a limit on the maximum length of detention pending deportation and that under no circumstance is detention indefinite. There should be automatic, regular and judicial review of detention in each individual case. Administrative detention should end when a deportation order cannot be executed; [...]

### **EC-RETD, Article 15(1), (5) and (6)**

“1. [...] Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.”

“5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

- (a) a lack of cooperation by the third-country national concerned, or
- (b) delays in obtaining the necessary documentation from third countries.”

### **EU-RD, Recital (16)**

“With regard to administrative procedures relating to the grounds for detention, the notion of ‘due diligence’ at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.”

### **CPT Standards, [27]**

“The CPT recognises that, in the very nature of things, immigration detainees may have to spend some time in an ordinary police detention facility. However, conditions in police stations will frequently – if not invariably – be inadequate for prolonged periods of detention. Consequently, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum.”



### **CPT IDF, page 3**

“Immigration detainees are frequently initially held at ‘point of entry holding facilities’, airport transit zones and police stations. Clearly, these places are often inadequate places in which to accommodate persons, in particular for extended stays. Consequently, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum (i.e. less than 24 hours).”

### **PBPPDLA, Principle III(1)**

“Principle III

#### 1. Basic principle

As a general rule, the deprivation of liberty of persons shall be applied for the minimum necessary period.

Deprivation of liberty of children shall be applied as a measure of last resort and for the minimum necessary period, and shall be limited to strictly exceptional cases.”

### **GUIDELINE 7**

## **DECISIONS TO DETAIN OR TO EXTEND DETENTION MUST BE SUBJECT TO MINIMUM PROCEDURAL SAFEGUARDS**

Right to be informed on arrival, to legal assistance and contact family members

### **ICCPR, Article 9(2)**

“2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”

### **CCPR-GC 35, para. 58**

“Detainees should be promptly informed of their rights, in a language they understand; providing information leaflets in the appropriate language, including in Braille, may often assist the detainee in retaining the information.”

### **HRC, *F.K.A.G. et al. v. Australia*, Communication No. 2094/2011, 26 July 2013, para. 9.5**

“9.5 [...] [T]he Committee considers that one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded; and that the reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint.”



## **BPP, Principles 10-14, 16 and 17**

### “Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

### Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

### Principle 12

1. There shall be duly recorded: ( a ) The reasons for the arrest; ( b ) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; ( c ) The identity of the law enforcement officials concerned; ( d ) Precise information concerning the place of custody.
2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

### Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment,

respectively with information on and an explanation of his rights and how to avail himself of such rights.

### Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest. [...]

### Principle 16

Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

### Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. 2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.”



## **SMR, Rules 54 and 55**

### **“Rule 54**

Upon admission, every prisoner shall be promptly provided with written information about:

- (a) The prison law and applicable prison regulations;
- (b) His or her rights, including authorized methods of seeking information, access to legal advice, including through legal aid schemes, and procedures for making requests or complaints;
- (c) His or her obligations, including applicable disciplinary sanctions; and
- (d) All other matters necessary to enable the prisoner to adapt himself or herself to the life of the prison.

### **Rule 55**

1. The information referred to in rule 54 shall be available in the most commonly used languages in accordance with the needs of the prison population. If a prisoner does not understand any of those languages, interpretation assistance should be provided.
2. If a prisoner is illiterate, the information shall be conveyed to him or her orally. Prisoners with sensory disabilities should be provided with information in a manner appropriate to their needs.
3. The prison administration shall prominently display summaries of the information in common areas of the prison.”

## **WGAD-D5, Principles 1, 2, 5, 8**

“Principle 1: Any asylum-seeker or immigrant, when held for questioning at the border, or inside national territory in the case of illegal entry, must be informed at least orally, and in a language which he or she understands, of the nature of and 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.

Principle 2: Any asylum-seeker or immigrant must 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.

Principle 5: Any asylum-seeker or immigrant, upon admission to a centre for custody, must be informed of the internal regulations and, where appropriate, of the applicable disciplinary rules and any possibility of his or her being held incommunicado, as well as of the guarantees accompanying such a measure.

Principle 8: Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned.”





### **WGAD/CRP.1/2015, Principles 7, 9**

“Principle 7. Right to be informed

28. Any persons deprived of their liberty shall be informed about their rights and obligations under law through appropriate and accessible means. Among other procedural safeguards, this includes the right to be informed, in a language and means, modes or format the detainee understands, of the reasons justifying the deprivation of liberty, the possible judicial avenue to challenge the arbitrariness and lawfulness of the deprivation of liberty<sup>51</sup> and the right to bring proceedings before the court and to obtain without delay appropriate remedies.

Principle 9. Assistance by legal counsel and access to legal aid

30. Any persons deprived of their liberty shall have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension. Upon apprehension, all persons shall be promptly informed of this right.

31. Assistance by legal counsel in the proceedings shall be at no cost for a detained person, without adequate means, or for the individual bringing proceedings before a court on the detainee’s behalf. <sup>57</sup> In such cases, effective legal aid shall be provided promptly at all stages of the deprivation of liberty; this includes, but is not limited to, the detainee’s unhindered access to legal counsel provided by the legal aid regime.

32. Persons deprived of their liberty shall be accorded adequate time and facilities to prepare their case, including through disclosure of information in accordance with the present Basic Principles and Guidelines, and to freely communicate with legal counsel of their choice.

33. Legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisals, interference, intimidation, hindrance or harassment. Authorities shall respect the privacy and confidentiality of legal counsel detainee communications.

### **WGAD-D9, para. 83**

“84. All persons subjected to a measure of detention should benefit at all stages of access to a lawyer of her or his choice as well as to effective legal assistance and representation.”

### **SR-Migrants 2012, para. 72(a) and (b)**

“72. The Special Rapporteur calls on States to consider progressively abolishing the administrative detention of migrants. In the meantime, Governments should take measures to ensure respect for the human rights of migrants in the context of detention, including by:

(a) Ensuring that procedural safeguards and guarantees established by international human rights law and national law are applied to any form of detention. In particular, grounds for detention of migrants must be established by law. A decision to detain should only be taken under clear legal authority, and all migrants deprived of their liberty should be informed in a language they understand, if possible in writing, of the reasons for the detention and be entitled to bring proceedings before a court, so that the court can decide on the lawfulness of the detention. Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings;

(b) Ensuring that migrants in detention are accurately informed of the status of their case and of their right to contact a consular or embassy representative and members of their families. Migrants and their lawyers should have full and complete access to the migrants’ files; [...].”



#### **RPJDL, para. 24**

“24. On admission, all juveniles shall be given a copy of the rules governing the detention facility and a written description of their rights and obligations in a language they can understand, together with the address of the authorities competent to receive complaints, as well as the address of public or private agencies and organizations which provide legal assistance. For those juveniles who are illiterate or who cannot understand the language in the written form, the information should be conveyed in a manner enabling full comprehension.”

#### **ECHR, Article 5(2)**

“Everyone who is arrested shall be informed promptly, in a language he understands, of the reasons for his arrest and of any charge against him.”

#### **CFREU, Article 47**

“[...] Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

#### **EU-RD, Recital (15)**

“Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.”

#### **CPT Standards, [30], [82] and [87]**

“30. Immigration detainees should – in the same way as other categories of persons deprived of their liberty – be entitled, as from the outset of their detention, to inform a person of their choice of their situation and to have access to a lawyer and a doctor. Further, they should be expressly informed, without delay and in a language they understand, of all their rights and of the procedure applicable to them.”

“82. The right of access to a lawyer should include the right to talk with a lawyer in private, as well as to have access to legal advice for issues related to residence, detention and deportation. This implies that when irregular migrants are not in a position to appoint and pay for a lawyer themselves, they should benefit from access to legal aid. Further, all newly arrived detainees should be promptly examined by a doctor or by a fully qualified nurse reporting to a doctor. The right of access to a doctor should include the right – if an irregular migrant so wishes – to be examined by a doctor of his/her choice; however, the detainee might be expected to meet the cost of such an examination. Notifying a relative or third party of one’s choice about the detention measure is greatly facilitated if irregular migrants are allowed to keep their mobile phones during deprivation of liberty or at least to have access to them.”

“87. Arrangements should be made enabling detained irregular migrants to consult a lawyer or a doctor on an ongoing basis, and to receive visits from NGO representatives, family members or other persons of their choice, and to have telephone contact with them.”

## **EPR, paras. 23, 38 and 98**

### “Legal advice

23.1 All prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.

23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense.

23.3 Where there is a recognised scheme of free legal aid the authorities shall bring it to the attention of all prisoners.

23.4 Consultations and other communications including correspondence about legal matters between prisoners and their legal advisers shall be confidential.

23.5 A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security.

23.6 Prisoners shall have access to, or be allowed to keep in their possession, documents relating to their legal proceedings.”

### “Special minorities

38.1 Special arrangements shall be made to meet the needs of prisoners who belong to ethnic or linguistic minorities.

38.2 As far as practicable the cultural practices of different groups shall be allowed to continue in prison.

38.3 Linguistic needs shall be met by using competent interpreters and by providing written material in the range of languages used in a particular prison.”

### “Legal advice

98.1 Untried prisoners shall be informed explicitly of their right to legal advice.

98.2 All necessary facilities shall be provided to assist untried prisoners to prepare their defence and to meet with their legal representatives.”

## **ACHR, Article 7(4)**

“Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.”

## **PBPPDLA, Principle V**

### “Principle V

#### Due process of law

Persons deprived of liberty shall have the right to be promptly informed in a language they understand of the reasons for their deprivation of liberty and of the charges against them, as well as to be informed of their rights and guarantees; to have access to a translator or interpreter during the proceedings; and to communicate with their family. They shall have the right to a hearing and a trial, with due guarantees and within a reasonable time, by a judge, authority or official who is legally authorized to exercise judicial functions, or to be released without prejudice to the continuation of the proceedings.”



## Be brought promptly before a judicial or independent authority to have the detention decision reviewed

### **ACHR, Article 7(5)**

“Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.”

### **CFREU, Article 47**

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. [...]”

### **WGAD/CRP.1/2015, Principle 8**

“Principle 8. Timeframe for bringing proceedings before a court

29. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and to obtain without delay appropriate and accessible remedies applies from the moment of apprehension and ends with the release of the detainee or the final judgment, depending on the circumstances. The right to claim remedies after release may not be rendered ineffective by any statutes of limitation.”

### **WGAD-D5, Principle 3**

“Principle 3: Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.”

## Entitlement to take proceedings before a court (Non-derogability, Non-discrimination, Right to appear in person, Equality before the courts)

### **ICCPR, Article 9(4)**

“4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

### **CCPR-GC 35, paras. 15 and 42**

“15. [...] Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.”

“42. The right to bring proceedings applies in principle from the moment of arrest and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible. In general, the detainee has the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention or where questions regarding ill-treatment of the detainee arise. The court must have the power to order the detainee brought before it, regardless of whether the detainee has asked to appear.”



### **CMW, Article 16(8)**

“Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.”

### **BPP, Principles 4, 11 and 32**

#### “Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

#### Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor. 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

#### Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.”

### **PBPPDLA, Principle V**

#### “Principle V

##### Due process of law

Every person deprived of liberty shall, at all times and in all circumstances, have the right to the protection of and regular access to competent, independent, and impartial judges and tribunals, previously established by law. [...]

All persons deprived of liberty shall have the right to a defense and to legal counsel, named by themselves, their family, or provided by the State; they shall have the right to communicate privately with their counsel, without interference or censorship, without delays or unjustified time limits, from the time of their capture or arrest and necessarily before their first declaration before the competent authority.

All persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights. In particular, persons deprived of liberty shall have the right to lodge complaints or claims about acts of torture, prison violence, corporal punishment, cruel, inhuman, or degrading treatment or punishment, as well as concerning prison or internment conditions, the lack of appropriate medical or psychological care, and of adequate food.”





### **CPT Standards, [86]**

“Detained irregular migrants should benefit from an effective legal remedy enabling them to have the lawfulness of their deprivation of liberty decided speedily by a judicial body. This judicial review should entail an oral hearing with legal assistance, provided free of charge for persons without sufficient means, and interpretation (if required). Moreover, detained irregular migrants should be expressly informed of this legal remedy. The need for continued detention should be reviewed periodically by an independent authority.”

### **WGAD-1998, para. 69, Guarantees 3 and 4**

“69. In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees: [...]”

Guarantee 3: Determination of the lawfulness of the administrative custody pursuant to legislation providing to this end for: (a) The person concerned to be brought automatically and promptly before a judge or a body affording equivalent guarantees of competence, independence and impartiality; (b) Alternatively, the possibility of appealing to a judge or to such a body.

Guarantee 4: To be entitled to have the decision reviewed by a higher court or an equivalent competent, independent and impartial body.”

### **WGAD-2010, para. 61**

“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 International Covenant on Civil and Political Rights requires that migrant detainees enjoy the right to challenge the legality of their

detention before a court. Established time limits for judicial review must be obtained in ‘emergency situations’ when an exceptionally large number of undocumented immigrants enter the territory of a State.”

### **WGAD/CRP.1/2015, Principles 1, 4, 5, 6**

“Principle 1. Right to be free from arbitrary or unlawful deprivation of liberty

19. Recognizing that everyone has the right to be free from arbitrary or unlawful deprivation of liberty, everyone is guaranteed the right to take proceedings before a court, in order that that court may decide on the arbitrariness or lawfulness of the detention, and obtain without delay appropriate and accessible remedies.

Principle 4. Non-derogability

22. The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies is not derogable under international law.

23. The right must not be suspended, rendered impracticable, restricted, or abolished under any circumstances, even in times of war, armed conflict, or public emergency that threatens the life of the nation and the existence of which is officially proclaimed. [...]

Principle 5. Non-discrimination

26. The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies may be exercised by anyone regardless of race, colour, sex, property, birth, age, national, ethnic or social origin, language, religion, economic condition, political or other opinion; sexual orientation or gender identity, asylum-seeking or migration status, disability or any other status.



#### Principle 6. The court as reviewing body

27. A court shall review the arbitrariness and lawfulness of the deprivation of liberty. It shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful.

#### Principle 10. Persons able to bring proceedings before a court

34. Procedures shall allow anyone to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to obtain without delay appropriate remedies, including the detainee, his or her legal representative, family members or other interested parties, whether or not they have proof of the consent of the detainee.

35. No restrictions may be imposed on the detainee's ability to contact his or her legal representative, family members or other interested parties.

#### Principle 11. Appearance of the detainee before the court

36. The court should guarantee the physical presence of the detainee before it, especially for the first hearing of the challenge to the arbitrariness and lawfulness of the deprivation of liberty and every time that the person deprived of liberty requests to appear physically before the court.

#### Principle 12. Equality before the courts

37. The proceedings shall be fair and effective in practice and the parties to the proceedings in question shall be ensured the right to equal access, to present their full case, and equality of arms and be treated without any discrimination before the courts.

38. Every individual deprived of liberty shall be guaranteed the right to have access to all material related to the detention or presented to the court by State authorities, to preserve the equality of arms. The requirement that the same procedural rights be provided to all parties is subject only to distinctions that are based on the law and can be justified on objective, reasonable grounds not entailing actual disadvantage or other unfairness to the detained person.

#### **ECHR, Article 5(4)**

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

#### **EC-RETD, Article 15(2)**

“When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.”





### **ACHR, Article 7(6)**

“Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.”

### **PBPPDLA, Principle V**

“Principle V

Due process of law

Every person deprived of liberty shall, at all times and in all circumstances, have the right to the protection of and regular access to competent, independent, and impartial judges and tribunals, previously established by law.”

### **IACtHR-OC 18/03, para. 121**

“The rights of due process of law is a right that must be ensured to everyone, irrespective of his migratory status.”

### **CSR, Article 35**

“1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. 2. In order to enable the Office of the High Commissioner or any other agency

of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning: (a) The condition of refugees, (b) The implementation of this Convention, and; (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.”

### **Power to order release**

#### **HRC, *F.K.A.G. et al. v. Australia*, Communication No. 2094/2011, 26 July 2013, para. 9.6**

“9.6 [...] The Committee recalls its jurisprudence that judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.”

### **Access to international bodies**

#### **VCCR, Article 36(1)**

“1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State.”



### **BPP, Principle 16(2)**

“If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.”

### **SMR, Rule 62**

“1. Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.

2. Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

### **PBPPDLA, Principle V**

“Principle V

Due process of law

Persons deprived of liberty in a Member State of the Organization of American States of which they are not nationals, shall be informed, without delay, and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities

be notified of their deprivation of liberty immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.”

### **CCPR-GC 35, para. 58**

“Detained foreign nationals should be informed of their right to communicate with their consular authorities, or, in the case of asylum seekers, with the Office of the United Nations High Commissioner for Refugees.”

### **WGAD-1998, para. 69, Guarantee 6**

“69. In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees: [...]

Guarantee 6: Possibility of communicating by an effective medium such as the telephone, fax or electronic mail, from the place of custody, in particular with a lawyer, a consular representative and relatives.”

### **EU-RD, Article 18(2)(b)**

“[...] States shall ensure that: [...]

b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non- governmental organisations and bodies;

### **EU-RD, Article 18(2)(b)**

“[...] States shall ensure that: [...]

b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies;

## Indigenous people/Minorities/Stateless persons/ Non-nationals/Internally displaced persons

### **WGAD/CRP.1/2015, Principle 17**

“Principle 17. Specific obligations to guarantee access to the right to bring proceedings before a court

51. The adoption of specific measures are required under international law to ensure meaningful access to the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and receive without delay appropriate remedies by certain groups of detainees. This includes, but is not limited to [...] indigenous people, [...] minorities as based on national or ethnic, cultural, religious or linguistic identity, non-nationals, including migrants regardless of their migration status, asylum-seekers and refugees, internally displaced persons, stateless persons [...]”

### **GUIDELINE 8**

## **CONDITIONS OF DETENTION MUST BE HUMANE AND DIGNIFIED**

### Torture/Cruel, inhuman and degrading treatment

#### **UDHR, Article 5**

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

#### **ICCPR, Articles 7 and 10**

“Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10(1)

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

#### **CCPR-GC 20, para. 3**

“3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain



in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.”

### **CCPR-GC 21, para. 3**

“3. Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, [...] but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”

### **HRC, *C. v. Australia*, Communication No. 900/1999, 13 November 2002, para. 8.4**

“8.4 [...] [T]he Committee notes that the psychiatric evidence [...] was essentially unanimous that the author’s psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author’s continued detention and his sanity. Despite increasingly serious assessments of the author’s conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on

medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author’s illness had reached such a level of severity that irreversible consequences were to follow. In the Committee’s view, the continued detention of the author when the State party was aware of the author’s mental condition and failed to take the steps necessary to ameliorate the author’s mental deterioration constituted a violation of his rights under article 7 of the Covenant.”

### **UNCAT, Article 16**

“1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.”

### **CMW, Article 10**

“No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”



### **CSR, Article 33(1)**

“1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

### **SMR, Rule 1**

“All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.”

### **BPP, Principle 1**

“All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”

### **ECHR, Article 3**

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

### **CPT Standards, [93-95]**

“93. The prohibition of torture and inhuman or degrading treatment or punishment entails the obligation not to send a person to a country where there are substantial grounds for believing that he or she would run a real risk of being subjected to torture or other forms

of ill-treatment. Accordingly, irregular migrants should have ready access to an asylum procedure (or other residence procedure) which guarantees both confidentiality and an objective and independent analysis of the human rights situation in other countries; an individual assessment of the risk of ill-treatment in case of deportation to the country of origin or a third country should be carried out. The CPT is concerned that in certain countries the time-limit for submitting an application for asylum is limited by law to a number of days from the date of arrival in the country or in a detention facility; applications submitted after the deadline are not considered. Such an approach increases the possibility of persons being sent to a country where they run a real risk of being subjected to torture or other forms of ill-treatment.

94. In this context, the CPT has grave misgivings about the policy adopted by certain countries of intercepting, at sea, boats transporting irregular migrants and returning the persons concerned to North or North-West Africa. A practice with similar implications allegedly takes place at certain European land borders. Countries that implement such policies or practices could well be at risk of breaching the fundamental principle of “non-refoulement”, a principle which forms part of international human rights law as well as of European Union law. This is particularly the case when the countries to which irregular migrants are sent have not ratified or acceded to the 1951 Geneva Convention relating to the Status of Refugees.

95. In line with the [Twenty guidelines on forced return](#) adopted by the Committee of Ministers on 4 May 2005, removal orders should be issued in each and every case based on a decision following national laws and procedures, and in accordance with international human rights obligations. The removal order should be handed over in writing to the person concerned. Moreover, there should be the possibility to appeal against the order, and the deportation should not be carried out before the decision on any appeal has been delivered. The assistance of a lawyer and an interpreter should be guaranteed also at this stage of the procedure.”



### **CPT IDF, page 2**

“The CPT is of the view that the prolonged detention of persons under aliens legislation, without a time limit and with unclear prospects for release, could easily be considered as amounting to inhuman treatment.”

### **ACHR, Article 5(2)**

“2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.”

### **IACPPT, Articles 1 and 6**

“Article 1

The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

Article 6

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.”

### **ACHPR, Article 5**

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

## Vulnerability of children to ill-treatment and torture

### **SR-Torture 2015, para. 69, 70 and 72**

“69. Owing to their unique physiological and psychological needs, which render them particularly sensitive to deprivation and treatment that otherwise may not constitute torture, children are more vulnerable to ill-treatment and torture than adults. The detention of children, including pretrial and post-trial incarceration as well as institutionalisation and administrative immigration detention, is inextricably linked – in fact if not in law – with the ill-treatment of children, owing to the particularly vulnerable situation in which they have been placed that exposes them to numerous types of risk. Moreover, the response to address the key issues and causes is often insufficient.

70. In determining the seriousness of acts that may constitute ill-treatment or torture, due consideration must be given to physical and mental effects and the age of the victim. In the case of children, higher standards must be applied to classify treatment and punishment as cruel, inhuman or degrading. In addition, the particular vulnerability of children imposes a heightened obligation of due diligence on States to take additional measures to ensure their human rights to life, health, dignity and physical and mental integrity.”



72. The deprivation of liberty of children is intended to be an *ultima ratio* measure, to be used only for the shortest possible period of time, only if it is in the best interests of the child, and limited to exceptional cases. Failure to recognize or apply these safeguards increases the risk of children being subjected to torture or other ill-treatment, and implicates State responsibility.”

## Appropriate medical treatment/health screening

### **ICESCR, Article 12**

“1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

### **CESCR-GC 14, para. 34**

“[...] States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services [...]”

### **ACHR, Article 5(1)**

“1. Every person has the right to have his physical, mental, and moral integrity respected.”

### **ACHPR, Article 16**

“1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

### **CRC, Article 24**

“1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”

### **CPT Standards, paras. 31, 82 and 96**

“31. [...] All detention facilities for immigration detainees should provide access to medical care. Particular attention should be paid to the physical and psychological state of asylum seekers, some of whom may have been tortured or otherwise ill-treated in the countries from which they have come. The right of access to a doctor should include the right – if a detainee so wishes – to be examined by a doctor of his choice; however, the detainee might be expected to cover the cost of such a second examination. [...]”

82. [A]ll newly arrived detainees should be promptly examined by a doctor or by a fully qualified nurse reporting to a doctor. The right of access to a doctor should include the right – if an irregular migrant so wishes – to be examined by a doctor of his/her choice; however, the detainee might be expected to meet the cost of such an examination. [...]

96. Thirdly, in respect of any place where persons are deprived of their liberty by a public authority, the CPT consistently recommends that any sign of injury to a person who alleges ill-treatment, as well as the relevant statements made by the person concerned and the doctor’s conclusions (as to the degree of consistency between the person’s statement and the injuries observed), be duly recorded by





the doctor on a form designed for that purpose. A similar record should be made even in the absence of a specific allegation, when there are grounds to believe that ill-treatment may have occurred. Procedures should be in place to ensure that whenever injuries are recorded by a doctor which are consistent with allegations of ill-treatment made by the person concerned (or which, even in the absence of an allegation, are clearly indicative of ill-treatment), the record is systematically brought to the attention of the competent judicial or prosecuting authorities.”

#### **BPP, Principle 24**

“A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.”

#### **SMR, Rules 24-27**

“Rule 24

1. The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.

2. Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for drug dependence.

Rule 25

1. Every prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation.

2. The health-care service shall consist of an interdisciplinary team with sufficient qualified personnel acting in full clinical independence and shall encompass sufficient expertise in psychology and psychiatry. The services of a qualified dentist shall be available to every prisoner.

Rule 26

1. The health-care service shall prepare and maintain accurate, up-to-date and confidential individual medical files on all prisoners, and all prisoners should be granted access to their files upon request. A prisoner may appoint a third party to access his or her medical file.

2. Medical files shall be transferred to the health-care service of the receiving institution upon transfer of a prisoner and shall be subject to medical confidentiality.

Rule 27

1. All prisons shall ensure prompt access to medical attention in urgent cases. Prisoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals. Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care.

2. Clinical decisions may only be taken by the responsible health-care professionals and may not be overruled or ignored by non-medical prison staff.”





**RPJDL, paras. 49-55**

“49. Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated. All such medical care should, where possible, be provided to detained juveniles through the appropriate health facilities and services of the community in which the detention facility is located, in order to prevent stigmatization of the juvenile and promote self-respect and integration into the community.

50. Every juvenile has a right to be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention.

51. The medical services provided to juveniles should seek to detect and should treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society. Every detention facility for juveniles should have immediate access to adequate medical facilities and equipment appropriate to the number and requirements of its residents and staff trained in preventive health care and the handling of medical emergencies. Every juvenile who is ill, who complains of illness or who demonstrates symptoms of physical or mental difficulties, should be examined promptly by a medical officer.

52. Any medical officer who has reason to believe that the physical or mental health of a juvenile has been or will be injuriously affected by continued detention, a hunger strike or any condition of detention should report this fact immediately to the director of the detention facility in question and to the independent authority responsible for safeguarding the well-being of the juvenile.

53. A juvenile who is suffering from mental illness should be treated in a specialized institution under independent medical management.

Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release.

54. Juvenile detention facilities should adopt specialized drug abuse prevention and rehabilitation programmes administered by qualified personnel. These programmes should be adapted to the age, sex and other requirements of the juveniles concerned, and detoxification facilities and services staffed by trained personnel should be available to drug- or alcohol-dependent juveniles.

55. Medicines should be administered only for necessary treatment on medical grounds and, when possible, after having obtained the informed consent of the juvenile concerned. In particular, they must not be administered with a view to eliciting information or a confession, as a punishment or as a means of restraint. Juveniles shall never be testees in the experimental use of drugs and treatment. The administration of any drug should always be authorized and carried out by qualified medical personnel.”

**EPR, para. 39**

“39. Prison authorities shall safeguard the health of all prisoners in their care.”

**PBPPDLA, Principles IX(3) and X**

“Principle X

Health

Persons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being, including amongst other aspects, adequate medical, psychiatric, and dental care; permanent availability of suitable and impartial medical personnel; access to

free and appropriate treatment and medication; implementation of programs for health education and promotion, immunization, prevention and treatment of infectious, endemic, and other diseases; and special measures to meet the particular health needs of persons deprived of liberty belonging to vulnerable or high risk groups, such as: the elderly, women, children, persons with disabilities, people living with HIV-AIDS, tuberculosis, and persons with terminal diseases. Treatment shall be based on scientific principles and apply the best practices.

The provision of health services shall, in all circumstances, respect the following principles: medical confidentiality; patient autonomy; and informed consent to medical treatment in the physician-patient relationship.

The State shall ensure that the health services provided in places of deprivation of liberty operate in close coordination with the public health system so that public health policies and practices are also applied in places of deprivation of liberty.

Women and girls deprived of liberty shall be entitled to access to specialized medical care that corresponds to their physical and biological characteristics, and adequately meets their reproductive health needs. In particular, they shall have access to gynecological and pediatric care, before, during, and after giving birth, which shall not take place, as far as possible, inside the place of deprivation of liberty, but at hospitals or appropriate institutions. If a child is born in a place of deprivation of liberty, this fact shall not be mentioned in the birth certificate.

In women's or girls' institutions there shall be special accommodation, as well as adequate personnel and resources for pre-natal and post-natal care and treatment of women and girls.

Where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the

appropriate educational, pediatric, and nutritional services, in order to protect the best interest of the child.

#### Principle IX

[...]

#### 3. Medical examination

All persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by idoneous medical personnel immediately following their admission to the place of imprisonment or commitment, in order to verify their state of physical or mental health and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture.

The medical or psychological information shall be entered into the respective official register, and when necessary taking into account the gravity of the findings, it shall be immediately transmitted to the competent authority.”

## Registration of detainee's identity, location, time date and grounds of detention

### **IACPPT, Article 17(3)**

“3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:



- (a) The identity of the person deprived of liberty;
- (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- (d) The authority responsible for supervising the deprivation of liberty;
- (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.”

#### **CPT Standards, [85]**

“85. Every instance of deprivation of liberty should be covered by a proper individual detention order, readily available in the establishment where the person concerned is being held; and the detention order should be drawn up at the outset of the deprivation of liberty or as soon as possible thereafter. This basic requirement applies equally to irregular migrants who are deprived of their liberty. Further, the fundamental safeguards of persons detained by law enforcement agencies are reinforced if a single and comprehensive custody record is kept for every such person, recording all aspects of his/her custody and all action taken in connection with it.”

#### **SMR, Rule 6**

“There shall be a standardized prisoner file management system in every place where persons are imprisoned. Such a system may be an electronic database of records or a registration book with numbered and signed pages. Procedures shall be in place to ensure a secure audit trail and to prevent unauthorized access to or modification of any information contained in the system.”

#### **EPR, para. 15(1)**

“15.1 At admission the following details shall be recorded immediately concerning each prisoner:

- a) information concerning the identity of the prisoner;
- b) he reasons for commitment and the authority for it;
- c) the day and hour of admission;
- d) an inventory of the personal property of the prisoner that is to be held in safekeeping in accordance with Rule 31;
- e) any visible injuries and complaints about prior ill-treatment; and
- f) subject to the requirements of medical confidentiality, any information about the prisoner’s health.”

#### **PBPPDLA, Principle IX(2)**

“Principle IX

##### 2. Registration

The personal data of persons admitted to places of deprivation of liberty shall be recorded into an official register, which shall be made available to the person deprived of liberty, his or her representative, and the competent authorities. The register shall include, as a minimum the following information:



- a. Personal information including, at least, the following: name, age, sex, nationality, address and name of parents, family members, legal representatives or defense counsel if applicable, or other relevant data of the persons deprived of liberty;
- b. Information concerning the personal integrity and the state of health of the persons deprived of liberty;
- c. Reason or grounds for the deprivation of liberty;
- d. The authority that ordered or authorized the deprivation of liberty;
- e. The authority that conducted the person deprived of liberty to the institution;
- f. The authority legally responsible for supervising the deprivation of liberty;
- g. Time and date of admission and release;
- h. Time and date of transfers to another place and the destination;
- i. Identity of the authority who ordered the transfer and of the one who is responsible for it;
- j. Inventory of personal effects; and
- k. Signature of the persons deprived of liberty, or where this is impossible, an explanation about the reasons thereof.

#### **WGAD-D5, Principle 4**

“Principle 4: Any asylum-seeker or immigrant, when placed in custody, must enter his or her signature in a register which is numbered and bound, or affords equivalent guarantees, indicating the person’s identity, the grounds for the custody and the competent authority which decided on the measure, as well as the time and date of admission into and release from custody.”

#### **SR-Migrants 2012, para. 74**

“74. The Special Rapporteur encourages States to collect disaggregated data on the number of migrants in administrative detention, the number of migrants who are subject to different types of non-custodial measures and the compliance rate with these measures, in order to evaluate their effectiveness.”

### Physical conditions of accommodation, hygiene and adequate clothing

#### **SMR, Rules 12-17**

“Rule 12

1. Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself or herself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.

2. Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the prison.

Rule 13

All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.



#### Rule 14

In all places where prisoners are required to live or work:

(a) The windows shall be large enough to enable the prisoners to read or work by natural light and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

#### Rule 15

The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.

#### Rule 16

Adequate bathing and shower installations shall be provided so that every prisoner can, and may be required to, have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.

#### Rule 17

All parts of a prison regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.”

#### **WGAD-1998, para. 69**

“In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees: [...]

Guarantee 8: Custody effected in public premises intended for this purpose; otherwise, the individual in custody shall be separated from persons imprisoned under criminal law.”

#### **PBPPDLA, Principles XII and XVII**

##### “Principle XII

Accommodation, hygiene, and clothing

##### 1. Accommodation

Persons deprived of liberty shall have adequate floor space, daily exposure to natural light, appropriate ventilation and heating, according to the climatic conditions of their place of deprivation of liberty. They shall be provided with a separate bed, suitable bed clothing, and all other conditions that are indispensable for nocturnal rest. The installations shall take into account the special needs of the sick, persons with disabilities, children, pregnant women or breastfeeding mothers, and the elderly, amongst others.

##### 2. Hygiene

Persons deprived of liberty shall have access to clean and sufficient sanitary installations that ensure their privacy and dignity. They shall also have access to basic personal hygiene products and water for bathing or shower, according to the climatic conditions.

Women and girls deprived of their liberty shall regularly be provided with those articles that are indispensable to the specific sanitary needs of their sex.

##### 3. Clothing

The clothing to be used by persons deprived of liberty shall be sufficient and adequate to the climatic conditions, with due consideration to their cultural and religious identity. Such clothing shall never be degrading or humiliating.



## Principle XVII

### Measures against overcrowding

The competent authority shall determine the maximum capacity of each place of deprivation of liberty according to international standards related to living conditions. Such information, as well as the actual ratio of occupation of each institution or center shall be public, accessible and regularly updated. The law shall establish the procedures through which persons deprived of liberty, their legal representatives or non-governmental organizations can individually or collectively dispute the data regarding the maximum capacity or the occupation ratio. In these procedures, the participation of independent experts shall be permitted.

The occupation of an institution over its maximum capacity shall be prohibited by law. In cases where such overcrowding results in human rights violations, it shall be considered cruel, inhuman or degrading treatment or punishment. The law shall establish remedies intended to immediately address any situation of overcrowding. The competent judicial authorities shall adopt adequate measures in the absence of an effective legal regulation.

Once overcrowding is observed, States shall investigate the reasons for such situation and determine the corresponding individual responsibilities of the authorities who authorized that situation. Moreover, States shall adopt measures to prevent the repetition of such situations. In both cases, the law shall establish the procedures through which persons deprived of liberty, their legal representatives or non-governmental organizations can participate in those procedures.”

## EPR, paras. 18-21

### “Allocation and accommodation

[...] 18.1 The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.

18.2 In all buildings where prisoners are required to live, work or congregate: a. the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system; b. artificial light shall satisfy recognised technical standards; and c. there shall be an alarm system that enables prisoners to contact the staff without delay.

18.3 Specific minimum requirements in respect of the matters referred to in paragraphs 1 and 2 shall be set in national law.

18.4 National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons.

18.5 Prisoners shall normally be accommodated during the night in individual cells except where it is preferable for them to share sleeping accommodation.

18.6 Accommodation shall only be shared if it is suitable for this purpose and shall be occupied by prisoners suitable to associate with each other.

18.7 As far as possible, prisoners shall be given a choice before being required to share sleeping accommodation.



18.8 In deciding to accommodate prisoners in particular prisons or in particular sections of a prison due account shall be taken of the need to detain: a. untried prisoners separately from sentenced prisoners; b. male prisoners separately from females; and c. young adult prisoners separately from older prisoners.

18.9 Exceptions can be made to the requirements for separate detention in terms of paragraph 8 in order to allow prisoners to participate jointly in organised activities, but these groups shall always be separated at night unless they consent to be detained together and the prison authorities judge that it would be in the best interest of all the prisoners concerned.

18.10 Accommodation of all prisoners shall be in conditions with the least restrictive security arrangements compatible with the risk of their escaping or harming themselves or others.

#### Hygiene

19.1 All parts of every prison shall be properly maintained and kept clean at all times. 19.2 When prisoners are admitted to prison the cells or other accommodation to which they are allocated shall be clean.

19.3 Prisoners shall have ready access to sanitary facilities that are hygienic and respect privacy.

19.4 Adequate facilities shall be provided so that every prisoner may have a bath or shower, at a temperature suitable to the climate, if possible daily but at least twice a week (or more frequently if necessary) in the interest of general hygiene.

19.5 Prisoners shall keep their persons, clothing and sleeping accommodation clean and tidy.

19.6 The prison authorities shall provide them with the means for doing so including toiletries and general cleaning implements and materials.

19.7 Special provision shall be made for the sanitary needs of women.

#### Clothing and bedding

20.1 Prisoners who do not have adequate clothing of their own shall be provided with clothing suitable for the climate.

20.2 Such clothing shall not be degrading or humiliating.

20.3 All clothing shall be maintained in good condition and replaced when necessary.

20.4 Prisoners who obtain permission to go outside prison shall not be required to wear clothing that identifies them as prisoners.

21. Every prisoner shall be provided with a separate bed and separate and appropriate bedding, which shall be kept in good order and changed often enough to ensure its cleanliness.”

#### **CPT IDF, pages 4-5**

“4. Adequate material conditions for longer stays (over 24 hours)24

- Immigration detention centres should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved.
- These centres should have adequate lighting (including daylight), ventilation and heating.
- Call bells should be installed in all detention areas where staff are not continuously present.
- All detained persons should:
  - be provided with a bed or plinth, and a clean mattress and clean blankets;
  - have ready access to toilet facilities, including at night;





- be provided, on a regular basis, with a basic sanitary kit (including adequate rations of soap, washing powder, toilet paper, shampoo, shaving utensils and toothpaste, and a toothbrush) free of charge;
- have access to a shower and to hot water;
- be offered the possibility to wear their own clothes during their stay if those are suitable and, if necessary, to have them washed and repaired;
- be provided with the necessary products and equipment to keep their accommodation clean;
- be provided with lockable space in which to keep personal belongings;
- have access to food and drinking water. Meals should take into account the religious requirements and dietary habits of foreign nationals.

#### 5. Open regime

- Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. Within the detention facility, detained persons should be restricted in their freedom of movement as little as possible.
- Detained irregular migrants should in principle have free access to outdoor exercise throughout the day (i.e. considerably more than one hour per day) and outdoor exercise areas should be appropriately equipped (benches, shelters, etc.).
- The longer the period for which persons are held, the more developed should be the activities which are offered to them. Purposeful activities, in an immigration detention context, can include, *inter alia*, language classes, IT/computer classes, gardening, arts and crafts, cookery skills and so-called “cultural kitchens”.
- Immigration detention centres should include access to a day room and to radio/television and newspapers/magazines, as well as other

appropriate means of recreation (e.g. board games, table tennis, sports), a library and a prayer room. All multiple occupancy rooms should be equipped with tables and chairs commensurate with the number of persons detained.”

## Food and drinking water

### SMR, Rule 22

“1. Every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

2. Drinking water shall be available to every prisoner whenever he or she needs it.”

### PBPPDLA, Principle XI

“Principle XI. Food and drinking water

#### 1. Food

Persons deprived of liberty shall have the right to food in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition, with due consideration to their cultural and religious concerns, as well as to any special needs or diet determined by medical criteria. Such food shall be provided at regular intervals, and its suspension or restriction as a disciplinary measure shall be prohibited by law.

#### 2. Drinking water

Every person deprived of liberty shall have access at all times to sufficient drinking water suitable for consumption. Its suspension or restriction as a disciplinary measure shall be prohibited by law.”



## **EPR, para. 22**

### “Nutrition

22.1 Prisoners shall be provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work.

22.2 The requirements of a nutritious diet, including its minimum energy and protein content, shall be prescribed in national law.

22.3 Food shall be prepared and served hygienically.

22.4 There shall be three meals a day with reasonable intervals between them.

22.5 Clean drinking water shall be available to prisoners at all times.

22.6 The medical practitioner or a qualified nurse shall order a change in diet for a particular prisoner when it is needed on medical grounds.”

## **BR, Rule 48**

“1. Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers. 2. Women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so. 3. The medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, shall be included in treatment programmes.”

## Complaints

### **UNCAT, Articles 2(1), 13, 16 and 22**

#### “Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

#### Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

#### Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

#### Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to



receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. [...]"

### **BPP, Principle 33**

"1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint."

### **RPJDL, paras. 75-78**

"75. Every juvenile should have the opportunity of making requests or complaints to the director of the detention facility and to his or her authorized representative.

76. Every juvenile should have the right to make a request or complaint, without censorship as to substance, to the central administration, the judicial authority or other proper authorities through approved channels, and to be informed of the response without delay.

77. Efforts should be made to establish an independent office (ombudsman) to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of equitable settlements.

78. Every juvenile should have the right to request assistance from family members, legal counsellors, humanitarian groups or others where possible, in order to make a complaint. Illiterate juveniles should be provided with assistance should they need to use the services of public or private agencies and organizations which provide legal counsel or which are competent to receive complaints."

### **EPR, paras. 70.1, 70.3, 70.4**

"70.1 Prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the director of the prison or to any other competent authority.

[...] 70.3 If a request is denied or a complaint is rejected, reasons shall be provided to the prisoner and the prisoner shall have the right to appeal to an independent authority.

70.4 Prisoners shall not be punished because of having made a request or lodged a complaint."



## **PBPPDLA, Principle VII**

“Principle VII. Petition and response

Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. This right may be exercised by third parties or organizations, in accordance with the law.

This right comprises, amongst others, the right to lodge petitions, claims, or complaints before the competent authorities, and to receive a prompt response within a reasonable time. It also comprises the right to opportunistly request and receive information concerning their procedural status and the remaining time of deprivation of liberty, if applicable.

Persons deprived of liberty shall also have the right to lodge communications, petitions or complaints with the national human rights institutions; with the Inter-American Commission on Human Rights; and with the other competent international bodies, in conformity with the requirements established by domestic law and international law.”

## **GUIDELINE 9**

# **THE SPECIAL CIRCUMSTANCES AND NEEDS OF PARTICULAR ASYLUM-SEEKERS MUST BE TAKEN INTO ACCOUNT**

Detention of persons in situation of vulnerability is exceptional

### **IACHR-Res03/08, page 2**

“States are required to provide special protections or guarantees to migrants in especially vulnerable conditions. For example, in decisions concerning children and adolescents, primary regard must be given to their best interest. Further, international standards may also require that special measures be taken in the case of persons who have been trafficked or other vulnerable groups.”

## **GUIDELINE 9.1**

# **VICTIMS OF TRAUMA OR TORTURE**

### **SR-Migrants 2012, paras. 44 and 72 (j)**

“44. Victims of torture are already psychologically vulnerable due to the trauma they have experienced and detention of victims of torture may in itself amount to inhuman and degrading treatment.



72. The Special Rapporteur calls on States to consider progressively abolishing the administrative detention of migrants. In the meantime, Governments should take measures to ensure respect for the human rights of migrants in the context of detention, including by: [...]

(j) Taking into due consideration the particular vulnerabilities of specific groups of migrants including victims of torture [...]. Detention of migrants belonging to vulnerable categories and in need of special assistance should be only allowed as a measure of last resort, and they should be provided with adequate medical and psychological assistance; [...].”

## GUIDELINE 9.2

### CHILDREN

#### Best interest of the child

##### **CRC, Article 3**

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

##### **CMW-CRC JGC 3/22, paras. 29-32**

“29. States parties shall ensure that the best interests of the child are taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases, including in granting or refusing applications on entry to or residence in a country, decisions regarding migration enforcement and restrictions on access to social rights by children and/or their parents or legal guardians, and decisions

regarding family unity and child custody, where the best interests of the child shall be a primary consideration and thus have high priority.

30. In particular, the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, placement or care of a child, or the detention or expulsion of a parent associated with his or her own migration status.

31. In order to implement the best interests principle in migration-related procedures or decisions that could affect children, the Committees stress the need to conduct systematically best-interests assessments and determination procedures as part of, or to inform, migration-related and other decisions that affect migrant children. As the Committee on the Rights of the Child explains in its general comment No. 14, the child’s best interests should be assessed and determined when a decision is to be made. A “best-interests assessment” involves evaluating and balancing all the elements necessary to make a decision in the specific situation for a specific individual child or group of children. A “best-interests determination” is a formal process with strict procedural safeguards designed to determine the child’s best interests on the basis of the best-interests assessment. In addition, assessing the child’s best interests is a unique activity that should be undertaken in each individual case and in the light of the specific circumstances of each child or group of children, including age, sex, level of maturity, whether the child or children belong to a minority group and the social and cultural context in which the child or children find themselves.

32. The Committees stress that States parties should:

- (a) Give high priority to the child’s best interests in their legislation, policy and practice;
- (b) Ensure that the principle of the best interests of the child is appropriately integrated, consistently interpreted and applied



through robust, individualized procedures in all legislative, administrative and judicial proceedings and decisions, and in all migration policies and programmes that are relevant to and have an impact on children, including consular protection policies and services. Adequate resources should be put in place in order to ensure this principle is applied in practice;

(c) Ensure that all best-interests assessments and determinations developed and conducted give appropriate weight to fulfilling the rights of the child – in the short and long terms – in the decision-making processes affecting children; and ensure due process safeguards are established, including the right to free, qualified and independent legal representation. The best-interests assessment should be carried out by actors independent of the migration authorities in a multidisciplinary way, including a meaningful participation of authorities responsible for child protection and welfare and other relevant actors, such as parents, guardians and legal representatives, as well as the child;

(d) Develop procedures and define criteria to provide guidance to all relevant persons involved with migration procedures on determining the best interests of the child and on giving them due weight as a primary consideration, including in entry, residence, resettlement and return procedures, and develop mechanisms aimed at monitoring its proper implementation in practice;

(e) Assess and determine the best interests of the child at the different stages of migration and asylum procedures that could result in the detention or deportation of the parents due to their migration status.<sup>7</sup> Best-interests determination procedures should be put in place in any decision that would separate children from their family, and the same standards applied in child custody, when the best interests of the child should be a primary consideration. In adoption cases, the best interests of the child shall be the paramount consideration;

(f) Conduct a best-interests assessment on a case-by-case basis in order to decide, if needed, and in accordance with the Guidelines for the Alternative Care of Children, the type of accommodation that would be most appropriate for an unaccompanied or separated child, or children with parents. In that process, community-based care solutions should be prioritized. Any measure that constrains children's liberty in order to protect them, e.g. placement in secure accommodation, should be implemented within the child protection system with the same standards and safeguards; be strictly necessary, legitimate and proportionate to the aim of protecting the individual child from harming him or herself or others; be part of a holistic care plan; and be disconnected from migration-enforcement policies, practices and authorities;

(g) Conduct a best-interests determination in cases that could lead to the expulsion of migrant families due to their migration status, in order to evaluate the impact of deportation on children's rights and development, including their mental health;

(h) Ensure that children are identified promptly in border controls and other migration-control procedures within the State's jurisdiction, and that anyone claiming to be a child is treated as such, promptly referred to child protection authorities and other relevant services, and appointed a guardian, if unaccompanied or separated;

(i) Provide guidance to all relevant authorities on the operationalization of the principle of the best interests of the child for migrant children, including children in transit, and develop mechanisms aimed at monitoring its proper implementation in practice;

(j) Develop and put into practice, with regard to unaccompanied children and children with families, a best-interests determination procedure aimed at identifying and applying comprehensive, secure and sustainable solutions, including further integration and settlement in the country of current residence, repatriation



to the country of origin or resettlement in a third country. Such solutions may include medium-term options and ensuring that there are possibilities for children and families to gain access to secure residence status in the best interests of the child. Best-interest determination procedures should be guided by child protection authorities within child protection systems. Possible solutions and plans should be discussed and developed together with the child, in a child-friendly and sensitive manner, in accordance with Committee on the Rights of the Child general comment No. 12 (2009) on the right of the child to be heard;

(k) If determined that it is in the best interests of the child to be returned, an individual plan should be prepared, together with the child where possible, for his or her sustainable reintegration. The Committees stress that countries of origin, transit, destination and return should develop comprehensive frameworks with dedicated resources for the implementation of policies and comprehensive inter-institutional coordination mechanisms. Such frameworks should ensure, in cases of children returning to their countries of origin or third countries, their effective reintegration through a rights-based approach, including immediate protection measures and long-term solutions, in particular effective access to education, health, psychosocial support, family life, social inclusion, access to justice and protection from all forms of violence. In all such situations, a quality rights-based follow-up by all involved authorities, including independent monitoring and evaluation, should be ensured. The Committees highlight that return and reintegration measures should be sustainable from the perspective of the child's right to life, survival and development."

#### **BR, Rules 49 and 52**

##### **“Rule 49**

Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.

##### **Rule 52**

1. Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national laws.
2. The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials.
3. After children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised."

#### **SR-Migrants 2012, para. 40**

"72. The Special Rapporteur calls on States to consider progressively abolishing the administrative detention of migrants. In the meantime, Governments should take measures to ensure respect for the human rights of migrants in the context of detention, including by: [...]

(h) Ensuring that legislation does not allow for the detention of unaccompanied children and that detention of children is permitted only as a measure of last resort and only when it has been determined to be in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of



the rights enshrined in the Convention on the Rights of the Child. Children under administrative detention should be separated from adults, unless they can be housed with relatives in separate settings. Children should be provided with adequate food, bedding and medical assistance and granted access to education and to open air recreational activities. When migrant children are detained, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice should be strictly adhered to. The detention of children whose parents are detained should not be justified on the basis of maintaining the family unit: instead, alternatives to detention should be applied to the entire family; [...]"

#### **EU-RD, Article 23**

"Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors. Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.

2. In assessing the best interests of the child, Member States shall in particular take due account of the following factors:

- (a) family reunification possibilities;
- (b) the minor's well-being and social development, taking into particular consideration the minor's background;
- (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- (d) the views of the minor in accordance with his or her age and maturity."

#### **EPR, paras. 35-36**

"Detained children

35.1 Where exceptionally children under the age of 18 years are detained in a prison for adults the authorities shall ensure that, in addition to the services available to all prisoners, prisoners who are children have access to the social, psychological and educational services, religious care and recreational programmes or equivalents to them that are available to children in the community.

35.2 Every prisoner who is a child and is subject to compulsory education shall have access to such education.

35.3 Additional assistance shall be provided to children who are released from prison.

35.4 Where children are detained in a prison they shall be kept in a part of the prison that is separate from that used by adults unless it is considered that this is against the best interests of the child.

Infants

36.1 Infants may stay in prison with a parent only when it is in the best interest of the infants concerned. They shall not be treated as prisoners. 36.2 Where such infants are allowed to stay in prison with a parent special provision shall be made for a nursery, staffed by qualified persons, where the infants shall be placed when the parent is involved in activities where the infant cannot be present. 36.3 Special accommodation shall be set aside to protect the welfare of such infants."





## Right to life/survival and development

### **CMW-CRC JGC 3/22, para. 42, in relation to CRC, Article 6 and CMW, Article 9**

“42. In the view of the Committees, the obligation of States parties under article 6 of the Convention on the Rights of the Child and article 9 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families include the protection and reduction – to the maximum extent possible – of migration-related risks faced by children, which may jeopardize a child’s right to life, survival and development. States, especially those of transit and destination, should devote special attention to the protection of undocumented children, whether unaccompanied and separated or with families, and to the protection of asylum-seeking children, stateless children and child victims of transnational organized crime, including trafficking, sale of children, commercial sexual exploitation of children and child marriage. States should also consider the specific vulnerable circumstances that could face migrant children on the basis of their gender and other factors, such as poverty, ethnicity, disability, religion, sexual orientation, gender identity or others, that may aggravate the child’s vulnerability to sexual abuse, exploitation, violence, among other human rights abuses, throughout the entire migratory process. Specific policies and measures, including access to child-friendly, gender-sensitive and safe judicial and non-judicial remedies, should be put in place in order to fully protect and assist such children, aiming to facilitate their ability to resume their lives with their rights as children fully respected, protected and fulfilled.”

## Right to liberty and ATDs

### **CRC, Article 37(b)**

“States Parties shall ensure that: [...]

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

### **CMW-CRC JGC 4/23, para. 10**

“10. Article 37 (b) of the Convention of the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.”

### **CRC-GC 6, paras. 61 and 63**

“61. 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. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with



article 37(b) of the Convention [...]. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.

In the exceptional case of detention, [...] special arrangements must be made for living quarters that are suitable for children and that separate them from adults [...]. Indeed, the underlying approach to such a program should be 'care' and not 'detention'. Facilities should not be located in isolated areas where culturally-appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian, [...] to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. [...] children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release, [...] the right to recreation and play as provided for in article 31 of the Convention, [and] shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative."

#### **CMW-CRC JGC 4/23, paras. 5 and 11**

"5. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children.

Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice. [...]

"11. [...] 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. When children are unaccompanied, they are entitled to special protection and assistance by the State in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children<sup>13</sup> When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family."

#### **RPJDL, para. 1**

"1. The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort."

#### **WGAD-2010, para. 60**

"60. [...] Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of unaccompanied minors would comply with the requirements of article 37(b), clause 2, of the [CRC], according to which detention can only be used as a last resort."



### **SR-Migrants-2009, paras. 105-108 and 110**

“105. The Special Rapporteur recalls that, as provided in article 37 of the Convention on the Rights of the Child, detention of children should be a measure of last resort and should only be taken for the shortest period of time possible. He also recalls that deprivation of liberty of children in the context of migration should never have a punitive nature.

106. The Special Rapporteur furthermore recalls that migrants should not be deprived of liberty as a sole consequence of their migratory status and that, according to general comment No. 6 of the Committee on the Rights of the Child, as a general rule, unaccompanied migrant children should not be detained.

107. The Special Rapporteur encourages States to provide alternatives to detention for the family group when parents are detained on the sole basis of migratory status, keeping in mind the necessary balance between the need to protect family unity and the best interest of the child. Exceptional migration-related detention of children should be done in places ensuring the integral protection and well-being of the child, taking due consideration for the fulfilment of the child’s rights to education, health care, recreation, consular assistance and legal representation, among others.

108. States should bear in mind that children should be kept separate from adults, or when housed with families, they should have accommodation distinct from other adults. [...]

110. The Special Rapporteur recommends the development of alternatives to deprivation of liberty, such as sheltered housing and alternative care with national child protection services.”

### **SMRAJJ, Rules 17.1(b) and (c)**

“17.1 The disposition of the competent authority shall be guided by the following principles: [...]

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.”

### **EUAPUM, page 9**

“Wherever unaccompanied minors are detected, they should be separated from adults, to protect them and sever relations with traffickers or smugglers and prevent (re)victimisation. From the first encounter, attention to protection is paramount, as is early profiling of the type of minor, as it can help to identify the most vulnerable unaccompanied minors. Applying the different measures provided for by the legislation and building the trust are indispensable to gain useful information for identification and family tracing, ensuring that unaccompanied minors do not disappear from care, identifying and prosecuting traffickers or smugglers.

Unaccompanied minors should always be placed in appropriate accommodation and treated in a manner that is fully compatible with their best interests. Where detention is exceptionally justified, it is to be used only as a measure of last resort, for the shortest appropriate period of time and taking into account the best interests of the child as a primary consideration.”



## Right to bring proceedings before a court/Right to legal assistance/Due process

### **CRC, Article 37(d)**

“Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

### **CRC-GC 10, para. 83**

“83. Every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours. The Committee also recommends that the States parties ensure by strict legal provisions that the legality of a pre-trial detention is reviewed regularly, preferably every two week. [...]”

### **CMW-CRC JGC 4/23, paras. 15-16**

“15. The Committees are of the view that States should ensure that their legislation, policies, measures and practices guarantee child-sensitive due process in all migration and asylum administrative and judicial proceedings affecting the rights of children and/or those of their parents. All children, including children accompanied by parents or other legal guardians, should be treated as individual rights holders, their child-specific needs considered equally and individually and their views appropriately heard and given due weight. They should have access to administrative and judicial remedies against decisions affecting their own situation or that of their parents, to guarantee that all decisions are taken in their best interests. Measures should be taken to avoid undue delays in migration/asylum procedures that could negatively affect children’s rights, including

family reunification procedures. Unless it is contrary to the child’s best interests, speedy proceedings should be encouraged, provided that this does not restrict any due process guarantees.

16. Children should be able to bring complaints before courts, administrative tribunals or other bodies at lower levels that are easily accessible to them, e.g., in child protection and youth institutions, schools and national human rights institutions, and should be able to receive advice and representation in a child-friendly manner by professionals with specialized knowledge of children and migration issues when their rights have been violated. States should ensure standardized policies to guide authorities in offering free, quality legal advice and representation for migrant, asylum-seeking and refugee children, including equal access for unaccompanied and separated children in local authority care and undocumented children.<sup>18</sup>

17. More specifically, and in particular in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to:

- (a) Access to the territory, regardless of the documentation they have or lack, and to be referred to authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards;
- (b) Be notified of the existence of a proceeding and of the decision adopted in the context of the immigration and asylum proceedings, its implications and possibilities for appeal;
- (c) Have the immigration proceedings conducted by a specialized official or judge, and any interviews carried out in person by professionals trained in communicating with children;
- (d) Be heard and take part in all stages of the proceedings and be assisted without charge by a translator and/or interpreter;



(e) Have effective access to communication with consular officials and consular assistance, and to receive child-sensitive rights-based consular protection;

(f) Be assisted by an attorney trained and/or experienced in representing children at all stages of the proceedings and communicate freely with the representative, and have access to free legal aid;

(g) Have the application and procedures involving children be treated as a priority, while ensuring ample time to prepare for proceedings and that all due process guarantees are preserved;

(h) Appeal the decision to a higher court or independent authority, with suspensive effect;

(i) For unaccompanied and separated children, have appointed a competent guardian, as expeditiously as possible, who serves as a key procedural safeguard to ensure respect for their best interests;

(j) Be fully informed throughout the entire procedure, together with their guardian and legal adviser, including information on their rights and all relevant information that could affect them.”

### **RPJDL, para. 2**

“2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.”

### **WGAD/CRP.1/2015, Principles 17 and 18**

“Principle 17. Specific obligations to guarantee access to the right to bring proceedings before a court

51. The adoption of specific measures are required under international law to ensure meaningful access to the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and receive without delay appropriate remedies by certain groups of detainees. This includes, but is not limited to children [...].

Principle 18. Specific measures for children

[...] 53. The exercise of the right to challenge the arbitrariness and lawfulness of the detention of children shall be prioritized<sup>86</sup> and accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.

54. The authorities overseeing the detention of children shall ex officio request courts to review the arbitrariness and lawfulness of their detention. This does not exclude the right of any child deprived of his or her liberty to bring such proceedings before a court in his or her own name or, if it is in his or her best interests, through a representative or an appropriate body.”

## Non-penalization

### **SR-Migrants-2009, para. 111**

“111. The Special Rapporteur recalls that irregular migration should not be criminalized and migrants, especially children, should not be detained in penitentiaries or facilities for criminal detention, and they should have, *inter alia*, the right to legal advice, an interpreter, legal review, to have contact with the external world as well as access to education and health services.”



### **CMW-CRC JGC 4/23, paras. 7 and 10**

“7. In addition, both the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have emphasized that children should not be criminalized or subject to punitive measures, such as detention, because of their or their parents’ migration status.<sup>7</sup> Irregular entry and stay do not constitute crimes per se against persons, property or national security.<sup>8</sup> Criminalizing irregular entry and stay exceeds the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention.

10. [...] [O]ffences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.”

## Stateless children

### **EUCN, Article 6(2)**

“Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality. Such nationality shall be granted:

- a) at birth *ex lege*; or
- b) subsequently, to children who remained stateless, upon an application being lodged with the appropriate authority, by or on behalf of the child concerned, in the manner prescribed by the internal law of the State Party. Such an application may be made subject to the lawful and habitual residence on its territory for a

period not exceeding five years immediately preceding the lodging of the application.”

See also [1961 Convention on the Reduction of Statelessness](#), Article 1

### **SR-Migrants-2009, para. 120**

“120. The Special Rapporteur encourages States to take effective measures to guarantee the birth registration of children born outside their parents’ country of origin and to uphold the principle of avoiding statelessness, and highlights the importance of harmonizing migration policies with public policies concerning childhood, adolescence and the family.”

## Right to private and family life/Family unity

### **CRC, Article 9(1)**

“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”

### **ICCPR, Article 17**

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”





### **ICESCR, Article 10(1)**

“The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. [...]”

### **ECHR, Article 8**

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### **CFREU, Article 7**

“Everyone has the right to respect for his or her private and family life, home and communications.”

### **ACHR, Articles 11 and 17(1)**

“Article 11

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.”

“Article 17

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”

### **ACHPR, Article 18(1), (2) and (3)**

“Article 18

The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.”

### **SR-Migrants-2009, para. 87**

“87. Migration policies, programmes and bilateral agreements should preserve family unity, including by facilitating family reunification and interaction among family members.”

## Conditions of detention

### **CRC, Articles 22, 37(a) and (c)**

#### “Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. [...]”

#### “Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. [...]

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”

## Consular officers and training of officials

### **SR-Migrants-2009, para. 115**

“114. States should recognize the important role played by consular offices in the protection of migrant children, and those offices should share good practices and strengthen cooperation.

115. States should pay special attention to the training of officials working with separated and unaccompanied children and dealing with their cases. States should ensure that all immigration officials in contact with children are aware of the principles and provisions of the Convention on the Rights of the Child.”

## Use of force

### **CCLEO, Article 3 and its Commentary (c)**

#### “Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Commentary:

[...]

(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children.”





## Protection and support of children victims of trafficking

### OHCHR-TG, Guideline 8

“Guideline 8: Special measures for the protection and support of child victims of trafficking

The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.

States and, where applicable, intergovernmental and non-governmental organizations, should consider, in addition to the measures outlined under Guideline 6:

1. Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo

Protocol, evidence of deception, force, coercion, etc. should not form part of the definition of trafficking where the person involved is a child.

2. Ensuring that procedures are in place for the rapid identification of child victims of trafficking.

3. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.

4. In cases where children are not accompanied by relatives or guardians, taking steps to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.

5. In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child’s best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child.

6. In both the situations referred to in the two paragraphs above, ensuring that a child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her, in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity.

7. Adopting specialized policies and programmes to protect and support children who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and health-care assistance.

8. Adopting measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation.

9. Protecting, as appropriate, the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to their identification.

10. Taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking.”





## Independent monitoring and inspection

### **SR-Migrants-2009, para. 113**

“113. States should recognize the need to allow independent scrutiny and control mechanisms of the conditions of detention of children (judicial authorities, international and local non-governmental organizations, international human rights mechanisms, consular services), and recognize the role played by civil society and local communities in addressing this and other issues concerning the protection of migrant children.”

### **GUIDELINE 9.3**

## **WOMEN**

### Non-discrimination

#### **CEDAW, Article 2**

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.”

### Health screening and gender-specific health care and assistance

#### **BR, Rules 6, 10 and 12**

“Rule 6

The health screening of women prisoners shall include comprehensive screening to determine primary health-care needs, and also shall determine:

(a) The presence of sexually transmitted diseases or blood-borne diseases; and, depending on risk factors, women prisoners may also be offered testing for HIV, with pre- and post-test counselling;

(b) Mental health-care needs, including post-traumatic stress disorder and risk of suicide and self-harm;

(c) The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues;

(d) The existence of drug dependency;

(e) Sexual abuse and other forms of violence that may have been suffered prior to admission.

#### Rule 10

1. Gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners.

2. If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.

#### Rule 12

Individualized, gender-sensitive, trauma-informed and comprehensive mental health care and rehabilitation programmes shall be made available for women prisoners with mental health-care needs in prison or in non-custodial settings.”

## Pregnant women and nursing mothers

### **CEDAW, Article 12(2)**

“[...] States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

### **SMR, Rule 28**

“In women’s prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate.”

### **BR, Rules 5 and 48**

#### “Rule 5

The accommodation of women prisoners shall have facilities and materials required to meet women’s specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.

#### Rule 48

1. Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.



2. Women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.

3. The medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, shall be included in treatment programmes.”

#### **EPR, para. 34**

“Women

34.1 In addition to the specific provisions in these rules dealing with women prisoners, the authorities shall pay particular attention to the requirements of women such as their physical, vocational, social and psychological needs when making decisions that affect any aspect of their detention.

34.2 Particular efforts shall be made to give access to special services for women prisoners who have needs as referred to in Rule 25.4.

34.3 Prisoners shall be allowed to give birth outside prison, but where a child is born in prison the authorities shall provide all necessary support and facilities.”

## Use of female and trained personnel

#### **BR, Rules 19 and 33**

“Rule 19

Effective measures shall be taken to ensure that women prisoners’ dignity and respect are protected during personal searches, which shall only be carried out by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures.

Rule 33

1. All staff assigned to work with women prisoners shall receive training relating to the gender-specific needs and human rights of women prisoners.

2. Basic training shall be provided for prison staff working in women’s prisons on the main issues relating to women’s health, in addition to first aid and basic medicine.

3. Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.”

#### **SR-Migrants 2012, para. 72(g)**

“72. The Special Rapporteur calls on States to consider progressively abolishing the administrative detention of migrants. In the meantime, Governments should take measures to ensure respect for the human rights of migrants in the context of detention, including by: [...]

(g) Giving particular attention to the situation of women in detention, ensuring that they are separated from men, and attended and supervised only by women officers, in order to protect them against sexual violence, and avoid the detention of pregnant women and breastfeeding mothers; [...]



## Right to bring proceedings before a court

### **WGAD/CRP.1/2015, Principles 17 and 19**

“Principle 17. Specific obligations to guarantee access to the right to bring proceedings before a court 51. The adoption of specific measures are required under international law to ensure meaningful access to the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and receive without delay appropriate remedies by certain groups of detainees. This includes, but is not limited to [...] women (in particular pregnant and breastfeeding women) [...]”

Principle 19. Specific measures for women and girls

55. Appropriate and tailored measures shall be taken into account in the provision of accessibility and reasonable accommodation to ensure the ability of women and girls to exercise their right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate remedies. This includes introducing an active policy of incorporating a gender equality perspective into all policies, laws, procedures, programmes and practices relating to the deprivation of liberty to ensure equal and fair access to justice.”

## GUIDELINE 9.4

### **VICTIMS OR POTENTIAL VICTIMS OF TRAFFICKING**

## Right to seek asylum

### **ATP, Article 14(1)**

“1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”

## Information on arrival and assistance

### **ATP, Article 6(2)(a) and (b)**

“2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

- (a) Information on relevant court and administrative proceedings;
- (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.”



## Protection, support and special needs

### **OHCHR-TG, Guideline 6**

“Guideline 6: Protection and support for trafficked persons

The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings.

Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.

2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling.

Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.

3. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality.

Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and

assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.

4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.

5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.

6. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial.

Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard.

7. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).

8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.”



### **WGAD/CRP.1/2015, Principle 17**

“Principle 17. Specific obligations to guarantee access to the right to bring proceedings before a court

51. The adoption of specific measures are required under international law to ensure meaningful access to the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and receive without delay appropriate remedies by certain groups of detainees. This includes, but is not limited to [...] trafficked persons or persons at risk of being trafficked.”

### **SR-Migrants 2012, para. 72 (i)**

“72. The Special Rapporteur calls on States to consider progressively abolishing the administrative detention of migrants. In the meantime, Governments should take measures to ensure respect for the human rights of migrants in the context of detention, including by: [...]

(i) Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for illegal entry or residence in the country or for the activities they are involved in as a consequence of their situation as trafficked persons. In this respect, the Special Rapporteur invites States that have not yet done so to consider ratifying the [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children](#), supplementing the [United Nations Convention against Transnational Organized Crime](#); [...]

## Children

### **SR-Trafficking 2016, para. 66**

“66. States hosting, among persons fleeing conflict, children who may have been or are at risk of being victims of trafficking in persons should: (d) Ban administrative detention of children, in particular but not only for violations of immigration laws and regulations; [...]

## GUIDELINE 9.5

### **ASYLUM-SEEKERS WITH MENTAL HEALTH OR PHYSICAL ILLNESS OR DISABILITIES**

#### Humane conditions of detention and special needs

##### **ACHPR, Article 18(4)**

“The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”

##### **SR-Migrants 2012, para. 72 (j)**

“72. The Special Rapporteur calls on States to consider progressively abolishing the administrative detention of migrants. In the meantime, Governments should take measures to ensure respect for the human rights of migrants in the context of detention, including by: [...]

(j) Taking into due consideration the particular vulnerabilities of specific groups of migrants including [...] migrants with a mental or physical disability and migrants living with HIV/AIDS. Detention of migrants belonging to vulnerable categories and in need of special assistance should be only allowed as a measure of last resort, and they should be provided with adequate medical and psychological assistance; [...].”



## Liberty and security

### **CRPD, Article 14**

“1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

- (a) Enjoy the right to liberty and security of person;
- (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.”

## Freedom of movement

### **CRPD, Article 18(1)(b)**

“1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities: [...]

- (b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement.”

## Living independently and be included in the community

### **CRPD, Article 19(b)**

“States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that: [...]

- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community; [...]

## Right to health

### **CRPD, Article 25**

“States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population based public health programmes;





(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

(c) Provide these health services as close as possible to people's own communities, including in rural areas;

(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

(f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.”

## Right to bring proceedings before a court

### **WGAD/CRP.1/2015, Principles 17 and 20**

“Principle 17. Specific obligations to guarantee access to the right to bring proceedings before a court 51. The adoption of specific measures are required under international law to ensure meaningful access to the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and receive without delay appropriate remedies by certain groups of detainees. This includes, but is not limited to [...] persons with disabilities, including psychosocial and intellectual disabilities, persons living with HIV/

AIDS and other serious communicable or contagious diseases, persons with dementia, drug users [...].

### Principle 20. Specific measures for persons with disabilities

56. Courts, while reviewing the arbitrariness and lawfulness of the deprivation of liberty of persons with disabilities, shall comply with the State's obligation to prohibit involuntary committal or internment on the ground of the existence of an impairment or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, as well as with their obligation to design and implement de-institutionalization strategies based on the human rights model of disability. The review must include the possibility of appeal.

57. The deprivation of liberty of a person with a disability, including physical, mental, intellectual or sensory impairments, is required to be in conformity with the law, including international law, offering the same substantive and procedural guarantees available to others and consistent with the right to humane treatment and the inherent dignity of the person.

58. Persons with disabilities are entitled to be treated on an equal basis with others, and not to be discriminated against on the basis of disability. Protection from violence, abuse and ill-treatment of any kind must be ensured.

59. Persons with disabilities are entitled to request individualized and appropriate accommodations and support, if needed, to exercise the right to challenge the arbitrariness and lawfulness of their detention in accessible ways.”



## GUIDELINE 9.6

### OLDER ASYLUM-SEEKERS

#### Allocation and accommodation

##### **EPR, paras. 18.8 and XVIII**

“18.8 In deciding to accommodate prisoners in particular prisons or in particular sections of a prison due account shall be taken of the need to detain:

[...]

c young adult prisoners separately from older prisoners.

XVIII

[...] In some prison systems, units have been provided for older prisoners, with ramps, lifts, handrails and wheelchairs. All the indications are that the need for such facilities is likely to continue and to expand. Unless there is provision in legislation for the release of elderly prisoners, especially those who become incapacitated, prisons may well have to build what in effect will be geriatric units to care for these prisoners in a humane manner.”

#### Health care and special needs

##### **EPR, Rule 46**

“[...] In planning for specialist care particular attention should be given to the needs of vulnerable groups, especially women and older prisoners.”

##### **SR-Migrants 2012, para. 72 (j)**

“72. The Special Rapporteur calls on States to consider progressively abolishing the administrative detention of migrants. In the meantime, Governments should take measures to ensure respect for the human rights of migrants in the context of detention, including by: [...]

(j) Taking into due consideration the particular vulnerabilities of specific groups of migrants including [...] unaccompanied older migrants [...]. Detention of migrants belonging to vulnerable categories and in need of special assistance should be only allowed as a measure of last resort, and they should be provided with adequate medical and psychological assistance; [...].”

#### Right to bring proceedings before court

##### **WGAD/CRP.1/2015, Principle 17**

“Principle 17. Specific obligations to guarantee access to the right to bring proceedings before a court

51. The adoption of specific measures are required under international law to ensure meaningful access to the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and receive without delay appropriate remedies by certain groups of detainees. This includes, but is not limited to [...] older persons [...].”



## GUIDELINE 9.7

### LESBIAN, GAY, BISEXUAL, TRANSGENDER OR INTERSEX ASYLUM-SEEKERS

#### Non-discrimination

##### YP, Principle 9(a)

“States shall: [...]”

a) Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse.”

#### Access to appropriate medical care and counselling tailored to their specific needs

##### YP, Principle 9(b)

“States shall: [...]”

b) Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired.”

Protective measures are in place to prevent violence or abuse

##### ICCPR, Article 7

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

##### YP, Principle 9(d)

“States shall: [...]”

Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population.”

#### Independent monitoring

##### YP, Principle 9(f)

“States shall: [...]”

f) 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.”



## Adequate training of detention personnel and other officials

### YP, Principle 9(g)

“States shall: [...]”

Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.”

## Right to bring proceedings before court

### WGAD/CRP.1/2015, Principle 17

“Principle 17. Specific obligations to guarantee access to the right to bring proceedings before a court

51. The adoption of specific measures are required under international law to ensure meaningful access to the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and receive without delay appropriate remedies by certain groups of detainees. This includes, but is not limited to [...] lesbian, gay, bisexual, transgender and intersex persons [...]”

## GUIDELINE 10

# DETENTION SHOULD BE SUBJECT TO INDEPENDENT MONITORING AND INSPECTION

## Independent monitoring/national inspection mechanisms

### OPCAT, Articles 1, 3, 4(1), 12 and 19

“Article 1

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 3

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence



(hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

#### Article 12

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

- (a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;
- (b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
- (c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;
- (d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

#### Article 19

The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation.”

#### Article 19

The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) To submit proposals and observations concerning existing or draft legislation.”

#### **OPIC CPR, Article 1**

“A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.”





### **BPP, Principle 29(1)**

“1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.”

### **RPJDL, paras. 72-74**

“72. Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities.

73. Qualified medical officers attached to the inspecting authority or the public health service should participate in the inspections, evaluating compliance with the rules concerning the physical environment, hygiene, accommodation, food, exercise and medical services, as well as any other aspect or conditions of institutional life that affect the physical and mental health of juveniles. Every juvenile should have the right to talk in confidence to any inspecting officer.

74. After completing the inspection, the inspector should be required to submit a report on the findings. The report should include an evaluation of the compliance of the detention facilities with the present rules and relevant provisions of national law, and recommendations regarding any steps considered necessary to ensure compliance with them. Any facts discovered by an inspector that appear to indicate that a violation of legal provisions concerning the rights of juveniles or the operation of a juvenile detention facility has occurred should be communicated to the competent authorities for investigation and prosecution.”

### **SMR, Rule 83**

“1. There shall be a twofold system for regular inspections of prisons and penal services:

(a) Internal or administrative inspections conducted by the central prison administration;

(b) External inspections conducted by a body independent of the prison administration, which may include competent international or regional bodies.

2. In both cases, the objective of the inspections shall be to ensure that prisons are managed in accordance with existing laws, regulations, policies and procedures, with a view to bringing about the objectives of penal and corrections services, and that the rights of prisoners are protected.”

### **PBPPDLA, Principle XXIV**

“Institutional Inspections

In accordance with national legislation and international law, regular visits and inspections of places of deprivation of liberty shall be conducted by national and international institutions and

organizations, in order to ascertain, at any time and under any circumstance, the conditions of deprivation of liberty and the respect for human rights.

As a minimum, such inspections shall be carried out with full access to places of deprivation of liberty and their installations, access to the information and documentation relating to the institution and the persons deprived of liberty therein; and the possibility of conducting private and confidential interviews with persons deprived of liberty and personnel.

The mandate of the Inter-American Commission on Human Rights and its Rapporteurships, in particular the Rapporteurship on the Rights of Persons Deprived of Liberty, shall be respected in all circumstances, so that they may verify the respect for the dignity and the fundamental rights and guarantees of persons deprived of liberty in Member States of the Organization of American States.

These provisions shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1997, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.”

#### **EPR, paras. 92-93**

“Governmental inspection

92. Prisons shall be inspected regularly by a governmental agency in order to assess whether they are administered in accordance with the requirements of national and international law, and the provisions of these rules.

Independent monitoring

93.1 The conditions of detention and the treatment of prisoners shall be monitored by an independent body or bodies whose findings shall be made public.

93.2 Such independent monitoring body or bodies shall be encouraged to co-operate with those international agencies that are legally entitled to visit prisons.”

#### **WGAD-D5, Principle 10**

“Principle 10: The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody.”





This Learning Programme was developed within the project 'Global Technical Assistance and Capacity Building Programme to Prevent Detention of Children and to Protect Children and Other Asylum-Seekers in Detention' funded by the European Union.

The views expressed herein can in no way be taken to reflect the official opinion of the European Union.