



## MODULE 2 THE IMMIGRATION DETENTION CONTEXT



## LEGEND

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 **LEARNING OBJECTIVES**

 **REFLECTION ACTIVITY**

 **SUPPLEMENTARY READING**

 **SELF-ASSESSMENT**

## TABLE OF CONTENTS

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

<b>CHAPTER 1: LEARNING OBJECTIVES AND MODULE STRUCTURE</b>	<b>3</b>
<b>CHAPTER 2: WHY WE NEED TO UNDERSTAND THE IMMIGRATION DETENTION CONTEXT</b>	<b>4</b>
<b>CHAPTER 3: WHY IMMIGRATION DETENTION TAKES PLACE</b>	<b>5</b>
<b>CHAPTER 4: WHO CAN BE DETAINED?</b>	<b>6</b>
<b>CHAPTER 5: THE IMMIGRATION DETENTION CONTEXT: UNDERSTANDING THE NATIONAL LEGAL FRAMEWORK IN RELATION TO IMMIGRATION DETENTION</b>	<b>7</b>
5.1 Understanding the national legal framework in relation to immigration detention: Using checklists .....	8
<b>CHAPTER 6: INTERIM ASSIGNMENT</b>	<b>9</b>
<b>CHAPTER 7: AUTHORITIES INVOLVED WITH IMMIGRATION DETENTION PROCEDURES</b>	<b>11</b>
<b>CHAPTER 8: IMMIGRATION DETENTION FACILITIES</b>	<b>12</b>
<b>CHAPTER 9: IMMIGRATION DETENTION FACILITIES IN PRACTICE</b>	<b>13</b>
<b>CHAPTER 10: REFERRALS</b>	<b>14</b>
<b>CHAPTER 11: INTERIM ASSIGNMENT</b>	<b>15</b>
<b>CHAPTER 12: KEY MESSAGES</b>	<b>17</b>



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Contents



## CHAPTER 1

# LEARNING OBJECTIVES AND MODULE STRUCTURE

### ✓ BY THE END OF THIS MODULE, YOU WILL BE ABLE TO:

- ✓ Explain the elements of the context for immigration detention; and
- ✓ Describe the process of immigration detention.

Please read the following chapters carefully and complete the short assignments.

This module should take you around 40 minutes to complete.



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Chapter 1

## CHAPTER 2

# WHY WE NEED TO UNDERSTAND THE IMMIGRATION DETENTION CONTEXT

Proper understanding of the context in which immigration detention takes place in a country is crucial. It enables us:



Click on each element of the diagram to see more.

When looking at the context of immigration detention in a particular country, several factors must be considered:

- Why immigration detention takes place;
- Who can be detained;
- The legal basis for detention;
- The authorities who are involved with immigration detention; and
- Where immigration detention takes place.



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## CHAPTER 3

# WHY IMMIGRATION DETENTION TAKES PLACE

In order to understand the context of immigration detention, it is paramount to first understand why immigration detention occurs in the first place.

In Module 1, Chapter 02 we already examined the variety of broad policy justifications advanced by States to justify immigration detention. It is, however, paramount to recall that although immigration detention may be permissible in an individual case, broad policy justifications made by governments for systematic detention of asylum-seekers and migrants go against carefully developed international standards, among them the requirement for an individual assessment of the necessity to detain. Broad policy justifications for detention are not compatible with the international legal framework. The aim of immigration detention monitoring is to assist governments in putting an end to such practices.



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Chapter 3

## WHO CAN BE DETAINED?

Having recapped the reasons behind immigration detention, it is now important to examine who could be subject to immigration detention in a given country:



Immigration detainees may include asylum-seekers (including rejected asylum-seekers), refugees, stateless persons, victims of trafficking, irregular migrants, and others



Immigration detainees could be men, women, children (including unaccompanied and separated children), families, people in situations of vulnerability/risk (e.g. survivors of torture or victims of trafficking)

People detained in places of immigration detention may include refugees, asylum-seekers, rejected asylum-seekers, stateless persons, victims of trafficking, smuggled migrants, or irregular migrants.

Detainees may be single men or women, as well as children (including unaccompanied or separated children) and families. The experience of immigration detention has been shown to cause severe physical and mental health problems. It may trigger or aggravate existing vulnerabilities, in particular for those persons with special needs.

It is also crucial to consider the length of immigration detention: prolonged or indefinite periods of detention can have deleterious effects on the mental and physical health of detainees. Even short-term detention can fail to meet international standards. Therefore, the duration of detention should always be of concern to monitors, noting that there is a great variation in this among countries: some countries permit very lengthy detention periods (even indefinite), while others only permit detention for an initial period, e.g. for health, identity or security checks. Remember that excessively long immigration detention can be arbitrary (you may wish to refer to the Fundamentals of Immigration Detention e-Learning).



# THE IMMIGRATION DETENTION CONTEXT: UNDERSTANDING THE NATIONAL LEGAL FRAMEWORK IN RELATION TO IMMIGRATION DETENTION

It is necessary for monitors to understand the domestic legal framework that permits immigration detention. This national legal framework must correspond to the parameters set by international law. However, this is often not the case.

International law provides that restrictions on liberty and the exceptional use of detention are only permissible when they are both legal and non-arbitrary. To ensure that systems of immigration detention comply with these international legal principles, it is important that immigration detention facilities be open to scrutiny and monitoring by independent national and international institutions and bodies.



## 5.1 Understanding the national legal framework in relation to immigration detention: Using checklists

Examining national legal frameworks, which is necessary for determining whether immigration detention takes place in accordance with the standards set by international law, is a very complex and time-consuming task because:

To assist monitors with the complexity that this task involves, various tools have been devised, such as the [Detention Checklist](#). The aim of checklists is to provide monitoring bodies with various optional questions that they may need to ask in order to establish whether a particular area of immigration detention is in keeping with the requirements set by international law.

- The relevant provisions in the national legal frameworks can be scattered through various legal documents
- The relevant provisions can be phrased in complex legal terminology
- Legal provisions can be absent or incomplete
- The practice on the ground may differ from what has been laid out in the legislation
- There can be gaps vis-à-vis the requirements of international law



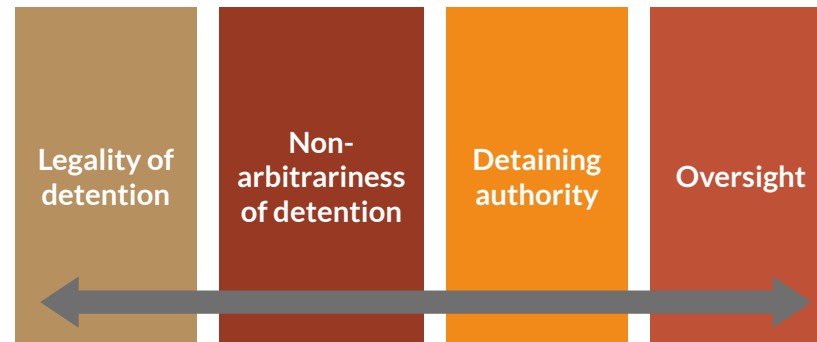




## CHAPTER 6

# INTERIM ASSIGNMENT

Please review the domestic legislation of your country in relation to immigration detention. Below you will see a list of questions, each of them relating to one of the four areas noted below. Match the questions with the areas they seek to examine.





A. Legality of detention	C. Detaining authority
B. Non-arbitrariness of detention	D. Oversight

		A	B	C	D
1.	What alternatives to immigration detention are provided for in domestic legislation?				
2.	Is there a National Preventive Mechanism in my country?				
3.	Does the national legislation list the grounds which permit immigration detention?				
4.	Which national law permits immigration detention?				
5.	What is the maximum period allowed for immigration detention?				
6.	Which bodies can carry out independent monitoring?				
7.	What is the legal status of the act permitting the immigration detention?				
8.	How is periodic review of detention ensured in the legislation?				
9.	Does the national legislation prescribe the maximum period for immigration detention?				
10.	Who is authorized to detain a person in the immigration context?				

# AUTHORITIES INVOLVED WITH IMMIGRATION DETENTION PROCEDURES

To understand the immigration detention context of a country, it is important that monitors distinguish between the various authorities who are involved with the immigration detention process.

In the Fundamentals of Immigration Detention e-Learning we examined the various authorities who are involved with different parts of the immigration detention process. Let us recap.

## DETAINING AUTHORITIES



- Police
- Border guards
- Navy/coastguard

## AUTHORITIES WHO AUTHORIZE DETENTION



- Judge
- Another competent authority

## AUTHORITIES WHO CARRY OUT DETENTION



- Immigration/ Detention officers
- Law enforcement or security forces
- Private companies [pop-up]

## Detaining authorities

Not every authority in a country has the power to detain a person. The law usually vests these powers with the police. In the immigration detention context, these powers can also be held by specialized agencies, such as border guards and coastguards. However, it is important to note that all authorities who detain people based on their immigration status must be authorized by law to do so. Therefore, the law must prescribe the powers to detain, and the initial period of detention cannot be long (usually it cannot exceed 48 hours).

## Authorities who authorize detention

Within this initial period of detention, a detainee must be brought before the competent authority who is authorized to order detention. Usually this is a judge, but in some countries this responsibility could be vested with another independent authority. It is crucial that this authority act independently of the detaining authority to ensure the necessary degree of accountability and transparency. The role of a judge is to ascertain that the detention is lawful and not arbitrary; the judge also carries out periodic reviews of this assessment and must have the powers to order release.

## Authorities who carry out detention

There are various types of authorities who supervise detention in places of immigration detention. These include detention officers, security forces and private companies.



# IMMIGRATION DETENTION FACILITIES

It is paramount that all places where immigration detention occurs, irrespective of their nature or labelling by authorities, are properly identified as such by those who carry out monitoring of immigration detention. Otherwise, such places may ‘fall off the radar’ of the monitoring bodies.

Monitors must remember that the term used to describe the immigration detention facility is irrelevant; equally it is unimportant whether authorities themselves qualify a particular situation as detention (you may wish to refer to the Fundamentals of Immigration

Detention e-Learning). What is necessary is verifying whether immigration detention is taking place in a particular facility; if this is the case, this facility should be subject to immigration detention monitoring.

The relevant question about a possible immigration detention place is whether a person is able to leave at will. If the answer is ‘no’, then this place must be qualified as an immigration detention facility and must be subject to immigration detention monitoring.





## CHAPTER 9

# IMMIGRATION DETENTION FACILITIES IN PRACTICE

Immigration detention may take place in:

1. Designated immigration detention centres;
2. Removal or transit centres;
3. Closed reception or processing centres;
4. Semi-open centres from which day release is or may be permitted;
5. Airports, ports, transit and 'international zones', harbour facilities or islands;
6. Vehicles, airplanes, boats or other vessels;
7. Prisons, police lockups/jails or police stations;
8. Prisons or cells for military personnel or military bases;
9. Houses, hostels, hotels and other community-based locations where residents are not free to leave;
10. Psychiatric institutions and hospitals;
11. Disused warehouses or private security company compounds; or
12. Any other place where people are physically deprived of their liberty.



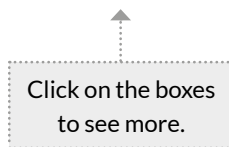
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Chapter 9

## REFERRALS

When considering the immigration detention context of a particular country, it is important for monitors to examine the various possible referrals that may need to occur in this context. Such avenues for referral should be available for those for whom immigration detention is not necessary and/or appropriate and/or who are in a situation of vulnerability/risk.

The referrals can involve the following:



## INTERIM ASSIGNMENT

Please read the following statements carefully and identify them as TRUE or FALSE.

	Statement	True	False
1.	Looking at alternatives to detention forms part of the necessity and proportionality considerations for immigration detention.		
2.	Immigration detention can be reviewed by the same authority who carried out the initial detention of the detainee.		
3.	Detention in the immigration context must always be authorized by a competent authority.		





	Statement	True	False
4.	Only a proper understanding of the immigration detention context in a specific country allows setting up a detention monitoring strategy.		
5.	The day-to-day running of immigration detention facilities can be contracted out to private companies that become solely responsible for them.		
6.	Considering alternatives to immigration detention is important, although failure to do so cannot render the detention arbitrary.		
7.	Immigration detention can occur in any closed facility where a person is not free to leave at will.		





## CHAPTER 12

# KEY MESSAGES



The national immigration detention context should always mirror the international standards applicable to immigration detention



Monitors must have a comprehensive understanding of the national context in which immigration detention occurs



Examination of the national legal framework related to immigration detention is crucial for a proper understanding of a country's immigration detention context



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