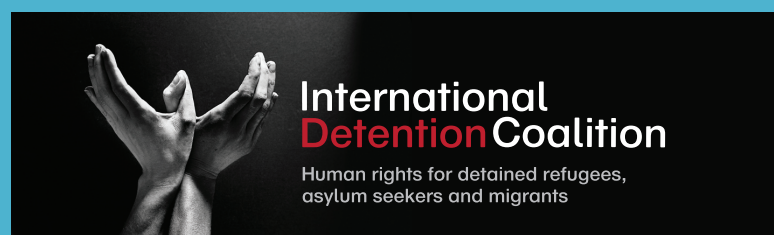


Legal framework and standards relating to the detention of refugees, asylum seekers and migrants

A GUIDE



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International Detention Coalition

The International Detention Coalition (IDC) is a coalition of over 250 non-governmental groups and individuals working in over 50 countries to protect the rights of refugees, asylum seekers and migrants in immigration detention around the world through education, networking, advocacy, reporting and research.

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DETENTION OF REFUGEES, ASYLUM SEEKERS & MIGRANTS STANDARDS BRIEF¹

1. There should be a presumption against the detention of refugees, asylum seekers and migrants, as it is inherently undesirable.
2. Vulnerable individuals - including refugees, children, pregnant women, nursing mothers, survivors of torture and trauma, trafficking victims, stateless persons, elderly persons, the disabled or those with physical or mental health needs – should not be placed in detention.
3. Children should not be detained for migration-related purposes. Their best interests must be protected in accordance with the Convention on the Rights of the Child. Children should not be separated from their caregivers and if they are unaccompanied, care arrangements must be made.
4. Asylum seekers should not be detained or penalized because they were compelled to enter a country irregularly or without proper documentation. They must not be detained with criminals and must have the opportunity to seek asylum and to access asylum procedures.
5. Detention should only be used as a measure of last resort. When used it must be necessary and proportionate to the objective of identity and security checks, prevention of absconding or compliance with an expulsion order.
6. Where a person is subject to detention, alternatives must first be pursued. Governments should implement alternatives to detention that ensure the protection of the rights, dignity and wellbeing of individuals.
7. No one should be subject to indefinite detention. Detention should be for the shortest possible time with defined limits on the length of detention, which are strictly adhered to.
8. No one should be subject to arbitrary detention. Decisions to detain must be exercised in accordance with fair policy and procedures and subject to regular independent judicial review. Detainees must have the right to challenge the lawfulness of their detention, which must include the right to legal counsel and the power of the court to release the detained individual.
9. Conditions of detention must comply with basic minimum human rights standards. There must be regular independent monitoring of places of detention to ensure these standards are met. States should ratify the Optional Protocol to the Convention against Torture, which provides a strong legal basis for a regular and independent monitoring of places of detention.
10. The confinement of refugees in closed camps constitutes detention. Governments should consider alternatives that allow refugees freedom of movement.

¹ This brief outlines a summary of the International Detention Coalition's (IDC) position on the detention of refugees, asylum seekers and migrants, based on identified international law, standards and guidelines. For the full position of the IDC please visit: www.idcoalition.org

Introduction²

The International Detention Coalition (IDC) is a network of more than 250 non-governmental organizations (NGOs), faith-based groups, academics and individuals that provide legal, social, medical and other services, carry out research and reporting, and undertake advocacy and policy work on behalf of refugees, migrants and asylum seekers, many of whom are in detention. These groups and individuals, from over 50 countries, have come together to form the IDC to share information, and to promote good practices relating to the use of detention by governments.

Purpose

After consultation with its members and with reference to international legal authority, the IDC has drafted its core position on detention, which is presented in this document. It should be noted that the supporting authority focuses on international standards and is not meant to provide a comprehensive description of all human rights standards – international, regional or national – which are relevant to migration-related detention.

The authority cited in support of each element of the IDC's positions discussed below includes both "hard law" and "soft law".

The "hard law" refers to international agreements, whether described as treaties, covenants, conventions, charters or protocols, which are legally binding on States that have either ratified or acceded to them.

The "soft law" discussed in this guide includes General Assembly resolutions, reports of the various bodies of the Office of the High Commissioner for Human Rights (OHCHR), guidance and reports issued by treaty monitoring bodies and advisory opinions issued by the International Court of Justice (ICJ). Decisions of the ICJ can also be categorised as soft law since they are only binding on the State parties to the dispute, and only with respect to the particular case in dispute. Beyond the particular case, decisions of the ICJ are of non-binding, but highly persuasive, authority in interpreting and applying international law. Treaty monitoring bodies also issue guidance in the form of reports and comments which interpret provisions contained in international treaties.

Intergovernmental bodies such as Special Rapporteurs of the UN Human Rights Council and the UN Working Group on Arbitrary Detention provide particularly helpful guidance on standards relevant to migration-related detention. Finally, the Office of the High Commissioner for Refugees (OHCR) provides refugee-specific guidance by way of guidelines and conclusions reached by its Executive Committee.

The decisions of national courts when applying human rights treaties to a dispute within a particular State can also provide helpful guidance on the interpretation of international standards.

² Additional documents discussing the many human rights standards which are relevant to migration-related detention can be found on the IDC website at <http://www.idcoalition.org>. These documents include: UNHCR Selected Documents Relating to Detention (Feb. 2009); UNHCR Legal and Protection Policy, Research Policy, Research Series, Alternatives to Detention of Asylum Seekers and Refugees, Ophelia Field and Alice Edwards; Amnesty International, Irregular Migrants and Asylum-Seekers – Alternatives to Detention (2009); Amnesty International, Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees (2007); International Commission of Jurists, Migration and International Human Rights Law, Practitioners Guide No. 6 (2011); Equal Rights Trust, Unravelling anomaly: Detention discrimination and the protection needs of stateless persons, London (2010).

Although the “soft law” cited in this guide does not have the same legal force as treaties, it has persuasive authority. As such, these documents provide helpful guidance in interpreting many of the provisions contained in treaties which are binding on states which are party to them. Note that although the relevant parts of these documents have been extracted and reproduced in this guide, the citations contained in those extracts have been omitted.

Although not all states have ratified or acceded to the treaties which are cited in this guide, they may still be bound by the principles established in those treaties as well as the non-treaty standards under customary international law. Customary international law refers to customs that are accepted as obligatory rules of conduct by states. For example, the principle of *non-refoulement* is widely considered to be customary international law. Arguments can and should be made that many of the standards discussed herein constitute customary international law and, therefore, are applicable to states which detain refugees, asylum seekers and migrants.

Background on migration-related detention

The UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999) define detention as:

Confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.

States worldwide are increasingly turning to the use of various forms of detention as a migration management tool. Millions of refugees languish for years, sometimes generations, in camps and segregated facilities, many of which impose significant restrictions on freedom of movement. When detaining arriving refugees, asylum seekers and migrants, states give little consideration to specific vulnerabilities such as age, gender, medical and psychological conditions. Refugees and asylum seekers are caught up in the broad nets that states use worldwide to thwart the entry of undocumented persons. States detain refugees, asylum seekers and migrants in removal centers, immigration detention facilities, prisons, police stations, airports, hotels, in ships and in shipping containers, as well as in closed refugee camps. They are detained upon arrival in a country, pending a final immigration decision, or while awaiting deportation from a country.

Detention can last for months or, in some cases, years, during which time men, women, boys and girls can languish in often overcrowded and unhygienic conditions. Many human rights violations can and do occur in these circumstances. In many cases, there is little independent oversight of detention conditions or the reasons for detention, and many refugees, asylum seekers and migrants are denied access to bail hearings and to judicial review.

Refugees and asylum seekers who have fled their countries and are in need of international protection also face obstacles in accessing asylum and protection procedures to which they are entitled under international law. Stateless persons and others without documentation who are unable to be removed from a country may face indefinite detention. Refugees, asylum seekers and migrants are detained with persons convicted of crimes; men and women are confined together in detention quarters; and, children are mixed with unrelated adults.

Women and minor boys and girls, particularly those who are unaccompanied, are especially vulnerable to violence and abuse in such circumstances. The negative impact of even short-term detention on the mental health of individuals is well-documented, especially for children.

Migration-related detention not only creates incredible hardships on those in detention, it also separates families, disrupts communities and diverts both governmental and non-governmental actors from pursuing more humane, reasonable and cost-effective alternatives to detention.

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1. There should be a presumption against the detention of refugees, asylum seekers and migrants, as it is inherently undesirable.

International human rights law provides that everyone has a right to liberty and security of person and that no one shall be subjected to arbitrary arrest or detention. International human rights law also provides that there should be a presumption against detention. This right is applicable to all deprivations of liberty, including those which occur in the immigration context. This includes refugees, asylum seekers and migrants, including migrant workers and members of their families.

UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[<http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>]

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) [<http://www.un.org/en/documents/udhr/index.shtml>]

Article 3

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

UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158

[<http://www.un.org/documents/ga/res/45/a45r158.htm>]

Article 16

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

UN Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/85, 30 December 2002

[[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfb8/\\$FILE/G0216255.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfb8/$FILE/G0216255.pdf)]

73. Infractions of immigration laws and regulations should not be considered criminal offences under national legislation. The Special Rapporteur would like to stress that irregular migrants are not criminals per se and they should not be treated as such. Detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.

74. Governments should consider the possibility of progressively abolishing all forms of administrative detention.

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

[<http://www.unhcr.org/refworld/docid/3be01b964.html>]

Article 31

Refugees unlawfully in the country of refuge

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

UN High Commissioner for Refugees, UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999

[<http://www.unhcr.org/refworld/docid/3c2b3f844.html>]

1. The detention of asylum-seekers is, in the view of UNHCR inherently undesirable.

Guideline 2: General Principle

As a general principle asylum-seekers should not be detained.

According to Art 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter, a territory illegally. However the position of asylum-seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movements based on illegal entry or presence.

2. Vulnerable individuals – including refugees, children, pregnant women, nursing mothers, survivors of torture and trauma, trafficking victims, stateless persons, elderly persons, the disabled or those with physical or mental health needs – should not be placed in detention.

International standards identify a range of vulnerable groups that should generally not be detained, including refugees, children, pregnant women, nursing mothers, survivors of torture and trauma, trafficking victims, elderly persons, the disabled or those with physical or mental health needs.

International standards advise against the detention of children and urge states to detain children only as a measure of last resort. Women asylum-seekers and adolescent girls, especially unaccompanied girls, are particularly at risk when they are held in detention centers. Detention of pregnant women in their final months of pregnancy and nursing mothers should be avoided.

Where detained, women asylum-seekers should be held in separate facilities from men unless they are close family relatives. The Special Rapporteur on the Human Rights of Migrants has also recognized that detention has a heavy impact on pregnant women and their children, as well as on the elderly, disabled and mentally ill.

Given the negative effects that detention has on the psychological well-being of those detained, alternatives to detention should be considered in the case of unaccompanied elderly persons, torture or trauma victims and persons with a mental or physical disability. The UNHCR recommends that such vulnerable persons should only be detained upon medical certification that detention will not adversely affect their health and wellbeing.

The Convention on the Rights of Persons with Disabilities specifically recognises that persons with disabilities have a right to liberty and security of person and that ‘reasonable accommodation’ must be provided to ensure they are treated in accordance with international human rights law. Detention facilities may not satisfy the requirements of ‘reasonable accommodation’ and, accordingly, persons with disabilities should not be detained in such circumstances.

Stateless persons are also considered vulnerable as they are prone to being detained for extended periods of time. Stateless persons who cannot be removed within a reasonable period of time should not be detained, and states have an obligation to make this assessment before and also during detention. The UNHCR has urged that stateless persons are entitled to benefit from the same standards of treatment as those in detention generally and that statelessness should not be a bar to release from detention. States should make every effort to resolve cases of statelessness in a timely manner.

The Office of the High Commissioner for Human Rights has urged states to ensure that trafficked persons are not, under any circumstances, held in immigration detention. States are obliged to refrain from punishing victims of trafficking for their illegal entry, or for having been trafficked.

UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999

[<http://www.unhcr.org/refworld/docid/3c2b3f844.html>]

Introduction

1. The detention of asylum-seekers is, in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs.

...

Guideline 6: Detention of Persons under the Age of 18 years

In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, **minors who are asylum-seekers should not be detained.**

...

Guideline 7: Detention of Vulnerable Persons

Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories:

Unaccompanied elderly persons.

Torture or trauma victims.

Persons with a mental or physical disability.

In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being.

...

Guideline 8: Detention of Women

Women asylum-seekers and adolescent girls, especially those who arrive unaccompanied, are particularly at risk when compelled to remain in detention centres. As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom may have special needs, should be avoided.

...

Guideline 9: Detention of Stateless Persons

Everyone has the right to a nationality and the right not to be arbitrarily deprived of their nationality.³

Stateless persons, those who are not considered to be nationals by any State under the operation of its law, are entitled to benefit from the same standards of treatment as those in detention generally. Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.

³ Article 15 UDHR. See EXCOM Conclusion No. 78(XLVI).

In the event of serious difficulties in this regard, UNHCR's technical and advisory service pursuant to its mandated responsibilities for stateless persons may, as appropriate, be sought.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3 [<http://www.un.org/documents/ga/res/44/a44r025.htm>]

Article 37

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

United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955 [<http://www2.ohchr.org/english/law/treatmentprisoners.htm>]

Separation of categories

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate...

UN Commission on Human Rights, *Migrant Workers*, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/85, 30 December 2002 [[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/\\$FILE/G0216255.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf)]

Detention of victims of trafficking and smuggling

41. Victims of trafficking and smuggling commit infractions or offences, such as irregular entry, use of false documents and other violations of immigration laws and regulations, which make them liable to detention... Victims of trafficking are thus often detained and deported without regard for their victimization and without consideration for the risks they may be exposed to if returned to their country of origin.

42. The victims' needs for specific medical, psychological or legal assistance are often not taken into account...

Detention of women, children and other vulnerable groups

43. The Special Rapporteur observed that very often national legislation does not contain special provision regarding administrative detention of vulnerable groups, such as children, pregnant women, the elderly and the physically and mentally ill. Administrative detention should never be punitive in nature and special arrangements should be sought to protect vulnerable groups. In these cases, the harm inflicted seems to the Special Rapporteur to be wholly disproportionate to the policy aim of immigration control.

...

50. Often elderly people, persons with disabilities, pregnant women and ill people, including the mentally ill, are detained without any particular regard for their conditions and specific needs. It was reported that detention has a heavy impact on pregnant women and their children, as well as the elderly, disabled and mentally ill. Pregnant women, for example, need to have access to proper nutrition for the well-being of the baby and to medical and support service that are not available in detention facilities.

UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000

[<http://www.unhcr.org/refworld/docid/4720706c0.html>]

Article 3 Use of terms

For the purposes of this Protocol:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs...

UN General Assembly, *Trafficking in women and girls: resolution/ adopted by the General Assembly*, 30 January 2003, A/RES/57/176

[<http://www.unhcr.org/refworld/docid/3f4352044.html>]

The General Assembly...

8. *Calls upon* all Governments to criminalize trafficking in women and children...while ensuring that the victims of those practices are not penalized for being trafficked....

Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1

[[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/caf3deb2b05d4f35c1256bf30051a003/\\$FILE/N0240168.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/caf3deb2b05d4f35c1256bf30051a003/$FILE/N0240168.pdf)]

Protection and assistance

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

...

Guideline 2: Identification of trafficked persons and traffickers

...

6. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.

...

Guideline 4: Ensuring an adequate legal framework

...

5. Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

...

Guideline 6: Protection and support for trafficked persons

...

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.

UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex 1

[\[http://www.un.org/disabilities/convention/conventionfull.shtml\]](http://www.un.org/disabilities/convention/conventionfull.shtml)

Article 14:

1. State 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. State 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.

UN General Assembly, *Convention relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117

[\[http://www2.ohchr.org/english/law/stateless.htm\]](http://www2.ohchr.org/english/law/stateless.htm)

Article 26 - Freedom of movement

Each Contracting State 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.

3. Children should not be detained for migration-related purposes. Their best interests must be protected in accordance with the Convention on the Rights of the Child. Children should not be separated from their caregivers and if they are unaccompanied, care arrangements must be made.

Under international law, states are required to take all appropriate measures to ensure that children are protected against all forms of discrimination and punishment on the basis of the status, activities, expressed opinions, or beliefs of their parents, legal guardians, or family members. Children should not be detained because they or their parents, guardians or family members do not have legal status in a country. In all actions taken by a state, the best interests of the child should be the primary consideration. Given the detrimental effects that detention can have on children, these obligations imply that states should not detain children for immigration-related purposes.

With few exceptions, states should also ensure that children are not separated from their parents against their will. As a result, the IDC considers that families should not be detained. Families should instead be released or offered alternatives to detention pending the resolution of their case. States are required to ensure that children seeking refugee status or who are considered refugees, whether accompanied or unaccompanied, receive appropriate protection and humanitarian assistance.

Where a state detains children, any arrest or detention of a child must be in compliance with the law and should only be used as a measure of last resort and for the shortest time possible. Those children who are detained shall be treated with humanity and respect and in a manner which takes into account the needs of their age. In particular, children should not be separated from adults unless it is considered in the child's best interests not to do so.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3 [<http://www.un.org/documents/ga/res/44/a44r025.htm>]

Article 2

2. State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

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.

...

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.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

...

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

...

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. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(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;

(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;

(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.

UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution/ adopted by the General Assembly., 14 December 1990, A/RES/45/113*

[\[http://www.un.org/documents/ga/res/45/a45r113.htm\]](http://www.un.org/documents/ga/res/45/a45r113.htm)

I. FUNDAMENTAL PERSPECTIVES

...

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.

UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, 18 December 1998, E/CN.4/1999/63/Add.3*

[\[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/4cd8d9a17ff06b01802567230059e05c?OpenDocument\]](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/4cd8d9a17ff06b01802567230059e05c?OpenDocument)

37. Unaccompanied minors should never be detained.

UN Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2002/23 on International Protection for Refugees, 14 August 2002, E/CN.4/Sub.2/RES/2002/23*

[\[http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.2002.23.En?OpenDocument\]](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2002.23.En?OpenDocument)

The Sub-Commission on the Promotion and Protection of Human Rights...

4. *Reminds* States that the detention of asylum-seekers and refugees is an exceptional measure and should only be applied in the individual case where it has been determined by the appropriate authority to be necessary in line with international refugee and human rights law, and encourages States to explore alternatives to detention and to ensure that children under 18 are not detained.

UN Commission on Human Rights, *Migrant Workers, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/85, 30 December 2002*

[\[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/\\$FILE/G0216255.pdf\]](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf)

54. ...Article 37 of the Convention on the Rights of the Child also establishes that 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.

...

75. ...Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

(a) Ensuring that the 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 is 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, including access to education and health. Children under administrative custodial measures 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. Should the age of the migrant be in dispute, the most favourable treatment should be accorded until it is determined whether he/she is a minor.

UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999

[\[http://www.unhcr.org/refworld/docid/3c2b3f844.html\]](http://www.unhcr.org/refworld/docid/3c2b3f844.html)

Guideline 6: Detention of Persons under the Age of 18 years

In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, minors who are asylum-seekers should not be detained.

UN High Commissioner for Refugees, *Conclusion on International Protection*, 9 October 1998, No. 85 (XLIX) – 1998

[\[http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c6e30\]](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c6e30)

(dd) Deplores that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status: notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.

UN High Commissioner for Refugees, *Refugee Children*, 12 October 1987, No. 47 (XXXVIII) – 1987

[\[http://www.unhcr.org/refworld/docid/3ae68c432c.html\]](http://www.unhcr.org/refworld/docid/3ae68c432c.html)

The Executive Committee

...

(d) *Stressed* that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity;

(e) *Condemned* the exposure of refugee children to physical violence and other violations of their basic rights, including through sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention, and called for national and international action to prevent such violations and assist the victims.

UN High Commissioner for Refugees, *Agenda for Protection [Global Consultations on International Protection/General]*, 26 June 2002, A/AC.96/965/Add.1

[\[http://www.unhcr.org/refworld/topic,4565c2251a,470a33e22,3d4fd0266,0.html\]](http://www.unhcr.org/refworld/topic,4565c2251a,470a33e22,3d4fd0266,0.html)

Goal 1, Point 9. Adequate reception arrangements

...States, UNHCR, NGOs and other partners to work with refugee communities to address the needs of unaccompanied minors and separated child asylum-seekers and refugees, including, as necessary, their temporary placement in foster families or appointment of State or non-State guardians, and the monitoring of such arrangements.

Goal 6, Point 2. Measures to improve the framework for the protection of refugee children

States, UNHCR and partners to set in place measures to ensure that, as appropriate, refugee children and adolescents participate equitably in decision-making in all areas of refugee life, as well as in the implementation of such decisions, and that protection and age-sensitive approaches are applied at every stage of programme development, implementation, monitoring and evaluation

4. Refugees and Asylum seekers should not be detained or penalized because they were compelled to enter a country irregularly or without proper documentation. They must not be detained with criminals and must have the opportunity to seek asylum and to access asylum procedures.

The Convention Relating to the Status of Refugees prohibits states from imposing penalties, on account of illegal entry or presence, on refugees who enter or are present in their territory without authorization. Often when refugees flee from their countries, they flee with little but the clothes on their backs. Many are unable to obtain adequate documentation or visas to legally enter other countries to seek refuge. In its guidelines on detention, the UNHCR indicates that as a general rule asylum seekers should not be detained. Under the guidelines, detention of asylum seekers may only be used: 1) to verify identity; 2) to determine the elements on which the claim for refugee status or asylum is based; 3) in cases where asylum seekers have destroyed their travel and/or identity documents, or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum; or, 4) to protect national security and order.

Where states do detain refugees and asylum seekers, the UNHCR urges the use of separate detention facilities. If separate facilities are not used, refugees and asylum seekers should be accommodated separately from individuals charged with or convicted of crimes, in accordance with international standards on the treatment of prisoners. Despite the UNHCR's admonishment, states continue to detain refugees, asylum seekers and migrants with general prison populations in penal settings.

Access to fair and efficient asylum procedures is often difficult for refugees and asylum seekers who are detained. They are completely dependent upon their attorneys, legal representatives, social workers or others inside the facility to assist them in making an application, if such representation is even possible or available. Refugees and asylum seekers who are detained find it difficult to identify and present witnesses or supporting documents in their case. Consistent with their obligations under international law, states should take steps to ensure that asylum seekers have access to procedures as well as to legal assistance in preparing their claims for international protection.

UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

[<http://www.unhcr.org/refworld/docid/3be01b964.html>]

Article 31

Refugees unlawfully in the country of refuge

1. The Contracting 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 in the sense of article 1, 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.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955

[<http://www2.ohchr.org/english/law/treatmentprisoners.htm>]

Separation of categories

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;

(b) Untried prisoners shall be kept separate from convicted prisoners;

(c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;

(d) Young prisoners shall be kept separate from adults.

UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999

[<http://www.unhcr.org/refworld/docid/3c2b3f844.html>]

Guideline 2: General Principle

As a general principle asylum-seekers should not be detained.

...asylum-seekers are often forced to arrive at, or enter, a territory illegally. However the position of asylum seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.

Guideline 3: Exceptional Grounds for Detention

...

There should be a presumption against detention.

...

Guideline 5: Procedural Safeguards

If detained, asylum seekers should be entitled to the following minimum procedural guarantees...

(v) to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.

Detention should not constitute an obstacle to an asylum-seekers' possibilities to pursue their asylum application.

...

Guideline 10: Conditions of Detention

...

(iii) The use of separate detention facilities to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups.

UN High Commissioner for Refugees, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, 21 October 1981, No. 22 (XXXII) - 1981 [<http://www.unhcr.org/3ae68c6e10.html>]

B. Treatment of asylum seekers who have been temporarily admitted to country pending arrangements for a durable solution

...

2(a) ...they should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their freedom of movements other than those which are necessary in the interest of public health and public order.

UN High Commissioner for Refugees, *Conclusion on Protection Safeguards in Interception Measures*, 10 October 2003, No. 97 (LIV) - 2003

[<http://www.unhcr.org/refworld/docid/3f93b2894.html>]

Conclusion on Protection Safeguards in Interception Measures

The Executive Committee...

(a) *Recommends* that interception measures be guided by the following considerations in order to ensure the adequate treatment of asylum-seekers and refugees amongst those intercepted...

vi. Intercepted asylum-seekers and refugees should not become liable to criminal prosecution under the Protocol Against the Smuggling of Migrants by Land, Sea or Air for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met.

UN High Commissioner for Refugees, *General Conclusion on International Protection*, 13 October 1989, No. 55 (XL) - 1989 [<http://www.unhcr.org/refworld/docid/3ae68c43c.html>]

The Executive Committee...

(g) *Noted* with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation and reiterated its Conclusion No. 44 (XXXVII) which circumscribes the grounds for detention of such persons.

UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, 18 December 1998, E/CN.4/1999/63/Add.3

[<http://www.unhcr.org/refworld/country,,UNCHR,,GBR,4562d8b62,45377b810,0.html>]

30. Detainees should be held in special immigration detention centres in conditions appropriate to their status and not with persons charged with or convicted of criminal offences (unless so charged and convicted themselves).

UN High Commissioner for Refugees, *Conclusion on International Protection*, 9 October 1998, No. 85 (XLIX) – 1998 [<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c6e30>]

Detention of asylum-seekers

...

(ee) *Notes* with concern that asylum-seekers detained only because of their illegal entry or presence are often held together with persons detained as common criminals, and reiterates that this is undesirable and must be avoided whenever possible, and that asylum-seekers shall not be located in areas where their physical safety is in danger.

UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII) – 1986 [<http://www.unhcr.org/refworld/docid/3ae68c43c0.html>]

The Executive Committee...

(f) *Stressed* that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered.

UN Commission on Human Rights, *Migrant Workers*, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/85, 30 December 2002

[[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/\\$FILE/G0216255.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf)]

75. ...Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

(i) *Ensuring* that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law. Representatives of UNHCR, ICRC, NGOs and churches should be allowed access to the place of custody.

UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: Addendum Visit to Argentina*, 23 December 2003, E/CN.4/2004/3/Add.3

[<http://www.unhcr.org/refworld/country,,UNCHR,,ARG,,4090ffe20,0.html>]

75. An effective judicial remedy should be provided for administrative orders for the detention of foreigners with a view to their expulsion from the country. Any person detained for reasons related to immigration should have an opportunity to request a court to rule on the legality of his or her detention before the expulsion order is enforced. The current practice of detaining foreigners for reasons related to immigration together with individuals charged with ordinary offences should be halted.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3 [<http://www.un.org/documents/ga/res/44/a44r025.htm>]

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.

5. Detention should only be used as a measure of last resort. When used it must be necessary and proportionate to the objective of identity and security checks, prevention of absconding or compliance with an expulsion order.

States should only use immigration-detention as a last resort. The principle of proportionality means that any measure taken by a governmental authority – such as the decision to detain, which affects a basic human right such as the right to liberty – must be: appropriate in order to achieve the objective desired; necessary in order to achieve the objective (or, in other words, there are not other alternative measures) and reasonable.

Under UNHCR guidelines, detention of asylum seekers can only be resorted to, if necessary, for the following exceptional reasons:

- *To verify identity:* This involves cases where the identity of an asylum seeker may be unknown or in dispute.
- *To determine the elements of the asylum claim:* This means that an asylum seeker can be detained only for the purposes of a preliminary interview to determine the basis of his or her asylum claim. According to UNHCR, this exception cannot be used to justify detention for the entire status determination procedure, or for an unlimited time period.
- *In cases where asylum seekers have destroyed their travel or identity documents or have used fraudulent documents to mislead the authorities of the country in which they intend to seek asylum:* In such cases, an absence of good faith on the part of the asylum seeker must be established. In cases involving fraudulent documents or no documents, detention can only be used when there is an intention to mislead or a refusal by the asylum seeker to cooperate with the authorities. Asylum seekers who arrive without documents because they were unable to obtain any in their country of origin should not be detained solely for that reason.
- *To protect national security and public order:* This exception involves cases where there is evidence to indicate that the asylum seeker has a criminal background or affiliations which are likely to pose a risk to public order or national security if he or she is permitted entry into the country. Detention under these circumstances must be reviewable, and legal advice available.

UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

[<http://www.unhcr.org/refworld/docid/3be01b964.html>]

Article 31

Refugees unlawfully in the country of refuge

...

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3 [<http://www.un.org/documents/ga/res/44/a44r025.htm>]

Article 37

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.

UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999 [<http://www.unhcr.org/refworld/docid/3c2b3f844.html>]

Guideline 3: Exceptional Grounds for Detention

Detention of asylum-seekers may be exceptionally resorted to for the reasons set out below as long as this is clearly prescribed by national law which is in conformity with general norms and principles of international human rights law... there should be a presumption against detention...

In assessing whether detention of asylum -seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved...

In conformity with EXCOM Conclusion No 44 (XXXVII) the detention of asylum-seekers may only be resorted to, if **necessary**:

(i) to verify identity. This relates to those cases where identity may be undetermined or in dispute.

(ii) to determine the elements on which the claim for refugee status or asylum is based.

This statement means that the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim.⁶ This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

(iii) in cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum.

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum-seekers who

arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

(iv) to protect national security and public order.

This relates to cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he/she be allowed entry.

Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country.

UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII) – 1986 [<http://www.unhcr.org/refworld/docid/3ae68c43c0.html>]

The Executive Committee...

(b) *Expressed* the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.

UN High Commissioner for Refugees, *Expulsion*, 12 October 1977, No. 7 (XXVIII) – 1977 [<http://www.unhcr.org/refworld/category,LEGAL,UNHCR,EXCONC,,3ae68c4320,0.html>]

The Executive Committee...

(e) *Recommended* that an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged.

UN Commission on Human Rights, *Migrant Workers*, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/85, 30 December 2002 [[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/\\$FILE/G0216255.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf)]

74. Governments should consider the possibility of progressively abolishing all forms of administrative detention.

75. When this is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

(a) 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 is 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, including access to education and health. Children under administrative custodial measures should be separated from adults, unless they can be housed with relatives in separate settings. Children should be provided with adequate food, bedding, medical assistance and granted access to education and 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. Should the age of the migrant be in dispute, the most favourable treatment should be accorded until it is determined whether he/she is a minor.

6. Where a person is subject to detention, alternatives must first be pursued. Governments should implement alternatives to detention that ensure the protection of the rights, dignity and wellbeing of individuals.

Under international standards, immigration-related detention must only be used as a last resort, be proportionate, and only where less restrictive measures are individually assessed as being inadequate. Thus, states should pursue alternatives to detention for both migrants and asylum seekers. Alternatives to detention include: screening and assessment; case management; registration and documentation requirements; reporting; posting of bail, bond or surety; and open accommodation centres.

A number of states have developed community-based alternatives to detention models, including public-private partnerships between governmental agencies and NGOs which provide specialized assistance, information, legal aid and counseling for refugees, asylum seekers, children, families and victims of torture, human trafficking and trauma. For more details on this, please see IDC research available at: www.idcoalition.org

UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999

[\[http://www.unhcr.org/refworld/docid/3c2b3f844.html\]](http://www.unhcr.org/refworld/docid/3c2b3f844.html)

Introduction

1. The detention of asylum-seekers is, in the view of UNHCR inherently undesirable.

...

3. Consistent with... Article [31 of the 1951 Convention Relating to the Status of Refugees], detention should only be resorted to in cases of **necessity**.

...

Guideline 3: Exceptional Grounds for Detention

...

There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4], these should be applied **first** unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

Guideline 4: Alternatives to Detention

Alternatives to the detention of an asylum-seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions.

Alternatives to detention which may be considered are as follows:

(i) Monitoring Requirements.

Reporting Requirements: Whether an asylum-seeker stays out of detention may be conditional on compliance with periodic reporting requirements during the status determination procedures. Release could be on the asylum-seeker's own recognisance, and/or that of a family member, NGO or community group who would be expected to ensure the asylum-seeker reports to the authorities periodically, complies with status determination procedures, and appears at hearings and official appointments.

Residency Requirements: Asylum-seekers would not be detained on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum-seekers would have to obtain prior approval to change their address or move out of the administrative region. However this would not be unreasonably withheld where the main purpose of the relocation was to facilitate family reunification or closeness to relatives.

(ii) Provision of a Guarantor/ Surety. Asylum seekers would be required to provide a guarantor who would be responsible for ensuring their attendance at official appointments and hearings, failure of which a penalty most likely the forfeiture of a sum of money, levied against the guarantor.

(iii) Release on Bail. This alternative allows for asylum-seekers already in detention to apply for release on bail, subject to the provision of recognisance and surety. For this to be genuinely available to asylum-seekers they must be informed of its availability and the amount set must not be so high as to be prohibitive.

(iv) Open Centres. Asylum-seekers may be released on condition that they reside at specific collective accommodation centres where they would be allowed permission to leave and return during stipulated times.

These alternatives are not exhaustive. They identify options which provide State authorities with a degree of control over the whereabouts of asylum-seekers while allowing asylum-seekers basic freedom of movement.

UN Sub-commission on the Promotion and Protection of Human Rights, *Resolution 2000/21 on the Detention of Asylum Seekers*, 18 August 2000, para. 6

[<http://www.unhcr.org/refworld/docid/3dda66394.html>]

The Sub-Commission on the Promotion and Protection of Human Rights...

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.

UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, 18 December 1998, E/CN.4/1999/63/Add.3

[<http://www.unhcr.org/refworld/country,,UNCHR,,GBR,4562d8b62,45377b810,0.html>]

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

UN Commission on Human Rights, *Migrant Workers*, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/85, 30 December 2002

[[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/\\$FILE/G0216255.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf)]

75. ...Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

...

(f) Ensuring that non-custodial measures and alternatives to detention are made available to migrants, including through providing such measures in law and ensuring that the prescribed conditions are not discriminatory against non-nationals. Official statistics should be kept on the percentage of migrants deprived of their liberty out of the total number subject to administrative detention.

UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Bahamas, 28 April 2004*, CERD/C/64/CO/1 [<http://www.unhcr.org/refworld/country,,CERD,,BHS,,411763fa4,0.html>]

17. ...The Committee emphasizes that detention should be a last resort and invites the State party to adopt alternatives to detention for undocumented migrants and asylum-seekers. It recommends the institution of a right of appeal against orders to detain people entering the country without proper papers; such individuals should be duly informed of their rights and maximum duration of detention should be strictly defined.

UN Human Rights Committee (HRC), *Report of the UN Human Rights Committee (Volume I)*, 10 October 2000, A/55/40

[<http://www.unhcr.org/refworld/category,REFERENCE,HRC,,,3f475a844,0.html>]

...

527. The Committee urges the State to reconsider its policy of mandatory detention of “unlawful non-citizens” with a view to instituting alternative mechanisms of maintaining an orderly migration process.

***Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, UN Human Rights Committee (HRC), 6 November 2003**

[<http://www.unhcr.org/refworld/country,,HRC,,PAK,,404887ed0,0.html>]

9.3 Concerning Mrs Bakhtiyari and her children, the Committee observes that Mrs Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs Bakhtiyari and her children for length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the [International] Covenant [on Civil and Political Rights].

7. No one should be subject to indefinite detention. Detention should be for the shortest possible time with defined limits on the length of detention, which are strictly adhered to.

No one should be subject to indefinite detention. Indefinite detention is inhumane and contrary to international human rights law. Indefinite detention can be considered arbitrary and is in violation of human rights standards governing deprivation of liberty. In the case of refugees and asylum-seekers, it amounts to a penalty contrary to international refugee law.

Detention should be for the shortest possible time, and specific maximum limits on the length of detention must be set out in law and strictly adhered to. Many states place no restrictions on the length of time that a refugee, asylum seeker or migrant can be detained. Families of those who are detained indefinitely suffer without knowing when their loved ones will be released or whether they will be removed. Indefinite detention is especially harmful for vulnerable categories of people such as those discussed in Point 2 above. In particular, survivors of torture can be re-traumatized by detention and even more so when it is indefinite. Placing limits on detention serves two purposes: first, it provides some certainty to the detainee on when he or she can expect to be released; second, it can serve to provide a timeline for a state within which to take a decision on a case.

Stateless persons are considered particularly prone to being detained for extended periods of time. Stateless persons who cannot be removed within a reasonable period of time should not be detained, and states have an obligation to make this assessment before and also during detention. The UNHCR has stated that stateless persons are entitled to benefit from the same standards of treatment as those in detention generally and that statelessness should not be a bar to release from detention. States should make every effort to resolve cases of statelessness in a timely manner.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[\[http://www.unhcr.org/refworld/docid/3ae6b3aa0.html\]](http://www.unhcr.org/refworld/docid/3ae6b3aa0.html)

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999

[\[http://www.unhcr.org/refworld/docid/3c2b3f844.html\]](http://www.unhcr.org/refworld/docid/3c2b3f844.html)

Guideline 3: Exceptional Grounds for Detention

...

In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary, it should only be imposed in a non-discriminatory manner for a minimal period.

...

Guideline 9: Detention of Stateless Persons

Everyone has the right to a nationality and the right not to be arbitrarily deprived of their nationality.⁴

Stateless persons, those who are not considered to be nationals by any State under the operation of its law, are entitled to benefit from the same standards of treatment as those in detention generally. Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.

In the event of serious difficulties in this regard, UNHCR's technical and advisory service pursuant to its mandated responsibilities for stateless persons may, as appropriate, be sought.

UN Human Rights Council, *Report of the Working Group on Arbitrary Detention: addendum : mission to Equatorial Guinea (8-13 July 2007)*, 18 February 2008, A/HRC/7/4/Add.3

[<http://www.unhcr.org/refworld/country,,UNHRC,,GNQ,,47fddcc92,0.html>]

100.

...

(l) As far as possible, the detention of foreigners who enter the country without the necessary visa or who remain in the country once their visa has expired should be avoided. If the detention is necessary to ensure their expulsion from the country, a reasonable maximum duration of detention should be established.

UN Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: report of the Working Group on Arbitrary Detention: addendum: mission to Angola*, 29 February 2008, A/HRC/7/4/Add.4 [<http://www.unhcr.org/refworld/pdfid/47d560352.pdf>]

97. The Working Group expresses its concern that the new Immigration Act makes detention mandatory for a significant part of illegal immigrants. Although it appears from the Immigration Act that the expulsion of foreign citizens must be enforced within 8 days for non-resident citizens and within 15 days for residents, which would indicate that the time limit for detention is the same, the Working Group observed that illegal immigrants are being detained for much longer periods of time, sometimes for months, even years, hence for potentially indefinite periods. It has to be recalled that detention of illegal immigrants must be the exception, not the rule, and indefinite detention is clearly in violation of applicable international human rights instruments governing deprivation of liberty.

⁴ Article 15 UDHR. See EXCOM Conclusion No. 78(XLVI).

UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, 18 December 1998, E/CN.4/1999/63/Add.3

[<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4cd8d9a17ff06b01802567230059e05c?OpenDocument>]

35. An absolute maximum duration for the detention of asylum seekers should be specified in national law.

UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, 28 December 1999, E/CN.4/2000/4, Annex II

[<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/39bc3afe4eb9c8b480256890003e77c2?OpenDocument>]

II. Guarantees Concerning Detention

...

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

UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention: Addendum: Visit to Australia (24 May-6 June 2002), 24 October 2002, E/CN.4/2003/8/Add.2

[<http://www.unhcr.org/refworld/country,,UNCHR,,AUS,,3e2e7ca54,0.html>]

Recommendation 2. The potentially indeterminate duration of detention should be revised as follows:

(i) A reasonable time limit for detention should be set, after which the person would be given a bridging visa and lodged with family or friends, or in a reception centre located in an urban area;

(ii) Persons able to provide credible guarantees (relatives with Australian nationality, family residing legally and permanently in Australia, benevolent organizations providing sponsorship or acting as guarantors, etc.) should be released and received in the community while waiting for a decision. In the case of a negative decision, the person should be detained pending removal only if he/she refuses to leave voluntarily.

UN High Commissioner for Refugees, Conclusion on International Protection, 9 October 1998, No. 85 (XLIX) – 1998

[<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c6e30>]

Detention of asylum-seekers

...

(dd) *Deplores* that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.

UN Commission on Human Rights, Migrant Workers - Report of the Special Rapporteur, Gabriela Rodriguez Pizarro, E/CN.4/2003/85

[[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/\\$FILE/G0216255.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf)]

75. ...Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

(g) Ensuring that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite. The Special Rapporteur recommends that States consider

entering into bilateral and multilateral agreements to speed up documentation/ deportation procedures and thereby reduce the length of detention.

C. v. Australia, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002 [<http://www.unhcr.org/refworld/docid/3f588ef0.html>]

8.2 As to the claims relating to the first period of detention, in terms of article 9, paragraph 1 [of the Optional Protocol to the International Covenant on Civil and Political Rights], 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. In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention (para. 4.28 et seq.), the Committee observes that the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.

8. No one should be subject to arbitrary detention. Decisions to detain must be exercised in accordance with fair policy and procedures and subject to regular independent judicial review. Detainees must have the right to challenge the lawfulness of their detention, which must include the right to legal counsel and the power of the court to release the detained individual.

International law establishes that no one shall be subject to arbitrary arrest, detention or exile. In order for detention to be lawful, there must be a basis in law justifying such. In order for states to comply with their obligations under international law, they should: provide prompt information to the detainee about the reasons for the detention and his or her rights; provide access to effective legal counsel; conduct initial and periodic review of detention; and, facilitate contact with the local UNHCR office, national refugee bodies or other agencies.

All detainees must have the right to challenge the lawfulness of their detention in a court, which must include the right to access legal counsel and the power of the court to release the detained individual.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[<http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>]

Article 2

...

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms 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.

...

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

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.

...

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.

UN General Assembly, *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, 9 December 1988

[<http://www.un.org/documents/ga/res/43/a43r173.htm>]

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.

...

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 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

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 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 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.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

...

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.

UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention: Addendum Visit to Argentina, 23 December 2003, E/CN.4/2004/3/Add.3

[<http://www.unhcr.org/refworld/country,,UNCHR,,ARG,,4090ffe20,0.html>]

75. An effective judicial remedy should be provided for administrative orders for the detention of foreigners with a view to their expulsion from the country. Any person detained for reasons related to immigration should have an opportunity to request a court to rule on the legality of his or her detention before the expulsion order is enforced. The current practice of detaining foreigners for reasons related to immigration together with individuals charged with ordinary offences should be halted.

UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3 [<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/170/72/PDF/G0317072.pdf?OpenElement>]

85. The Working Group considers that the right to challenge the legality of detention or to petition for a writ of habeas corpus or remedy of amparo is a personal right, which must in all circumstances be guaranteed by the jurisdiction of the ordinary courts.

86. The Working Group considers that, even where illegal immigrants and asylum-seekers are concerned, any decision to place them in detention must be reviewed by a court or a competent, independent and impartial body in order to ensure that it is necessary and in conformity with the norms of international law and that, where people have been detained, expelled or returned without being provided with legal guarantees, their continued detention and subsequent expulsion are to be considered as arbitrary.

UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, 28 December 1999, E/CN.4/2000/4 [<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/165/70/PDF/G9916570.pdf?OpenElement>]

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.

UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, 15 December 1995, E/CN.4/1996/40 [<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G95/148/44/PDF/G9514844.pdf?OpenElement>]

The Working Group suggests that the Commission should ask States to incorporate the remedy of habeas corpus in their legislation, as an individual right, which has been shown capable of ending arbitrary detention, or at least preventing its harmful consequences.

UN Commission on Human Rights, Commission on Human Rights Resolution 2004/39: Arbitrary Detention, 19 April 2004, E/CN.4/RES/2004/39 [http://ap.ohchr.org/documents/alldocs.aspx?doc_id=9840]

3. *Encourages* the Governments concerned:

(c) To respect and promote the right of anyone who is deprived of his/her liberty by arrest or detention to be entitled to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful, in accordance with their international obligations.

UN Commission on Human Rights, Torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur, Mr Theo Van Boven, UN Doc E/CN.4/2003/68, 23 December 2003 [<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/173/27/PDF/G0317327.pdf?OpenElement>]

26.

(g) Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay. Information regarding the time and place of arrest as well as the identity of the law enforcement officials having carried out the arrest should be scrupulously recorded; similar information should also be recorded regarding the actual detention, the state of health upon

arrival at the detention centre, as well as the time the next of kin and lawyer were contacted and visited the detainee. Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention. In accordance with the Basic Principles on the Role of Lawyers, all persons arrested or detained should be informed of their right to be assisted by a lawyer of their choice or a State-appointed lawyer able to provide effective legal assistance. The right of foreign nationals to have their consular or other diplomatic representatives notified must be respected. Security personnel who do not honour such provisions should be disciplined. In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association. In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours.

(h) Administrative detention often puts detainees beyond judicial control. Persons under administrative detention should be entitled to the same degree of protection as persons under criminal detention. At the same time, countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention.;

(i) Provisions should give all detained persons the ability to challenge the lawfulness of the detention, e.g. through habeas corpus or amparo. Such procedures should function expeditiously.

UN Commission on Human Rights, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/85, 30 December 2002

[\[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfb8/\\$FILE/G0216255.pdf\]](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfb8/$FILE/G0216255.pdf)

74. Governments should consider the possibility of progressively abolishing all forms of administrative detention.

75. When this is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

...

(c) Ensuring that procedural safeguards and guarantees established by international human rights law and national law in case of criminal proceedings are applied to any form of detention. In particular, deprivation of liberty should be allowed only on the basis of criteria established by law. A decision to detain should only be taken under clear legal authority, and all migrants deprived of their liberty, whether under administrative proceedings or in cases of preventive detention for reasons of public security, should 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;

(d) Ensuring that migrants deprived of their liberty are informed in a language they understand, if possible in writing, of the reasons for the deprivation of liberty, of the available appeal mechanisms and of the regulations of the facility. Detained migrants shall also be accurately informed of the status of their case and of their right to contact a consular or embassy representative and members of their families. A briefing on the facility and information on the immigration law should also be provided. Migrants and their lawyers should have full and complete access to the migrants' files;

(e) Facilitating migrants' exercise of their rights, including by providing them with lists of lawyers offering pro bono services, telephone numbers of all consulates and organizations providing assistance to detainees and by creating mechanisms, such as toll-free numbers, to inform them of the status of their case. Efforts should be made to conclude agreements with

NGOs, universities, volunteers, national human rights institution and humanitarian and other organizations to provide basic services, such as translation and legal assistance, when they cannot otherwise be guaranteed.

UN General Assembly, *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live: resolution/ adopted by the General Assembly, 13 December 1985, A/RES/40/144* [<http://www.un.org/documents/ga/res/40/a40r144.htm>]

Article 5

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.

...

(c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings;

UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999*
[<http://www.unhcr.org/refworld/docid/3c2b3f844.html>]

Paragraph 1: ...Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.

...

Guideline 5: Procedural Safeguards

If detained, asylum-seekers should be entitled to the following minimal procedural guarantees:

(i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;

(ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;

(iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend;

(iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;

(v) to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.

Detention should not constitute an obstacle to an asylum-seekers' possibilities to pursue their asylum application.

UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII) – 1986 [<http://www.unhcr.org/refworld/docid/3ae68c43c0.html>]

The Executive Committee...

(e) Recommended that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3 [<http://www.un.org/documents/ga/res/44/a44r025.htm>]

Article 37

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;

...

(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.

9. Conditions of detention must comply with basic minimum human rights standards. There must be regular independent monitoring of places of detention to ensure these standards are met. States should ratify the Optional Protocol to the Convention against Torture, which provides a strong legal basis for a regular and independent monitoring of places of detention.

Where states detain refugees, asylum seekers or migrants, the conditions of detention must comply with international human rights standards. All persons, regardless of status, enjoy certain basic human rights. Persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity. The prohibition against torture, inhuman or degrading treatment is firmly established in international law. Detainees should not be housed in overcrowded conditions or with convicted criminals. Further, men and women should be housed separately unless they are part of a family. Children should not be detained with adults. Where families are detained, special facilities should be made available to them.

Conditions in detention facilities should meet all requirements of local and national health regulations. Every detainee should be provided with food of nutritional value adequate for his or her health. Detainees should receive appropriate medical treatment, including access to psychological services. Where children are detained, they must have access to education. Detainees should have access to recreation services as well as an opportunity to practise their religion. States should facilitate communication with the outside world for detainees. Staff in detention facilities should receive training regarding asylum and human rights standards. Staff should also be trained on how to recognize and respond to symptoms of stress.

Finally, in order to assure state compliance with human rights standards, regular and independent monitoring of places of detention should occur. States should ratify the Optional Protocol to the Convention against Torture which allows both unannounced national and international monitoring, while ensuring the national visiting bodies are guaranteed open and transparent access to all places of immigration detention. Independent and regular monitoring of places of detention must not replace judicial review by a court of law for those in immigration detention. See also IDC Detention Monitoring Checklist, Appendix 1.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[<http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>]

Article 7

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

...

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.

...

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

[\[http://www2.ohchr.org/english/law/cescr.htm\]](http://www2.ohchr.org/english/law/cescr.htm)

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

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.

UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

[\[http://www.unhcr.org/refworld/docid/3ae6b3a94.html\]](http://www.unhcr.org/refworld/docid/3ae6b3a94.html)

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.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

...

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

...

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 I, 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.

UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158

[<http://www.un.org/documents/ga/res/45/a45r158.htm>]

Article 17

1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

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. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.

...

5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.

7. Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

8. If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

...

Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3 [<http://www.un.org/documents/ga/res/44/a44r025.htm>]

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 28

1. States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of dropout rates.

...

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

...

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

...

(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.

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) [<http://www.un.org/en/documents/udhr/index.shtml>]

Article 5

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

UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution/ adopted by the General Assembly*, 9 December 1988, A/RES/43/173 [<http://www.un.org/documents/ga/res/43/a43r173.htm>]

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.

...

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

...

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

...

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

...

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

...

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

...

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.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

...

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

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.

UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199

[<http://www2.ohchr.org/english/law/cat-one.htm>]

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 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

Article 18

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.

...

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;

...

United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955

[\[http://www.unhcr.org/refworld/docid/3ae6b36e8.html\]](http://www.unhcr.org/refworld/docid/3ae6b36e8.html)

Register

...

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;

(b) Untried prisoners shall be kept separate from convicted prisoners;

(c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;

(d) Young prisoners shall be kept separate from adults.

Accommodation

9. (1) Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. 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 institution.

10. 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.

11. 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.

12. 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.

13. Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and 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.

14. All pans of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.

Personal hygiene

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

16. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly. ***Clothing and bedding***

...

19. Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.

Food

20. (1) Every prisoner shall be provided by the 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 needs it.

...

Medical services

22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their

equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

26. (1) The medical officer shall regularly inspect and advise the director upon:

(a) The quantity, quality, preparation and service of food;

(b) The hygiene and cleanliness of the institution and the prisoners;

(c) The sanitation, heating, lighting and ventilation of the institution;

(d) The suitability and cleanliness of the prisoners' clothing and bedding;

(e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.

(2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

Discipline and punishment

27. Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.

...

31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

...

Information to and complaints by prisoners

...

36. (1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.

(2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present.

(3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.

(4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.

Contact with the outside world

37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

38. (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.

39. Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration.

...

Religion

41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.

(2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.

(3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.

42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

Inspection

55. There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.

86. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate.

UN General Assembly, *Principles of Medical Ethics*, 16 December 1983, A/RES/38/118

[\[http://www.un.org/documents/ga/res/38/a38r118.htm\]](http://www.un.org/documents/ga/res/38/a38r118.htm)

The General Assembly...

1. Urges all Governments to take measures with a view to promoting the application by all health personnel and Government officials, in particular those employed in institutions of detention or imprisonment, of the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment.

UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992

[\[http://www.unhcr.org/refworld/docid/453883fb0.html\]](http://www.unhcr.org/refworld/docid/453883fb0.html)

11. In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State party should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 28 December 1999, E/CN.4/2000/4, Annex II

[\[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/39bc3afe4eb9c8b480256890003e77c2?OpenDocument\]](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/39bc3afe4eb9c8b480256890003e77c2?OpenDocument)

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.

UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, 18 December 1998, E/CN.4/1999/63/Add.3

[\[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4cd8d9a17ff06b01802567230059e05c?OpenDocument\]](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4cd8d9a17ff06b01802567230059e05c?OpenDocument)

29. Each decision to detain should be reviewed as to its necessity and its compliance with international legal standards by means of a prompt, oral hearing by a court or similar

competent independent and impartial review, accompanied by the appropriate provision of legal aid. In the event that continued detention is authorized, detainees should be able to initiate further challenges against the reasons for detention.

...

31. Detainees should be given adequate access to their legal representatives, relatives and officials of the Office of the United Nations High Commissioner for Refugees.

...

38. Specialized non-governmental organizations, the Office of the United Nations High Commissioner for Refugees and legal representatives should have access to all places of detention, including transit zones at international ports and airports.

39. All staff should receive training related to the special situation and needs of asylum seekers in detention.

UN Economic and Social Council, *Torture and other cruel, inhuman or degrading treatment or punishment*, Report of the Special Rapporteur, Mr Theo Van Boven, UN Doc E/CN.4/2003/68, 23 December 2003 [<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/173/27/PDF/G0317327.pdf?OpenElement>]

43. With regard to access to the outside world, the Special Rapporteur reiterates that persons deprived of their liberty shall be permitted to have contact with, and receive regular visits from, their relatives, lawyers and doctors and, when security requirements so permit, third parties such as human rights organizations or other persons of their choice. In accordance with principle 19 of the Body of Principles on Detention, access to the outside world can only be denied on reasonable conditions and restrictions as specified by law or lawful regulations. The Special Rapporteur notes that such access is not only a basic guarantee to prevent incidents of torture and other forms of ill-treatment, but also forms part of the right to family and private life enshrined in article 12 of the Universal Declaration of Human Rights and article 17 of ICCPR. In the light of the interpretation given by the Human Rights Committee in general comment No. 16, "interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant" (para. 3).

UN Commission on Human Rights, *Report of the Special Rapporteur on the question of Torture*, Theo Van Boven, UN Doc E/CN.4/2003/68, 17 December 2002 [http://ap.ohchr.org/documents/alldocs.aspx?doc_id=3360]

26.

...

(f) Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Independent non-governmental organizations should be authorized to have full access to all places of detention, including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas, detention units of medical and psychiatric institutions and prisons, with a view to monitoring the treatment of persons and their conditions of detention. When inspection occurs, members of the inspection team should be afforded an opportunity to speak privately with detainees. The team should also report publicly on its findings. In addition, official bodies should be set up to carry out inspections, such teams being composed of members of the judiciary, law enforcement officials, defence lawyers and physicians, as well as independent experts and other representatives of civil society. Ombudsmen and national or human rights institutions should be granted access to all places of detention with a view to monitoring the conditions of detention. When it so requests, the

International Committee of the Red Cross should be granted access to places of detention. Non-governmental organizations and other monitoring bodies should also be granted access to non-penal State-owned institutions caring for the elderly, the mentally disabled and orphans as well as to holding centres for aliens, including asylum-seekers and migrants;

(g) Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay. Information regarding the time and place of arrest as well as the identity of the law enforcement officials having carried out the arrest should be scrupulously recorded...

UN Commission on Human Rights, *Migrant Workers*, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/85, 30 December 2002

[\[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/\\$FILE/G0216255.pdf\]](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf)

75. ...Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

...

(i) Ensuring that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law. Representatives of UNHCR, ICRC, NGOs and churches should be allowed access to the place of custody;

(j) Providing training to authorities with the power to detain on psychological aspects relating to detention, cultural sensitivity and human rights procedures, and ensuring that centres for the administrative detention of migrants are not run by private companies or staffed by private personnel unless they are adequately trained and the centres are subject to regular public supervision to ensure the application of international and national human rights law;

(k) Ensuring that the Body of Principles for the Protection of All Persons under any Form of Detention and Imprisonment are applied to all migrants under administrative detention. The Principles include the provision of a proper medical examination as promptly as possible and of medical treatment and care whenever necessary and free of charge; the right to obtain, within the limits of available public resources, educational, cultural and informational material; the provision for regular visits of places of detention 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, in order to supervise the strict observance of relevant laws and regulations;

(l) Ensuring the existence of mechanisms allowing detained migrants to make a request or complaint regarding their treatment, in particular in case of physical and psychological abuse, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to judicial authorities;

(m) Ensuring the presence in holding centres of a doctor with appropriate training in psychological treatments. Migrants should have the possibility of being assisted by interpreters in their contacts with doctors or when requesting medical attention. Detention of migrants with psychological problems, as well as those 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;

(n) Applying the Standard Minimum Rules for the Treatment of Prisoners to migrants under administrative detention, including providing for the separation of administrative detainees

from criminal detainees; the separation of women from men; a separate bed with clean bedding for each detainee; at least one hour of outdoor exercise daily and the right to communicate with relatives and friends and to have access to newspapers, books and religious advisers.

UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999

[<http://www.unhcr.org/refworld/docid/3c2b3f844.html>]

Guideline 10: Conditions of Detention

Conditions of detention of asylum-seekers should be humane with respect shown for the inherent dignity of the person. They should be prescribed by law.

Reference is made to the applicable norms and principles of international law and standards on the treatment of such persons. Of particular relevance are the 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 1955 UN Standard Minimum Rules for the Treatment of Prisoners, and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

The following points should be emphasised:

- (i) the initial screening of all asylum seekers at the outset of detention to identify trauma or torture victims, for treatment in accordance with Guideline 7.
- (ii) the segregation within facilities of men and women; children from adults (unless these are relatives);
- (iii) the use of separate detention facilities to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups;
- (iv) the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;
- (v) the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate;
- (vi) the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities;
- (vii) the opportunity to continue further education or vocational training;
- (viii) the opportunity to exercise their religion and to receive a diet in keeping with their religion;
- (ix) the opportunity to have access to basic necessities i.e. beds, shower facilities, basic toiletries etc.;
- (x) access to a complaints mechanism, (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

UN High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997

[<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b3360>]

Education

7.12 Every child, regardless of status, should have full access to education in the asylum country. The child should be registered with appropriate school authorities as soon as possible.

7.13 All children seeking asylum should have the right to maintain their cultural identity and values, including the maintenance and further development of their mother tongue.

7.14 All juveniles should be allowed to enrol in vocational/professional training or education which would improve their prospects, especially when returning to their country of origin.

UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII) – 1986 [<http://www.unhcr.org/refworld/docid/3ae68c43c0.html>]

The Executive Committee...

(f) Stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered.

10. The confinement of refugees in closed camps constitutes detention. Governments should consider alternatives that allow refugees freedom of movement.

Over seven million refugees live in camps or segregated settlements, with many living this way for ten years or more and some for generations. Many suffer from a variety of violations of their basic human rights, including significant restrictions placed on their freedom of movement, including through detention. International law guarantees that those lawfully within the territory of a state shall have the right to free movement and the freedom to choose his or her residence. Once a refugee is lawfully in the territory of a state which is party to the relevant international treaties, he or she should be subject only to those restrictions on freedom of movement and residence which are applicable to other non-citizens. Under the Refugee Convention, State parties shall not apply restrictions on the movement of refugees within its border other than those which are necessary. Restrictions shall only apply until a refugee's status is regularized in a country, or he or she obtains admission to another country. Regularization does not mean recognition of refugee status. Rather, a refugee is lawfully present in a state party's territory if admitted for a fixed period of time. The status of a person between irregular presence and the recognition or denial of refugee status is a form of lawful presence.

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) [<http://www.un.org/en/documents/udhr/index.shtml>]

Article 13

1. Everyone has the right to freedom of movement and residence within borders of each state.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[<http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>]

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.

...

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.

UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195

[<http://www.unhcr.org/refworld/docid/3ae6b3940.html>]

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to

guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State.

UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

[<http://www.unhcr.org/refworld/docid/3be01b964.html>]

Article 26

Freedom of Movement

Each Contracting State 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.

...

Article 31

Refugees Unlawfully in the Country of Refuge

1. The Contracting 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 in the sense of article 1, 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.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9

[<http://www.unhcr.org/refworld/docid/45139c394.html>]

1. Liberty of movement is an indispensable condition for the free development of a person. It interacts with several other rights enshrined in the [International] Covenant [on Civil and Political Rights], as is often shown in the Committee's practice in considering reports from States parties and communications from individuals. Moreover, the Committee in its general comment No. 15 ("The position of aliens under the Covenant", 1986) referred to the special link between articles 12 and 13.

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.

3. States parties should provide the Committee in their reports with the relevant domestic legal rules and administrative and judicial practices relating to the rights protected by article 12, taking into account the issues discussed in the present general comment. They must also include information on remedies available if these rights are restricted.

Liberty of movement and freedom to choose residence (para. 1)

4. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is “lawfully” within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State’s international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12. Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3. It is, therefore, important that States parties indicate in their reports the circumstances in which they treat aliens differently from their nationals in this regard and how they justify this difference in treatment.

5. The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3.

6. The State party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.

7. Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one’s choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory. Lawful detention, however, affects more specifically the right to personal liberty and is covered by article 9 of the Covenant. In some circumstances, articles 12 and 9 may come into play together.⁵

...

Restrictions (para. 3)

11. Article 12, paragraph 3, 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 (see paragraph 18 below).

12. The law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded. Restrictions which are not provided for in the law or are not in conformity with the requirements of article 12, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.

13. In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. article 5, paragraph 1); the relation between right and restriction, between norm

and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

15. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

16. States have often failed to show that the application of their laws restricting the rights enshrined in article 12, paragraphs 1 and 2, are in conformity with all requirements referred to in article 12, paragraph 3. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of "State secrets", or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities.

17. A major source of concern is the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence. Regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications. States' practice presents an even richer array of obstacles making it more difficult to leave the country, in particular for their own nationals. These rules and practices include, inter alia, lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue a passport because the applicant is said to harm the good name of the country. In the light of these practices, States parties should make sure that all restrictions imposed by them are in full compliance with article 12, paragraph 3.

18. The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental

⁵ See, for example, communication No. 138/1983, *Mpandajila v. Zaire*, paragraph 10; communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, paragraph 10; communication Nos. 241/1987 and 242/1987, *Birhashwirwa/Tshisekedi v. Zaire*, paragraph 13.

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 on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In examining State reports, the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of article 12.

UN High Commissioner for Refugees, *General Conclusion on International Protection*, 11 October 1991, No. 65 (XLII) - 1991 [<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c404>]

The Executive Committee...

(c) Emphasizes the primary importance of non-refoulement and asylum as cardinal principles of refugee protection and encourages States to intensify their efforts to protect the rights of refugees, to prevent them from becoming the object of armed attacks in camps or settlements, to avoid unnecessary and severe curtailment of their freedom of movement, to ensure conditions of asylum compatible with recognized international standards, and to facilitate their stay in countries of asylum, including through the issue of necessary personal documentation and permission to return after travel abroad...

UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999 [<http://www.unhcr.org/refworld/docid/3c2b3f844.html>]

Guideline 1: Scope of the Guidelines

These guidelines apply to all asylum-seekers who are being considered for, or who are in, detention or detention-like situations. For the purpose of these guidelines, UNHCR considers detention as: **confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.** There is a qualitative difference between detention and other restrictions on freedom of movement.

UN High Commissioner for Refugees, *Operational Protection in Camps and Settlements. A Reference Guide of Good Practices in the Protection of Refugees and Other Persons of Concern*, June 2006 [<http://www.unhcr.org/448d6c122.html>]

Page 50: Refugees lawfully in a country should, in principle, be free to choose where they live and to move freely within their country of asylum. Restrictions on the right to move freely in the territory, such as into or out of certain areas or camps, should only be imposed when this is clearly in the interests of refugee security or overall national security

Page 51: ...freedom of movement of refugees within the country of asylum and in and out of the refugee camps provides a more normalized environment for refugees, provides opportunities for interaction with the host community, and allows for access to income-generation activities, including employment, land, and markets. Genuine freedom of movement also enables refugees to travel to education or health facilities located outside camps.

Checklist for monitoring places of immigration detention

This checklist outlines broad areas that should be considered during monitoring visits to places of immigration detention. It builds upon a general detention monitoring checklist, drawn from international standards of detention. The checklist contains a series of prompts grouped in terms of key issues for the detention monitor – it is not intended to be prescriptive or exhaustive.

INTERNATIONAL STANDARDS	NATIONAL LAW / POLICY
Population status	Additional national standards / notes
Legal basis of detention <ul style="list-style-type: none"> • Legal basis to detain • Detention as a last resort 	
Demographics of detention population <ul style="list-style-type: none"> • Detainee profile stats – country of origin, number, gender, age • Screening procedure and practice for possible risk and vulnerability: gender, age, diversity, health • General observations of population • Length of time of detention: longest time, average time 	
Type/characteristics of detention facility <ul style="list-style-type: none"> • Criminal, military administrative or ad hoc (operating without clear legal or policy mandate) • High-security, secure, semi-secure, non-secure, mixed regime • Location of facility (proximity to urban areas, services) 	
Detention staff	
<ul style="list-style-type: none"> • Number of staff by categories, responsibilities, ratio to detainees, gender, languages spoken • Military, police or civilian staff • Government or contracted/private administrator • Relationship between staff and detainees, management and detainees • Training of staff 	
Treatment	
<ul style="list-style-type: none"> • Allegations of torture and ill-treatment • Use of force or other means of restraint • Use of solitary confinement • Transport of detainees • Culture of dignity and respect 	
Disciplinary procedure and sanctions <ul style="list-style-type: none"> • Procedures for disciplinary actions against detainees • Sanctions for rule violations and statistics of use • Composition of disciplinary authority – who determines whether a detainee has violated a rule? • Possibilities of appeal • Description of any disciplinary cells, duration of disciplinary confinement, circumstances of use 	
Protection measures	
<ul style="list-style-type: none"> • Information provided to detainees • Orientation and information provided to detainees upon arrival: Reason for detention, rights, responsibilities, how to access attorneys, interpreters, medical and other services • Language and format of information • Accessibility to internal rules and procedures of the detention facility 	
Access to protection mechanisms <ul style="list-style-type: none"> • Access to asylum and complementary protection procedure • Information provided regarding right to asylum and procedures (language, format) • Access to legal representation, conditions, privacy, frequency of visits • Access to UNHCR and NGOs, conditions, privacy, frequency • Location of asylum interviews, conditions, privacy • Access to judicial or administrative review of detention • Best interests determination for children 	
Complaint, inspection and investigation procedures <ul style="list-style-type: none"> • Describe any complaint and inspection investigation and response procedures for the facility • Independence and accessibility of such procedures • Accessibility to and ease of identification of guards • Independent monitoring of detention facility 	

<p>Separation of detainees</p> <ul style="list-style-type: none"> • Separation of criminal detainees from administrative detainees • Separation according to gender, age • Family unity provisions 	
<p>Safety and control</p> <ul style="list-style-type: none"> • Surveillance • Fire safety • Procedures for incident and emergency management 	
<p>Conditions</p>	
<p>Capacity and occupancy of the detention facility</p> <ul style="list-style-type: none"> • Approved capacity of the facility • Number of actual detainees by nationality, age and gender 	
<p>Facility conditions</p> <ul style="list-style-type: none"> • Size and occupancy of cells or units where detainees sleep • Material conditions: lighting, ventilation, furniture, sanitary facilities, temperature, hygiene standard • Ability for detainees to adjust/direct lighting/temperature • Overall facility cleanliness and hygiene, responsibility for maintenance • Natural light • Security of detainee personal possessions 	
<p>Food</p> <ul style="list-style-type: none"> • Meals: quality, quantity, frequency, cost, diversity • Where food is supplemented by friends/family/others visiting, is food provided to those without external support adequate? • Special dietary regimes (for medical, cultural, religious, health reasons) • Access to food between set meal times • Availability of clean water 	
<p>Personal hygiene</p> <ul style="list-style-type: none"> • Showers: number/detainee, cleanliness, maintenance, access • Provision of basic hygiene supplies (including female hygiene needs) • Bedding: quality, cleanliness, frequency of change, climate appropriate • Access to laundry facilities • Access to culturally appropriate clothing, shoes 	
<p>Contact with the outside world</p> <ul style="list-style-type: none"> • Access to printed materials • Access to television • Access to means of communication (telephones, written correspondence and parcels, computers/internet): frequency, cost, number/detainee, incoming and outgoing 	
<p>Visitation</p> <ul style="list-style-type: none"> • Right to have or refuse all forms of visits • Informal visitors - access, frequency, conditions, duration, who can visit, description of visiting rooms, physical contact • Access to/protection from media • Formal visitors: consular, legal, UNHCR 	
<p>Detention regime</p>	
<p>Administration of Time</p> <ul style="list-style-type: none"> • Time spent inside unit or cells daily • Time spent/available for physical exercise • Time spent/available for working, voluntary or involuntary • Time spent/available for other recreation activities • Access to outdoor area, regularity, duration 	
<p>Services and activities available</p> <ul style="list-style-type: none"> • Work: Access, type, remuneration • Education: Access, type, conditions, language • Recreation: Access, type, location, duration (indoor/outdoor) • Psychosocial support: Access, type (including individual counselling, group) • Religion: Access to religious representatives and services, conditions, frequency 	
<p>Health care</p>	
<p>Access to medical care</p> <ul style="list-style-type: none"> • Medical examination upon entry to facility: Who conducts, what is covered, gender sensitive • Availability of, access to and procedures for medical care throughout detention • Number, training, qualification and independence of medical and psychological staff • Medical centre: number of beds, equipment, medication, personnel • Mental health: Access to counsellors/psychologists/psychiatrists and description of services • Provision of specialty care for those with particular needs: torture survivors, children, women, elderly, ill etc 	