



# International Detention Coalition

Human rights for detained refugees,  
asylum seekers and migrants

## International Detention Coalition (IDC) Immigration Detention Submission to the Special Rapporteur on the Human Rights of Migrants

February 3, 2012

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The International Detention Coalition (IDC) is a coalition of over 250 non-governmental groups and individuals working in over 50 countries. Coalition members provide legal, social and other services, undertake research and reporting as well as advocacy and policy work on behalf of refugees, asylum seekers and migrants. The IDC advocates for greater respect for the human rights of detainees; this includes limiting the use of, seeking alternatives to, and using the least restrictive forms of immigration detention.

The IDC actively maintains a website to share new information and resources with its members and other interested stakeholders – [www.idcoalition.org](http://www.idcoalition.org) .

## 1. Background

States worldwide are increasingly using various forms of detention as a one-size fits all approach to migration management in an attempt to address irregular migration. When detaining arriving refugees, asylum seekers and migrants, states give little consideration to specific vulnerabilities such as age, gender, medical conditions and protection needs.

Detention can last for months or, in some cases, years, during which time men, women, boys and girls are deprived of their liberty, often in overcrowded and unhygienic conditions that do not meet international standards. In some cases detention is arbitrary, with little or no independent oversight of detention conditions or reasons for detention. Many migrants are denied access to bail hearings, judicial review or a right to challenge their detention.

Irregular migrants, refugees and asylum seekers are being detained in some or more of the following ways:

- In removal centres, immigration detention facilities, prisons, police stations, airports, hotels, in ships and shipping containers, as well as in closed camps
- On arrival in a country, pending a final immigration decision, or while awaiting removal from the country.

Many human rights violations can and do occur in these circumstances. The physical and psychological consequences that occur as a result, including the re-victimization of those that have had traumatic experiences in their country of origin, on their journey or in the destination country, are well documented. The negative impact of even short-term detention on the mental health of individuals is now well documented, particularly for children.

Women and minors, particularly unaccompanied minors, are especially vulnerable to violence and abuse in detention.

Refugees and asylum-seekers are being denied access to the asylum and protection procedures to which international law entitles them.

Stateless persons and others without documentation who are unable to be removed from the country may face indefinite detention. Non-criminal migrants are being mixed with criminal inmates, genders mixed in shared detention quarters, and children mixed with unrelated adults.

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

## 2. Human rights legal standards relating to the detention of refugees, asylum seekers and migrants

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 procedures as are established by law.

*Article 9(1) International Covenant on Civil and Political Rights*

Under international law all individuals have the right to the freedom of liberty. This freedom is a fundamental human right and, as such, all States have a duty to protect it. The Human Rights committee has emphasized that this customary norm of international law is “applicable to all deprivations of liberty...[including] immigration control”. Immigrants, refugees and asylum seekers are particularly vulnerable to deprivations of liberty; therefore, States must seek to ensure that their domestic law does not infringe on the right to liberty by allowing for arbitrary arrest or detention.

In considering comprehensive, integrated and balanced responses to the issue of migration-related detention, we would like to outline a number of international and regional human rights standards that States should consider before making a decision to detain a person for migration-related purposes:

- As a general rule, certain classes of individuals should not be placed in migration-related detention, even if they lack proper documentation or are irregular migrants, including:
  - o Refugees and asylum seekers
  - o Children
  - o Pregnant women and nursing mothers
  - o Survivors of torture or trauma
  - o Victims of human trafficking
  - o The elderly and disabled
  - o Those in need of urgent physical or mental health care, including victims of violence suffered in transit.<sup>1</sup>

Refugees and asylum seekers should not be detained or penalized because they were compelled to enter a country irregularly or without proper documentation and must have the opportunity to seek asylum in a fair and effective asylum procedure. Doing so will bring a State into conflict with international human rights and refugee laws.<sup>2</sup>

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<sup>1</sup> 1951 Geneva Convention Relating to the Status of Refugees, art. 31(1); Convention on the Rights of the Child, articles 3(1), 22(1), 37(c)(1990); OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1 (20 May 2002), Guideline 2, 6, Guideline 4, 5, Guideline 6, 1; UNHCR Revised Guidelines on Applicable Standards Relating to the Detention of Asylum Seekers, §§ 6, 7, 8, 9, 22, 37, 7, 8, 10 (Feb. 1999); UN Standard Minimum Rules for the Treatment of Prisoners (1977), Rules 8, 53(1).

<sup>2</sup> 1951 Geneva Convention Relating to the Status of Refugees, art. 31(1); Convention on the Rights of the Child, articles 3(1), 22(1), 37(c)(1990); UNHCR ExCom Conclusion No. 97 (LIV-2003), (a)(vi); UNHCR ExCom Conclusion No. 85 (XLIX-1998) (ee); UNHCR ExCom Conclusion No. 55 (XL-1989) (g); UNHCR ExCom Conclusion No. 44 (XXXVII-1986) (a); UNHCR ExCom Conclusion No. 22 (XXXII-1981), 2; UNHCR Revised Guidelines on Applicable Standards Relating to the Detention of Asylum Seekers, § 1 (Feb. 1999).

Children should not be detained or separated from their caregivers for migration- related purposes. Their best interests, including their right to development, must be protected in accordance with the Convention on the Rights of the Child.<sup>3</sup>

For all classes of migrants, States should only use detention as a measure of last resort, after having considered whether there are less invasive means of achieving the same objectives, such as open centres, sureties, bail or reporting requirements.<sup>4</sup>

If used, detention must be necessary and proportionate to the objective of initial identity, security or health checks, or otherwise to prevent absconding or in compliance with an expulsion order.<sup>5</sup>

No one should be subject to indefinite detention. Indefinite detention is inhumane and contrary to international human rights law. 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.<sup>6</sup>

No one shall 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. All detainees must be advised of the reasons for their detention and 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.<sup>7</sup>

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<sup>3</sup> Convention on the Rights of the Child, articles 3(1), 9(1), 22(1), 37 (1990).

<sup>4</sup> 1951 Geneva Convention Relating to the Status of Refugees, art. 31(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family (1990), art. 39(1); UNHCR Revised Guidelines on Applicable Standards Relating to the Detention of Asylum Seekers, § 3 (Feb. 1999); UNHCR ExCom Conclusion No. 44 (XXXVII-1986); UNHCR Revised Guidelines on Applicable Standards Relating to the Detention of Asylum Seekers, § 3 (Feb. 1999); UNHCR ExCom Conclusion No. 44 (XXXVII-1986). The principle of proportionality supports the use of detention only as a measure of last resort. Under this principle, any measure taken by a government affecting 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 that objective; and, reasonable

<sup>5</sup> 1951 Geneva Convention Relating to the Status of Refugees, art. 31(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), art. 39(2); UNHCR Revised Guidelines on Applicable Standards Relating to the Detention of Asylum Seekers, § 3 (Feb. 1999); UNHCR ExCom Conclusion No. 44 (XXXVII-1986).

<sup>6</sup> UNHCR Revised Guidelines on Applicable Standards Relating to the Detention of Asylum Seekers, §§ 3, 9 (Feb. 1999); UNHCR ExCom Conclusion No. 85 (XLIX-1998); Working Group on Arbitrary Detention, Deliberation Number 5, E/CN.4/2000, 4, Annex II, 2000, Principle 7.

<sup>7</sup> International Covenant on Civil and Political Rights (1966), articles 2(3),9(1), 9(2), 9(4); Convention on the Rights of the Child, art. 37(b) (1990); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), articles 16(4), 16(5), 16((7), 16(8), 18(3)(d); UNHCR Revised Guidelines on Applicable Standards Relating to the Detention of Asylum Seekers, 1, §§ 3, 5, 9 (Feb. 1999); UNHCR ExCom Conclusion No. 44 (XXXVII-1986), § (e).; Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodriguez Pizarro, E/CN.4/2003/85, Recommendation 75.; Report of

Detention must ensure the human rights and dignity of the person and that conditions of detention comply with basic minimum human rights standards, including but not limited to access to legal counsel, healthcare, including in particular for pregnant and nursing women, provision of nutritious food, sanitary conditions, education for children, and other services.<sup>8</sup> Detainees should not be detained within penal facilities and made to wear prison uniforms and deprived of contact visits.<sup>9</sup>

Generally, different categories of detainees should be kept in separate facilities taking into account their gender, age and need for any special treatment.<sup>10</sup>

There must be regular independent monitoring of places of detention to ensure that these standards are met. States should consider ratifying the Optional Protocol to the Convention against Torture, which provides a strong legal basis for regular and

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Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, E/CN.4/2003/68, 26(g); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), Principles 4, 9, 11(1), 11(2), 13, 14, 32; Conclusions and Recommendations of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 85, 86; Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3/Add.3 (2004), Recommendations, 75; Report of the Working Group on Arbitrary Detention, Deliberation Number 5, E/CN.4/4, Annex 11, 2000, Principle 8; UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988), Principles 11(1), 14, 17(1), 18(1)

<sup>8</sup> International Covenant on Civil and Political Rights (1966), articles 7, 10(1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (1984), art. 16(1); Convention on the Rights of the Child, articles 3, 22(1), 37(1990); International Convention on the Protection of Human Rights of All Migrants and Their Families (1990), art. 17; UNHCR Revised Guidelines on Applicable Standards Relating to the Detention of Asylum Seekers, §§ 7, 8, 9, 10(Feb. 1999); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), Principles 1, 3, 6, 28.

<sup>9</sup> U.N. Comm'n on Human Rights, Working Group on Arbitrary Detention, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Regarding the Situation of Immigrants and Asylum Seekers*, Principle 9, U.N. Doc. E/CN.4/2000/4/Annex 2 (Dec. 28, 1999). Refugee Convention, *supra* note 32, art. 31. Though “penalties” is not a defined term, it clearly includes imprisonment. See Goodwin-Gill, *supra* note 32, ¶ 29. In addition, significant scholarship argues that the term “penalties” applies to situations outside the purely criminal context. UNHCR Division of Protective Services, *Alternatives to Detention of Asylum Seekers and Refugees*, Legal and Protection Policy Research Series, UNHCR, ¶ 15, POLAS/2006/03 (Apr. 2006) (citing Ryszard Cholewinski, *Enforced Destitution of Asylum Seekers in the United Kingdom*, 10(3) INT’L J. REFUGEE L. 462 (1998); Goodwin-Gill, *supra* note 32, at 185; Alice Edwards, *Tampering with Asylum: The Case of Australia*, 15(3) INT’L J. REFUGEE L. 192 (2003)). UNHCR Division of Protective Services has stated, “it is arguable that detaining asylum seekers or otherwise restricting their freedom of movement without appropriate justification, could amount to a penalty within the meaning of article 31.” *Id.* U.N. High Comm’r for Refugees, Executive Committee Conclusion on Detention of Refugees and Asylum Seekers No. 44, ¶ (f) (1986). UNHCR Detention Guidelines, *supra* note 29, Guideline 10(iii) (noting that in relation to article 31(2) “the use of prisons should be avoided”).

<sup>10</sup> UN Standard Minimum Rules for the Treatment of Prisoners, Rule 8 (1977); UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, § 8 (Feb. 1999)

independent monitoring of places of detention by both national bodies and an international sub-committee.<sup>11</sup>

In conclusion, we encourage all States to consider and implement legislation and policy that ensures the above international human right standards are maintained and upheld.

See Appendix 3 and 4 for more details on international legal human rights standards relating to the detention of refugees, asylum seekers and migrants.

### 3. International trends

The IDC through its international work on immigration detention has observed two parallel processes occurring globally in relation to the detention of refugees, asylum seekers and migrants. One is the dramatic increase in the use of immigration detention as a first resort internationally over the past 10-15 years by states as a migration management tool, and secondly a shift against this in a number of countries over the past 5 years where detention reform has occurred and there has been a move to target the use of detention as more of a last resort.

The IDC has received reports from across the globe over the past year on the growing use of harmful and unnecessary detention as a migration management tool by governments, putting vulnerable refugees and asylum seekers and irregular migrants at risk.

The IDC remains concerned that governments are cooperating bilaterally and multilaterally in detention initiatives that attempt to restrict migration flows without considering alternatives. Industrialized countries continue to fund, pressure and provide incentives to neighbouring countries to detain asylum seekers. In some places people seeking protection have not been given access to UNHCR and have been returned to countries that are not signatories to the UN Refugee Convention, placing refugees at risk of being returned to danger. These trends are apparent in regions across the globe.

Industrialised countries, such as the US, EU member states and Australia continue to fund, pressure or promote immigration detention in neighbouring countries, including non-signatories to the Refugee Convention or other human rights treaties, placing refugees at risk of refoulement and human rights abuses.

The expansion and diversification of global migration flows are hitting transit countries harder, exposing xenophobic tendencies and prioritizing national security concerns over development and human security. The IDC has identified a common government concern in countries that include a mix of destination and transit migration, or are

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<sup>11</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), art. 11; Optional Protocol to the UN Convention Against Torture (2006), art. 1; UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988) Principle 29, art. 1. See also: Amnesty International: Migration-related detention: A Research Guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees, November 2007; UNHCR Selected Documents Relating To Detention, Division of International Protection Services, February, 2009.

principally mixed migration “transit” corridors to a more industrialized “destination” country. Governments are concerned that irregular migrants who are not in their preferred destination cannot be relied on to remain in the country while a decision is being made on their case.

Immigration detention remains far less regulated, reviewed and monitored than criminal or other forms of detention, and many countries have used a one-size fits all immigration detention model, where undocumented migrants are detained regardless of individual circumstances, age, protection needs or vulnerabilities.

In Asia, Africa, the Middle East and the Americas, undocumented migrants, including their dependent spouses and children, may face criminal charges, detention and deportation, without access to judicial recourse or ensuring their salaries are recovered. Detention is often for prolonged periods in conditions below basic international standards placing individuals at risk of human rights abuses.’

In the Americas and Africa, refugees travelling on dangerous journeys to seek protection are being detained in appalling conditions where their basic human rights are often denied. In Asia and the Middle East, detained refugees and asylum seekers risk being ‘refouled’ or sent back to danger, as many countries have not signed the Refugee Convention and do not recognize refugees.

Undocumented migrants globally are often isolated and neglected in the community, and subject to policies such as criminalization, arrest, detention and deportation, that cause unnecessary suffering and family separation.

The impact of that has been felt significantly across all regions. There has been growing litigation on wrongful, unlawful, arbitrary and negligent detention, heightened risk of human rights abuses, increased criticism to states on their detention practices, and also growing evidence and recognition of the impact of detention on mental health and on children.

As a response, a number of countries have undertaken detention reform, including legislative and policy change to limit and put safeguards on the use of immigration detention, to introduce alternatives or to and to avoid or not detain certain vulnerable groups, such as children.

While many States continue to view irregular migration through a national security framework, we have seen however a number of States use a human security approach, effectively managing, supporting and protecting irregular migrants outside of immigration detention. This includes mechanisms such as the use of individual screening and assessment, community reception models, regularization and various alternatives, such as provisional release, reporting and case management. In addition, an increasing number of States are ensuring that vulnerable groups such as children, women at risk, the elderly, the ill, refugees, trafficking victims, are not detained.

For example, New Zealand and Sweden have legislation, which ensures a presumption against detention, detention only as last resort and a requirement to ensure community alternatives and legal options to remain, before the use of detention. Argentina has strong legal safeguards against detention and has successfully regularized irregular migrants. In countries like Japan and Belgium, we are seeing the release of children and

families from detention. Australia recently announced it will begin the release of asylum seekers from immigration detention following initial screening, which despite the delays in processing, has come from almost 20 years of damage done to extremely vulnerable people.

These examples and mechanisms have been found to be effective, cheaper and more humane than unnecessary and damaging immigration detention, and we call upon states to explore and implement these alternatives as a matter of priority. This is detailed in section 4 of this report.

Many of these examples were highlighted in the Global ATD Roundtable in Geneva last month, including the findings of our research. See Appendix 7.

In addition, alternatives to detention are increasingly on the UN agenda. There have been sessions in the UNHCR Executive Committee and the UN Human Rights Council, reports from various special procedures and meetings of UNHCR and OHCHR. See details in Appendix 8.

## Regional developments

Following the IDC regional consultations with more than 260 NGOs, academics and civil society groups in 62 countries, we found the following:

### Asia Pacific:

The detention of refugees, asylum seekers and migrants is a growing concern in the Asia Pacific region. Many countries in the region have not signed the 1951 Refugee Convention, leaving refugees and asylum seekers vulnerable to refoulement. Irregular migrants are at risk of abuse of their rights and have little voice in advocating for their own rights.

Common areas of concern in the Asia Pacific region:

- **Forms:** Criminalization, arbitrary, penal and punitive detention
- **Safeguards:** Lack of detention standards and transparency, access to asylum and places of detention, monitoring of places of detention, legal provision and judicial review. Lack of release options, alternatives to detention and community reception models
- **Vulnerable groups:** Impact of detention on vulnerable populations, such as children (including unaccompanied minors), pregnant women, health conditions, elderly, refugees, asylum seekers and UNHCR registered individuals
- **Conditions and treatment:** Poor conditions and treatment, abuse, neglect, insecurity, refoulement, deportation of ill detainees, separation of children and families, isolation, cultural insensitivity and lack of freedom, respect and privacy, deterioration of physical and mental health and lack of health, welfare and psychosocial services and supports

### Middle East and North Africa

In 2011 the IDC held the first ever workshop on immigration detention for NGOs from across the Middle East and North Africa. The workshop was held in Beirut and attended by 35 participants representing 9 countries. Representatives from UNHCR, UNICEF,



and ICRC in Lebanon were among those in attendance.

Detainees are held in immigration detention facilities, prisons and police cells across the Middle East and North Africa, with varying access to legal assistance, UNHCR, embassies, health care, family and community. Whilst challenges between countries vary, the following are key issues across the region:

- Criminalisation of migration/irregular migration
- Detention of asylum seekers, refugees, migrant workers, trafficked persons, children, stateless persons
- Lack of access to legal advice, asylum procedures and other protection mechanisms for those in detention
- Lack of screening of detention population
- Poor physical conditions of detention – including overcrowding, lack of adequate health, sanitation and hygiene facilities
- Refoulement and forced return from detention
- Lack of access to detention facilities and lack of independent monitoring

### **East and Southern Africa**

In July 2011 the IDC held a workshop on immigration detention for IDC members and key stakeholders from across East and Southern Africa. Key issues emerging in relation to immigration detention across the region:

- Lack of knowledge of procedural safeguards by detention authorities
- Lack of knowledge of legal rights by detainees
- Lack of differentiation of prisoners and immigrant detainees.
- Detention of children – age identification problematic and ad hoc
- Criminalization of irregular migrants
- Treatment and conditions in places of detention
- Use of prisons and police stations as places of detention
- Lack of psychosocial support
- Lack of access to consistent legal aid to immigration detainees
- Lack of long-term prospects, right to move and work
- Lack of release mechanisms and community-based support models
- Lack of information and programs to support voluntary return

### **Europe**

The IDC is very concerned by trends in Europe as they relate to immigration detention. Some concerns are regional, others are specific to a particular sub-region or country within Europe.

Concerns arising out of Europe include:

- Shrinking asylum space
- Only limited examples of ATD being used with some governments unhappy about outcomes of ATD in practice.
- Conditions of detention in countries both within and outside of the European Union, including the Ukraine, Greece, Bulgaria, Russia
- Length of time in detention, policy has changed in a number of European countries to increase time limits for detention

- Detention of children, vulnerable groups, asylum seekers, minors including UAMs, families
- Tougher border control at the edges of Europe
- Readmission agreements, Dublin
- Externalisation of detention and immigration control- payment by the EU to non-EU countries to build new detention centres, aid in further tightening borders into the EU

### **Americas**

The regional consultations in the Americas found both practices of great concern and also probably some of the best legislation and policy of immigration detention globally. For example both Venezuela and Argentina for example have immigration laws, which avoid and limit the use of immigration detention, and ensure it can only be used as last resort.

Shared issues of concern across the region were:

- Lack of implementation of existing legal and policy requirements
- Access to asylum, places of detention and official statistics
- Criminalization of irregular migrant
- Punitive and discriminatory use of detention, including of Haitians
- Use of prisons and immigration detention centres in conditions at standards lower than international standards.

### **Immigration detention of asylum seeker, refugee and migrant children, their families and unaccompanied or separated minors**

The campaign to end the immigration detention of children is coordinated by the International Detention Coalition (IDC) and will be launched in the week of the 21st of March this year at the Human Rights Council in Geneva. At the event the IDC will invite various specialists to speak on the issue and present a policy paper that outlines a new model for preventing the immigration detention of children.

Every day, all around the world, tens of thousands of children and young people are affected by immigration detention. Whether detained themselves or impacted by the detention of their guardians, children and young people are particularly vulnerable to abuse and neglect. Because they are minors, often they are unable to advocate for their fundamental human rights.

Human rights standards, including the UNHCR's 1999 Revised Guidelines on the Detention of Asylum Seekers, state children who are asylum seekers 'should not be detained.' The Convention on the Rights of the Child outlines a range of protective measures for children and states that children should be detained only as a last resort.

The general prohibition on the detention of children recognises that detention can have significant negative impacts on their health and well-being. Studies have shown that the detention of children undermines their cognitive, emotional and physical development. These findings detail that detained children suffer anxiety, distress, bed-wetting, suicidal ideation and self-destructive behaviour including attempted and actual self-harm. Other children suffered from specific psychiatric illnesses such as depression and Post

Traumatic Stress Disorder.

**Three levels of vulnerability** Children who are at risk of immigration detention are vulnerable at three levels: as migrants, as people without documentation and as children.

**The principle** Prior to being undocumented migrants, children are children. Central to upholding the rights as undocumented child migrants, states must recognise them primarily as children and act with their 'best interests' being a 'primary consideration.'

### **Three recommendations to governments**

- ⇒ States should not detain refugee and migrant children. Rather, states should provide such children with access to **safe and secure accommodation** appropriate to their age, gender, cultural background, and family situation, pending a resolution of their migration status.
- ⇒ States should provide migrant and refugee children with access to **protection determination processes** that are child and gender-sensitive and consider the best interest of the child. Children found to be in need of international protection should benefit from this and be granted the relevant rights attached to such protection.
- ⇒ States should provide asylum seeker and refugee children with **educational and training opportunities** appropriate to their age, experiences and the period of time in which they will remain within a state's territory.

IDC will continue to engage with governments on this issue, pilot alternatives to child detention with its members in 50 countries and start public campaign work on this issue.

#### **4. IDC Research findings:**

The IDC has undertaken research together with La Trobe University<sup>12</sup> over the past 3 years and found the following issues:

- a. **Impact of detention:** Detention has been shown to harm health and wellbeing. The third major concern is that the potential impact of detention on the health of those detained is so severe that its use as a message of deterrence and control cannot be justified. Research has demonstrated that being in detention is associated with poor mental health including high levels of depression, anxiety and post-traumatic stress disorder (PTSD) and that mental health deteriorates the longer someone is detained.

One study found clinically significant symptoms of depression were present in 86% of detainees, anxiety in 77%, and PTSD in 50%, with approximately one quarter reporting suicidal thoughts. The impact on children is particularly

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<sup>12</sup> R. Sampson, G. Mitchell, L Bowring, There are alternatives: A handbook on the prevention of unnecessary immigration detention. Immigration Detention Coalition and La Trobe University, 2011. Please see research document for full references on findings at: [www.idcoalition.org/handbook](http://www.idcoalition.org/handbook)

disturbing, especially as the consequences for their cognitive and emotional development may be lifelong. For adults, it has been found that the debilitating impacts of detention extend well beyond the period of confinement, especially for those detained for prolonged periods. Searching for alternatives that do not rely on confinement is all the more important in light of the evidence of the harm that it can produce.

It was noted that the special needs and protection concerns of vulnerable groups of migrants (including children, women, families and migrants with mental health issues) are often not met. In many national contexts little distinction is made as to their different legal statuses under national as well as international law, and with decreasing attention to specific vulnerabilities of age, gender and circumstance.

- b. Deterrence:** Existing evidence and government statements suggest a policy of detention is not effective in deterring asylum seekers, refugees and irregular migrants. Despite increasingly tough detention policies being introduced over the past 20 years, the number of irregular arrivals has not reduced. Several studies have been undertaken to establish which factors most impact the choice of destination of asylum seekers and irregular migrants. According to this research, the principal aim of asylum seekers and refugees is to reach a place of safety.

Asylum seekers have very limited understanding of the migration policies of destination countries before arrival and are often reliant on people smugglers to choose their destination. Those who are aware of the prospect of detention before arrival believe it is an unavoidable part of the journey, that they will still be treated humanely despite being detained, and that it is a legitimate right of states if undertaken for identity and health checks. Rather than being influenced primarily by immigration policies such as detention, most refugees choose destinations where they will be reunited with family or friends; where they believe they will be in a safe, tolerant and democratic society; where there are historical links between their country and the destination country; or where they can already speak the language of the destination country.

One study also found that the majority of refugees who had experienced detention did not pass on a message of deterrence to people overseas as the relief of escaping persecution and reaching a place of safety overrode the trauma and sense of rejection they had experienced as a result of detention.

This evidence shows detention has little impact on destination choices.

- c. Alternatives to immigration detention (ATD) and good practices:** According to standards agreed to by governments in international and regional human rights instruments, immigration detention should only be used as a measure of last resort, only where necessary and always in proportion to the objective. Therefore, where a government intends to detain a person for immigration related reasons, it should first consider and pursue alternatives to detention that ensure the protection of the rights, dignity and wellbeing of individuals.

Recent and unprecedented research undertaken by the IDC found that there are cost-effective and reliable alternatives to prevent unnecessary immigration detention, currently used in a variety of settings that are beneficial to government,

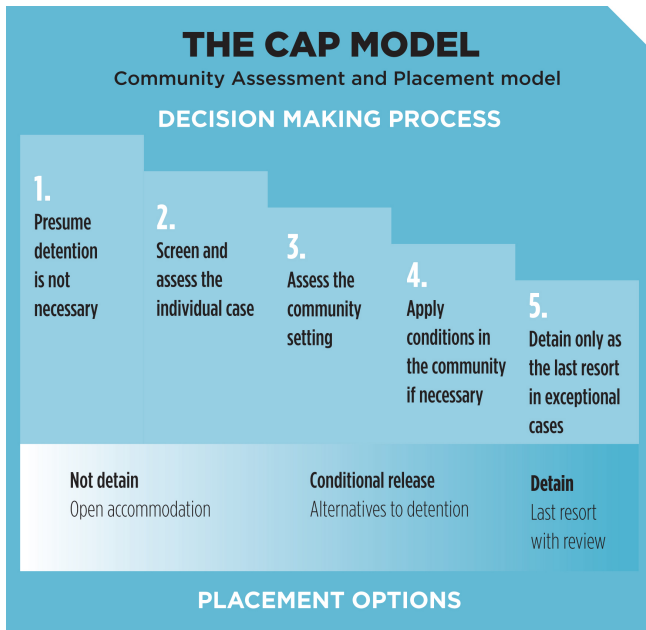
the community and the individual. The IDC has been successful in increasing international interest in the use of alternatives, which have been shown to improve health and wellbeing of individuals, improve respect for and protection of human rights of migrant populations by allowing them freedom of movement and access to other basic rights.

This research was undertaken to address this gap. The aim was to identify and describe any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country. This was achieved through an extensive review of existing literature; an international online survey of 88 participants in 28 countries; and international field work in nine countries including in-depth interviews with 57 participants and eight site visits. Participants included representatives of governments, non-governmental organisations, international human rights organisations and key agencies from the United Nations.

The research has identified a range of mechanisms currently in use that can assist in preventing unnecessary detention by ensuring detention is only applied as the last resort in exceptional cases. In particular, the research found that the most significant policies for preventing unnecessary detention lie in the process of determining who should be detained and the reasons for their detention, rather than in traditional conceptions of 'alternative to detention' programs. In addition, those countries that only used detention in a small number of cases or for short periods of time did not see themselves as making use of 'alternative to detention' programs. Instead, their normal way of operating involved managing most irregular migrants and asylum seekers in a community setting.

The research also identified common characteristics of successful community management programs and, where able, established the reasons why these factors contributed to compliance, cost and health and wellbeing outcomes. Such 'alternative to detention' programs rely on a range of strategies to keep individuals engaged in immigration procedures while living in the community. Although such programs sometimes make use of residential facilities as part of a management system, the location of the individual is not of primary concern. Instead, the focus is on assessing each case and ensuring that the community setting contains the necessary structures and conditions that will best enable the individual to work towards a resolution of their migration status with authorities.

By taking a strengths-based approach to this area of policy, the research has been able to identify and incorporate positive examples from a range of countries into one framework. The Community Assessment and Placement model (CAP model) identifies five steps that prevent and reduce the likelihood of unnecessary detention. These steps are: 1. Presume detention is not necessary. 2. Screen and assess the individual case. 3. Assess the community setting. 4. Apply conditions in the community if necessary. 5. Detain only as the last resort in exceptional cases.



The CAP model has been designed as a non-prescriptive framework to assist governments in their exploration and development of preventative mechanisms and alternatives to detention. Although designed in this way, these five mechanisms are also steps that could be taken in individual cases to assess the need for detention and to ensure detention is only applied as a last resort in exceptional cases.

Throughout the report, examples of current practice are provided to assist in understanding how such a process can be implemented in a range of settings. For example:

1. Argentina operates with a presumption against detention.
2. New Zealand has established alternatives to detention in law.
3. Hong Kong has developed criteria to assess the need to detain with release on 'own recognisance' and basic needs met for eligible groups.
4. Indonesia has established a mechanism by which irregular migrants holding UNHCR documentation may live in the community.
5. The United Kingdom has increased investment in early legal advice because it results in quicker and more durable decisions, saving money overall.
6. Belgium has expanded its return counselling program for families because compliance rates remained high and children were no longer detained.

The research identified a range of benefits associated with the prevention of unnecessary detention and in the use of alternative to detention programs, including that they:

- Cost less than detention
- Maintain high rates of compliance and appearance • Increase voluntary return and independent departure rates
- Reduce wrongful detention and litigation
- Reduce overcrowding and long-term detention
- Respect, protect and fulfill human rights
- Improve integration outcomes for approved cases • Improve client health and welfare

The handbook is designed to expand current policy debates beyond the traditional interpretation of an 'alternative to detention' by looking more broadly at mechanisms that prevent and reduce unnecessary detention. Policy makers and other stakeholders will be able to use this handbook when assessing current practice in their own countries by providing a conceptual framework for discussion of systemic issues and by describing a range of concrete examples for exploring possibilities for practice and implementation.

Despite its focus on national systems, the handbook is also a resource for stimulating debate in regional and international forums by establishing a shared understanding of key concepts and presenting a range of examples for consideration.

Dealing with irregular migration is an everyday issue of governance. As the handbook shows, with effective laws and policies, clear systems and good implementation, managing asylum seekers, refugees and irregular migrants can be achieved in the community in most instances.

By learning to screen and assess the case of each individual subject to or at risk of detention and introduce appropriate supports and conditions in the community as needed, authorities can learn to manage people in the community in the majority of cases without the financial and human cost that detention incurs. The research shows that cost-effective and reliable alternatives to detention are currently used in a variety of settings and have been found to benefit a range of stakeholders affected by this area of policy.

See more details in Appendixes 4 and 6.

## **5. Conclusion**

The IDC warmly welcomes the thematic report on immigration detention by the Special Rapporteur on the human rights of migrants, which comes at both a critical and opportune time when a number of states are reviewing their immigration detention laws, policies and practices.

Around the world, vulnerable refugees, asylum seekers and migrants are being unnecessarily detained and damaged around the world, despite the fact that there are effective and practical alternatives which work in the interest of government, the community and individual.

The IDC calls on governments around the world to stop the use of detention as a migration management tool; to adhere to international human rights standards that prohibit arbitrary detention and require detention to be a last resort; and to pursue alternatives to detention.

There must be a presumption against the use of immigration detention, with alternatives used in the first instance. Priority must be given to exploring, developing and implementing alternatives to immigration detention at national levels.

States must work to ensure the rights of irregular migrants and the unity of the family are upheld. Regularization and alternatives to detention must be essential components of all migration policies. We note that under international human rights law all migrants, irrespective of immigration status, have the same rights as others in the community. The lack of status does not strip a migrant of their rights, or a state of their basic

With immigrants, asylum seekers or refugees being detained under either criminal or administrative law, states should not be permitted to criminalize the actions of these vulnerable people, and to subject them to punitive measures such as imprisonment for immigration violations. Moreover, if individuals are subject to administrative detention (the objective of which is to guarantee that another measure, such as deportation or expulsion, can be implemented) then States must ensure procedural guarantees are upheld.

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 and not be refouled if found to be refugees and until their status has been determined.

States must ensure independent monitoring of places of detention. Encourage states to sign and ratify OpCAT and develop National Preventive Mechanisms who could be responsible for monitoring.

States must work to improve conditions of detention and access to protection mechanisms and protection actors, such as UNHCR and legal representation, in accordance with international standards.

In addition, with the growing regionalization of immigration detention, regional and national dialogue on alternatives to detention and improving conditions and protection of those in detention is urgently needed. Irregular migration and government concerns related to border protection, security and people smuggling cannot be resolved through criminalization and detention. These are complex issues that must be tackled through international, regional and national cooperation, ensuring the human rights and protection of migrants.'

There is a need for enhanced coordination across UN agencies on immigration



detention, and further consultation and collaboration with civil society groups on research, advocacy, education and service provision to detainees, such as legal advice and social and health services. Given the lack of one UN body with an overarching mandate on immigration detention, no international instrument on detention standards specifically for refugees, asylum seekers and migrants and the growing use of immigration detention worldwide, both the UN and civil society must remain vigilant, proactive and work collaboratively to ensure governments uphold international human rights standards for those in immigration detention.

In particular, the lack of international guidance to states on appropriate conditions for people deprived of their liberty for migration-related purposes leaves individuals exposed to arbitrary and ad hoc treatment. Greater work is needed from UN agencies, including the Special Rapporteur on the human rights of migrants, in providing more specificity on what kind of conditions are not permitted and not appropriate for administrative immigration detainees. This would be helpful in improving facilities globally and countering the trend towards criminalization of migration broadly.

Lastly, we commend the growing international examples of good practice around the world outlined in our research, where States have:

- Introduced legislation to not detain refugees, asylum seekers and irregular migrants in the first instance, including children, and other vulnerable groups;
- Introduced independent, regular monitoring of places of detention; and
- Developed community-based alternatives to detention models, such as public-private partnerships with NGOs that provide specialized assistance, information, legal provision and counseling for refugees, asylum seekers, children, families and victims of torture, human trafficking and trauma, including supports for rehabilitation, return and reintegration.

These models have in many instances led to high levels of compliance by individuals with immigration requirements, with the majority of individuals maintaining contact with the authorities and departing the country if refused the right to remain. They are also vastly cheaper than traditional detention and removal processes. These models have met government expectations, while ensuring the rights, dignity and wellbeing of refugees, asylum seekers and migrants are maintained. They also provide a useful starting point for the exploration of comprehensive, integrated and balanced solutions to the detention of migrants.

The IDC looks forward to the release of the Special Rapporteur's report at the upcoming Human Rights Council session.

International Detention Coalition (IDC)  
February 2012



# International Detention Coalition

Human rights for detained refugees,  
asylum seekers and migrants

## **Appendix 1: DETENTION OF REFUGEES, ASYLUM SEEKERS & MIGRANTS Position of the International Detention Coalition<sup>1</sup>**

1. The detention of refugees, asylum seekers and migrants is inherently undesirable.
2. Vulnerable individuals - including children, pregnant women, nursing mothers, survivors of torture and trauma, trafficking victims, 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.

## Appendix 2

### **IDC Guide: Legal framework relating to the detention of refugees, asylum seekers and migrants**

*Detention of irregular migrants and refugees and asylum seekers can only be used as a last resort. The International Detention Coalition has developed a new legal resource for IDC members, stakeholders and governments working on immigration detention law, policy and practice. This guide outlines the legal framework and standards relating to the detention of refugees, asylum seekers and migrants. It is an annotated guide to identified relevant supporting international legal authority relating to the detention of refugees, asylum seekers and migrants.*

**Available at:** <http://idcoalition.org/idc-guide-to-the-legal-framework-and-standards-relating-to-the-detention-of-refugees-asylum-seekers-and-migrants/>

## Appendix 3

### **IDC Handbook: There are Alternatives**

*Governments around the world are increasingly using detention as a migration management tool, with refugees, asylum seekers and migrants detained for prolonged periods. However, there are humane and cost effective mechanisms that prevent unnecessary and damaging detention and that ensure detention is only ever used as a last resort. The IDC has identified good practices from around the world and compiled them in a handbook, while also introducing a new model: CAP, the Community Assessment and Placement model.*

**Available at:** <http://idcoalition.org/cap/handbook/>

## Appendix 4

### **IDC Immigration Detention Monitoring Checklist**

*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 detention monitoring – it is not intended to be prescriptive or exhaustive.*

**Available on page 58-60 at:** <http://idcoalition.org/cap/handbook/>

## Appendix 5: 10 things the IDC research found:

1. Detention does not deter irregular migrants The research found that detention is not an effective deterrent of asylum seekers and irregular migrants in either destination or transit contexts. Detention fails to impact on the choice of destination country and does not reduce numbers of irregular arrivals. Studies have shown asylum seekers and irregular migrants either are:

- Not aware of detention policy or its impact in the country of destination
- May see it as an inevitable part of the journey, and
- Do not convey the deterrence message to other back to those in country of origin.

2. Detention interferes with human rights Detention undermines an individual's right to liberty and places them at greater risk of arbitrary detention and human rights violations

3. Detention harms health and wellbeing Detention, even for short periods, harms health and wellbeing for all. The consequences for the cognitive and emotional development of children may be lifelong

4. Detention is counterproductive in achieving compliance with final decisions. On the contrary, asylum seekers and irregular migrants in the community comply and cooperate if they are able to meet their basic needs, have been through a fair and informed process and are supported to achieve sustainable long-term solutions while awaiting a decision on their case. Individuals awaiting a decision on their case are a low absconding risk, and in transit contexts individuals appear less likely to abscond, if they are not at risk of detention and refoulement, and remain hopeful on future prospects.

5. There are alternatives to detention: Cost-effective, humane and reliable alternatives to detention are currently used around the world and have been found to benefit government, the community and the individual.

6. Alternatives cost less than detention A cost saving of 93% was noted in Canada and 69% in Australia on alternatives to detention compared to detention costs. In addition independent returns in the EU and Australia save approximately 70% compared to escorted removals.

7. Alternatives maintain high rates of compliance and appearance A recent study collating evidence from 13 programs found compliance rates ranged between 80% and 99.9%. For instance, Hong Kong achieves a 97% compliance rate with asylum seekers or torture claimants in the community, and in Belgium, a pilot working with families facing removal had an 82% compliance rate.

8. Alternatives increase independent departure and voluntary return rates for refused cases Examples in Canada, Australia and the US of both refused asylum seekers and irregular migrants had return rates of between 60% and 69%, while Sweden reported an 82% rate of return from the community among refused asylum seekers.

9. Alternatives reduce wrongful, unnecessary and long-term detention Wrongful detention has led to litigation, costly compensation and public criticism in a range of countries including Australia, South Africa and the UK. For instance, court rulings in Hong Kong required the government to demonstrate the reasons for detention, leading to a number

of policy changes including the introduction of individual case assessment.

10. Alternatives improve client health and well being, integration outcomes and respect human rights obligations. Appropriate management in the community has been found to be more likely to uphold human rights and support well being, improving ability to contribute fully to society if residency is secured or to face difficult futures such as return.

## **Appendix 6**

### **Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons**

*Geneva, Switzerland, 11-12 May 2011*

On 11 and 12 May 2011, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Office of the High Commissioner for Human Rights (OHCHR) organized the first Global Roundtable on Alternatives to Detention (ATD) of Asylum-Seekers, Refugees, Migrants and Stateless Persons, in Geneva. Thirty eight participants from 19 countries took part, drawn from governments, international organizations, human rights mechanisms, national human rights institutions, national and international non-governmental organizations (NGOs) and academic experts. The discussion was informed by a number of research papers.<sup>1</sup>

#### **Summary Conclusions available at:**

<http://www.unhcr.org/refworld/docid/4e315b882.html>



# International Detention Coalition

Human rights for detained refugees,  
asylum seekers and migrants

## Appendix 7

### **The issue of immigration detention at the UN level: Recent developments relevant to the work of the International Detention Coalition (IDC) January 2011**

The International Detention Coalition (IDC) works to protect the rights of refugees, asylum seekers and migrants in immigration detention around the world. The IDC is a coalition of over 200 non-governmental groups and individuals working in over 50 countries. Coalition members provide legal, social and other services; undertake research and reporting as well as advocacy and policy work.

Countries around the world are increasingly using detention as a migration management tool in an attempt to address irregular migration. Refugees and asylum seekers in particular, are increasingly detained for long periods, in conditions below international standards, often with little or no access to asylum procedures and with no right to challenge their detention. Between January 2009 and mid-2010 immigration policies have been 'characterized by greater restrictions and fewer rights, with a clear trend towards introducing laws to deter and criminalize asylum-seekers who arrived irregularly or overstayed their visas.'

The IDC has been working at the international level, as well as regionally, to counter this trend through education, networking, advocacy, reporting and research, with a particular focus on preventing and limiting the use of, seeking alternatives to, and using the least restrictive forms of, immigration detention. This report aims to provide a brief on discussions and developments on immigration detention at the UN level.

Developments at the UN level over the last 18 months suggest there is growing international recognition among UN agencies of the issue of immigration detention, particularly the detention of children, and the importance of exploring and promoting alternatives to immigration detention. For example, the Global Migration Group, an interagency group comprised mainly of UN entities, adopted a statement this year calling for States to review the situation of migrants in irregular situations, as irregular migrants often face 'prolonged detention or ill-treatment.' The statement also recognised that children are at particular risk.

A list of recent UN meetings on immigration detention can be found in Appendix 1, and a full list of immigration detention references in UN statements and reports can be found at <http://www.idcoalition.org>

#### **International / UN level developments**

Whilst there is no UN body with a mandate dedicated to immigration detention, several UN bodies look at immigration detention within their wider mandates. This report will examine the recent work of the following bodies in regard to immigration detention:

1. The General Assembly

2. 2. The United Nations High Commissioner for Refugees (UNHCR)
3. 3. The Office of the High Commissioner for Human Rights (OHCHR)
4. 4. The Human Rights Council
5. 5. The Working Group on Arbitrary Detention
6. 6. The Special Rapporteur on the Human Rights of Migrants
7. 7. The Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

### **1. The General Assembly**

The General Assembly is the main policymaking and representative organ of the United Nations and comprises all 192 members of the United Nations. The General Assembly has recently recognised the serious problem of immigration detention in two resolutions. In resolution 63/184, adopted in 2009, the Assembly called upon States ‘to respect the human rights and the inherent dignity of migrants and to put an end to arbitrary arrest and detention.’ The Assembly called for periods of detention to be reviewed and alternatives to detention to be implemented. The assembly also noted with approval that some States have adopted measures to reduce the detention of irregular migrants. In 2010 the Assembly again adopted a resolution on the protection of migrants and repeated its calls for States to reduce the detention of undocumented migrants.

### **2. The United Nations High Commissioner for Refugees (UNHCR)**

The UNHCR was established in 1950 by the United Nations General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. The UNHCR’s Executive Committee (ExCom) meets in Geneva annually to review and approve the agency’s programs and budget, advise on international protection and discuss a wide range of other issues. ExCom’s Standing Committee meets several times each year to carry on the body’s work between plenary sessions. The UNHCR also holds annual consultations with NGOs.

The UNHCR defines detention as follows: ‘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.’

The UNHCR has been active on the issue of immigration detention for some time. However, recently the UNHCR has given increasing weight to the problem of immigration detention and particularly alternatives to the detention of refugees and asylum seekers. The issue of immigration detention featured significantly in the 2010 ExCom meetings for the first time and the work of the IDC was mentioned in ExCom’s 2010 Note on International Protection. The Note states that to ‘address unjustified detention, UNHCR advocates strongly for the use of effective alternatives to detention’ and refers to a study conducted by the IDC to illustrate the positive results of particular alternative policies. In 2008, 2009 and 2010 the IDC helped to run side meetings during the annual NGO consultations on the topics of ‘Detention monitoring and human rights mechanisms’ and ‘Alternatives to immigration detention.’ In addition, at the 2009 ExCom, UNHCR and the IDC held a side meeting on alternatives to detention, attended by 30 governments. At the side meeting Ms. Erika Feller, Assistant High Commissioner for Protection, noted that

although alternatives to detention have been discussed within the UNHCR for many years, the discussion has led to few concrete suggestions. She therefore announced that the issue of detention would be given priority over the next year.

The UNHCR does appear to have given priority to the issue of immigration detention during the last year. In April this year the UNHCR held its first regional roundtable on detention alternatives in East Asia. The UNHCR has also committed to further revising its 1999 Guidelines on the Detention of Asylum Seekers, and in early 2011, the UNHCR plans to launch a study on alternatives to the detention of asylum seekers. The UNHCR is also planning to hold a global 'Alternatives to Detention' roundtable. Hopefully the UNHCR will continue to build on this momentum and will use the revised guidelines and research to advocate more strongly for alternatives to detention to be implemented.

### **3. The Office of the High Commissioner for Human Rights (OHCHR)**

The OHCHR is a United Nations agency that works to promote and protect human rights. The office was established by the UN General Assembly in 1993. The office is headed by the High Commissioner for Human Rights, who co-ordinates human rights activities throughout the UN System and supervises the Human Rights Council. The current High Commissioner is South African lawyer Navanethem Pillay.

In September 2009, the UN High Commissioner remarked that the plight of 'migrants, and particularly migrants in an irregular situation, is one of today's most critical human rights challenges...Promoting a human rights-based approach to migration will be one of the priorities of my office for the next biennium.' The OHCHR appears to have identified migrants' rights, including immigration detention, as a priority area for 2010/11. The Strategic Management Plan for 2010-2011 notes that although there have been advances in promoting the human rights of migrants, serious concerns remain. 'Immigrants are often routinely detained, at times without proper judicial safeguards, and increasingly face violence, arbitrary detention and expulsion.' The office will therefore 'continue to advocate against the criminalization of irregular migrants and address concerns related to migration detention.'

OHCHR released a study this year on the rights of the child in the context of migration and the report contains a section on detention. The report emphasises the harm caused by detaining children and concludes that children should only ever be detained as a last resort. The report encourages the use of alternatives to detention and references the IDC's study on alternatives to the detention of children.

### **4. The UN Human Rights Council (replaced UN Commission on Human Rights in 2006)**

The Human Rights Council is an inter-governmental body made up of 47 States and is responsible for strengthening the promotion and protection of human rights around the world. Like the UNHCR and the OHCHR, the Council has recently been focusing more on the rights of migrants. The Universal Periodic Review (UPR) reviews the human rights records of all 192 UN Member States once every four years and is one of the main features of the Council. The process has 'underscored with increasing urgency concerns about human rights violations related to the detention of migrants, and of asylum-seekers.'

In September 2009, the Human Rights Council held a special panel discussion devoted to the human rights of migrants in detention centres. The council resolved to hold the panel discussion because 'international human rights mechanisms...have given



increasing attention to human rights concerns related to the recourse to detention of migrants and the duration and conditions of their detention.’ The panel discussion was therefore held against the background of an increasing number of concerns being voiced by international human rights mechanisms about the rising use of immigration detention.

The IDC drafted a joint statement on immigration detention signed by 147 groups from around the world, tabled at this meeting by Migration Forum in Asia, Migrant Rights International, Amnesty International and Network for Immigrant and Refugee Rights.

The council recognised the problem of immigration detention in two resolutions in 2010: one of arbitrary detention and the other on the human rights of migrants. For example, resolution 15/16 ‘calls upon all States to respect the human rights and the inherent dignity of migrants and to put an end to arbitrary arrest and detention and, where necessary, to review detention periods in order to avoid excessive detention of irregular migrants, and to adopt, where applicable, alternative measures to detention.’

### **5. Special Procedures**

The Human Rights Council has created a number of special enquiry mechanisms, known as Special Procedures, to address thematic issues and specific country situations. There are currently 31 thematic mandates. Those of most relevance to the issue of immigration detention are the Working Group on Arbitrary Detention, the Special Rapporteur on the human rights of migrants and the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

### **6. The Working Group on Arbitrary Detention**

The Working Group on Arbitrary Detention is a UN-mandated body of independent human rights experts that investigate cases of arbitrary arrest and detention. It was established in 1991 by the former Commission on Human Rights as one of the "Special Procedures" created to monitor human rights violations, and is currently under the purview of the Human Rights Council.

The Working Group on Arbitrary Detention has addressed the issue of immigration detention on several occasions. Notably, in 1999 the Group adopted Deliberation 5, in which it set out 10 principals concerning the situation of immigrants and asylum-seekers. The Group has reiterated over the last few years that immigration detention should be a last resort and that it is permissible only for the shortest periods of time. They urge that alternatives to detention should be sought whenever possible and oppose the criminalisation of irregular migrants.

All country mission reports contain a chapter on administrative immigration detention. In 1997 the Group’s mandate was extended to cover the issue of administrative custody of asylum-seekers and immigrants. Since then, its observations of practices within States have prompted it to examine in more and more depth the issue of immigration detention. The group’s annual reports covering the years 1998, 2003, 2005 and 2008 include in-depth analyses of the issue. The group’s reports from 2009 and 2010 contain sections on Detention of immigrants in irregular situations. In its annual report for 2007 the Group recommended to the Human Rights Council ‘an in-depth and urgent deliberation to seek effective alternatives to prevent violations of rights affecting the large numbers of asylum-seekers and irregular migrants in detention around the world.’ This helped prompt the

Human Rights Council to hold their panel discussion on the human rights of migrants in detention centres.

The Working Group welcomed the Human Rights Council's panel, in which its Chairperson-Rapporteur participated. However, it remains concerned that the human rights of detained migrants in an irregular situation and those of asylum-seekers and refugees are still not guaranteed. During its fifty-sixth session (November 2009), the Working Group decided to focus on the issue of alternatives to detention, both in criminal law and in the administrative detention context, as one of its main priorities in 2010. In relation to alternatives to detention, the Group has requested States and other stakeholders to provide it with information, including good practices that it could recommend to States to follow.

### **7. The Special Rapporteur on the Human Rights of Migrants**

The mandate of the Special Rapporteur on the Human Rights of Migrants was created in 1999 by the Commission on Human Rights. The mandate of the Special Rapporteur covers all countries. The Special Rapporteur has addressed the question of the administrative detention of migrants in several of its reports to the Human Rights Council. For example, the 2009 report, prepared by Special Rapporteur Jorge Bustamante, contains two sections on the rights of children which include discussions on immigration detention. The report recommends that 'detention of children should be a measure of last resort and should only be taken for the shortest period of time possible.' Additionally 'the deprivation of liberty of children in the context of migration should never have a punitive nature.' The Rapporteur has also addressed migration-related detention in a number of its communications to governments and in reports on country visits.

### **8. The Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment**

In 1985 the UNCHR created the position of Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, to examine questions relevant to torture. The Rapporteur has occasionally addressed the issue of immigration detention. A number of country reports contain information on immigration detention. For example, the preliminary report on the Rapporteur's mission to Greece contains a section on migrants and detention. The Rapporteur's interim report to Human Rights Council calls upon the General Assembly to take action to improve the situation of the 10 million prisoners and detainees worldwide by drafting and adopting a special United Nations convention on the rights of detainees. While this would presumably include those in immigration detention, the issue of immigration detention is not discussed in the report.

### **Conclusion**

The IDC welcomes the increasing recognition at the UN level of the growing criminalisation and detention of irregular migrants, the detrimental effect of immigration detention and the need for the exploration and development of alternatives to immigration detention, particularly children.

There has been some encouraging discussion of alternatives to immigration detention at an international level and some countries have established models that demonstrate alternatives can work well and cost less than detention. But detention continues to be

widely used as measure of first resort, without proper consideration of viable community-based mechanisms.

There is much more work to be done to build on these positive developments and ensure the rights, dignity and wellbeing of refugees, asylum seekers and migrants affected by immigration detention.

Identified gaps at the international level including the need for greater monitoring and reporting on places of immigration detention, including countries who have recently begun to implement immigration detention policies. With access to detention continuing to be limited or non-existent in many countries, increased advocacy is needed to encourage states to accede to the CAT and the OPCAT.

There is a need for enhanced coordination across UN agencies on immigration detention, and further consultation and collaboration with civil society groups on research, advocacy, education and service provision to detainees, such as legal advice and social and health services.

In addition, with the growing regionalization of immigration detention, regional and national dialogue on alternatives to detention and improved conditions and protection of those in detention is urgently needed. The IDC remains concerned that governments are cooperating bilaterally and multilaterally in detention initiatives in attempts to restrict migration flows without considering alternatives. Industrialized countries continue to fund, pressure and provide incentives to neighboring countries to detain asylum seekers. In some places people seeking protection have not been given access to UNHCR and have been returned to countries that are not signatories to the Refugee Convention, placing refugees at risk of being returned to danger. These trends are apparent in the Asia Pacific, Americas, European Union, Middle East and North African regions.

The recent East Asian Roundtable on Alternatives to Detention in Seoul provides a positive an example of recent regional discussions. Hosted by the South Korean government and UNHCR in April 2010, this forum explored housing refugees, asylum seekers and irregular migrants in the community while their migration status is being resolved, without resorting to detention. The IDC encourages governments in other regions to organize and participate in similar forums.

In conclusion, given the lack of one UN body with an overarching mandate on immigration detention, no international instrument on detention standards specifically for refugees, asylum seekers and migrants and the growing use of immigration detention worldwide, both the UN and civil society must remain vigilant, proactive and work collaboratively in working to ensure governments uphold international human rights standards for those in immigration detention.

Jo Hambling and Grant Mitchell  
December 10, 2010

**Appendix 1:**

<b>Recent UN level events relating to immigration detention</b>		
<b>Date</b>	<b>Name</b>	<b>Location</b>
29 June 2010	<b>UNHCR</b> Annual Consultations with NGOs Side Meeting: Alternatives to Immigration Detention	Geneva, Switzerland
26-27 April 2010	<b>UNHCR Intergovernmental sub-regional East Asian Roundtable on Alternatives to Detention</b>	Seoul, South Korea
30 Sep 2009	<b>UNHCR Executive Committee</b> Side meeting: Alternatives to Detention	Geneva, Switzerland
17 Sep 2009	<b>Human Rights Council</b> 12th Session Panel Discussion on human rights of migrants in detention centres	Geneva, Switzerland
1 July 2009	<b>UNHCR</b> Annual Consultations with NGOs Side meeting: Alternatives to Immigration Detention	Geneva, Switzerland
25 June 2008	<b>UNHCR</b> Annual Consultations with NGOs Thematic session: Detention monitoring and human rights mechanisms	Geneva, Switzerland

<b>References to the International Detention Coalition</b>		
<b>Date</b>	<b>Document</b>	<b>Reference</b>
4-8 October 2010	UNHCR Executive Committee of the High Commissioner's Programme (Sixty-first session)  <i>Note on international detention</i>  <a href="http://www.unhcr.org/refworld/pdfid/4caaeabe2.pdf">http://www.unhcr.org/refworld/pdfid/4caaeabe2.pdf</a>	<b>40.</b> To address unjust detention, UNHCR advocates strongly for use of effective alternatives to detention. A global survey of alternatives to detention in use in a number of States, conducted by the <i>International Detention Coalition</i> , concluded that the use of such alternatives, especially for vulnerable people and children, has shown positive results.
5 July 2010	Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration  <a href="http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.29_en.pdf">http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.29_en.pdf</a>	<b>54.</b> State authorities seeking to uphold the principle of family unit integrity in situations of irregular migration should seek to address the situation of parents and families in ways that

		<p>not contemplate detention of mig children. The principle be applied in s circumstances should “care” rather than punitive or disciplir approach, and adequ alternatives to detent such as commur based and casew oriented models, shc be contemplated in first instance.<sup>46</sup></p> <p>Footnote 46 For a st on alternatives to detention of children, <i>International Deten Coalition</i>, “Children Detention”. Avail: from <a href="http://idcoalition.org/wp-content/uploads/2008/children-in-detention.p">http://idcoalition.org/wp-content/uploads/2008/children-in-detention.p</a></p>
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