

ADMINISTRATIVE DETENTION OF MIGRANTS

I. Introduction¹

Migrants are particularly vulnerable to deprivation of liberty. On the one hand violations of immigration regulations are often criminalized and punished severely, in an attempt to discourage irregular migration². Undocumented and irregular migrants therefore become particularly vulnerable to criminal detention, which is punitive in nature, for such infractions as irregularly crossing the State border, using false documents, leaving their residence without authorization, irregular stay, breaching or overstaying their conditions of stay.

On the other hand, a great number of countries resort to administrative detention³ of irregular migrants in connection with violations of immigration laws and regulations, including staying after the permit has expired, non-possession of identification documents, using somebody else's travel documents, not leaving the country after the prescribed period of time has expired, etc. The objective of administrative detention is to guarantee that another measure, such as deportation or expulsion, can be implemented⁴. Sometimes administrative detention is also admitted on grounds of public security and public order, among others.

The purpose of this paper is to detail the legal framework with which deprivation of liberty of migrants must comply in particular for what concerns the fundamental principle of international law that no one should be subjected to arbitrary detention⁵. International human rights norms, principles and standards define the content of that principle. Such norms, principles and standards apply to all individuals, including migrants and asylum-seekers, and to both criminal and administrative proceedings.

¹ This paper heavily relies on report E/CN.4/2003/85 of the Special Rapporteur on Migrants.

² See E/CN.4/2005/85/Add.1, communications sent to the Government of Malaysia.

³ For the purposes of this paper, the term "detention" is generally used to indicate administrative deprivation of liberty. Detention is to be considered as confinement within a narrowly bounded or restricted location which the detainee cannot leave. Other restrictive measures such as limitations on residency do not fall within the scope of the present study.

⁴ See for example reports on the Special Rapporteur on the human rights of migrants on visits to Spain (E/CN.4/2004/76/Add.2) and Italy (E/CN.4/2005/85/Add.3).

⁵ See Views of the Human Rights Committee, *A. v. Australia*, communication No. 560/1993 (CCPR/C/59/D/560/1993). The deliberation of the Working Group on Arbitrary Detention on the "Situation regarding immigrants and asylum-seekers" (E/CN.4/2000/4, annex II, Deliberation No. 5) and the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers set the conditions under which detention of migrants can be carried out. Other international forums, such as the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in South Africa in 2001, have highlighted that detention of migrants shall respect international human rights standards (see Durban Programme of Action (A/CONF.189/12, chap. I), paragraph 36). See also article 5 (a) of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. Guarantees against arbitrary detention are also enshrined in regional human rights instruments; in particular, see article 7 of the American Convention on Human Rights and article 25 of the American Declaration on the Rights and Duties of Man, article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 6 of the African Charter on Human and Peoples' Rights.

The paper will then briefly describe the main concerns in the practical implementation of such legal framework and finally highlight conclusions and guidelines regarding detention of migrants. Unless otherwise specified, this analysis focuses on the administrative detention of migrants. Administrative detention is in fact in general less regulated by law and it is in this context that migrant are more vulnerable to arbitrary detention and other abuses.

II. Legal Framework⁶

II.1 Protection from Arbitrary Detention

Article 9 of the Universal Declaration of Human Rights establishes that “no one shall be subjected to arbitrary arrest or detention”. This universally recognized principle is also enshrined in article 9 of the International Covenant on Civil and Political Rights (ICCPR), which also sets that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”. In its General Comment No. 8, the Human Rights Committee states that these provisions are applicable to all deprivations of liberty by arrest or detention, including in cases of immigration control. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly 43/173 of 9 December 1988) reiterates that any form of detention or imprisonment shall be ordered by, or be subject to the effective control of a judicial or other authority. In addition, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority and a detained person shall be entitled at any time to take proceedings before a judicial or other authority to challenge the lawfulness of his/her detention⁷.

According to the Body of Principles, persons under any form of detention or imprisonment shall be informed at the time of arrest of the reason for the arrest, as well as of their rights and how to avail themselves of those rights in a language they understand. Also, detained persons should have the assistance, free of charge, of an interpreter in connection with legal proceedings subsequent to arrest. Further, a detained person is entitled to have the assistance of a legal counsel, to be informed of that right and to be provided with facilities for exercising it. Detained persons also should have the right to be visited by and correspond with members of their families⁸.

According to the General recommendation number 30 of the Committee on the Elimination of Racial Discrimination on Discrimination against Non-Citizens “Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of

⁶ Both international binding and non-binding instruments are mentioned in this section.

⁷ See ICCPR, A/51/40 vol. I (1996) 17 at para. 96 and *Torres v. Finland* (291/1988), ICCPR, A/45/40 vol. II (2 April 1990) 96 (CCPR/C/38/D/291/1988) at para. 7.2 and *C. v. Australia* (900/1999), ICCPR/C/76/D/900/1999 (28 October 2002) at para. 3.3 and 8.3.

⁸ See ICCPR, A/52/40 Vol. I (1997) 19 at para 98, 100 and 111.

discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights”⁹. The Committee therefore recommends to “Ensure the security of non-citizens, with regard to arbitrary detention (...)”¹⁰

Article 16 paragraph 4 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, states “Migrant Workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law”. Paragraphs 8 and 9 of the same article state respectively “Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used”; and “Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation”.

II.1 a Consular Protection

The 1963 Vienna Convention on Consular Relations (art. 36) provides that, if so requested, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State that its national has been deprived of his/her liberty. Any communication to the consular post by the person detained shall be forwarded by the competent authorities without delay.

Article 16 paragraph 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that “When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner: (a) the consular or diplomatic authorities of his or her State of origin or of a State representing the interest of that State shall, if he or she so request, be informed without delay of his or her detention and of the reasons therefore; (b) the person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay; (c) the person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with

⁹ General Recommendation No. 30, 01/10/2004, para 2. Article 1, paragraph 2 of the Convention on the Elimination of Racial Discrimination provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality

¹⁰ Ibid. para 19.

representatives of the said authorities and to make arrangements with them for his or her legal representation”.

II.1 b Length of Administrative Detention

Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should never be indefinite. The Human Rights Committee found that “detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal”¹¹.

The Working Group on Arbitrary Detention¹² further stated that a maximum period should be set by law and the custody may in no case be unlimited or of excessive length.

II.1 c Application of Non-Custodial Measures

The Working Group on Arbitrary Detention recommended that “alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention”¹³. Similarly, in its resolution 2000/21, the Sub-Commission on the Promotion and Protection of Human Rights encouraged “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” (para. 6)¹⁴.

¹¹ CCPR/C/D/59/560/1993 para. 9.4 and *C. v. Australia* (900/1999), ICCPR/C/76/D/900/1999 (28 October 2002) at para. 8.2.

¹² E/CN.4/2000/4.

¹³ E/CN.4/1999/63/Add.3.

¹⁴ Guideline 4 deals with Alternatives to Detention and Provides the following “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. 9 (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

II.1 d *Detention of Children*

Article 37 (b) of the Convention on the Rights of the Child requires States parties to ensure that minors are detained in conformity with the law, as a measure of last resort and for the shortest possible period of time. In accordance with article 3 of the Convention, the best interests of the child shall be the primary consideration in any action taken by States parties.

Article 37 (d) of the Convention on the Rights of the Child states that “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”.

II.1 e *Victims of Trafficking*

Guideline 2, paragraph 6 of the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking¹⁵ provides that States and, where applicable, intergovernmental organizations and non-governmental organizations should consider “Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody”. Guideline 4, paragraph 5 further states that States should consider “ensuring that the 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”. Guidelines number 6, paragraph 1 finally states that States and, where applicable intergovernmental organizations and non-governmental organizations should consider “ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. (...) Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses”

II.2 *Conditions of Detention*

Administrative detention should never be of a punitive nature. Furthermore, as enshrined in article 10 of ICCPR, all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This implies not only the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment¹⁶, but also that migrants deprived of their liberty should be kept in conditions

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”.

¹⁵ E/2002/68/Add.1.

¹⁶ The freedom from torture or cruel, inhuman or degrading treatment or punishment is an underogable right guaranteed by both customary and conventional law. See, in particular, article 5 of the Universal

that take into account their status and needs. General Comment No. 15 of the Human Rights Committee states: “if lawfully deprived of their liberty, [aliens] shall be treated with humanity and with respect for the inherent dignity of their person”.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers also provide an extensive list of guarantees for the protection of the human dignity of persons, including migrants, deprived of their liberty. Despite their non-binding nature, they reflect internationally recognized principles.

General Recommendation Number 30 of the Committee on the Elimination of Racial Discrimination recommends to “Ensure (...) that conditions in centres for refugees and asylum seekers meet international standards”.

Article 37 of the Convention on the Rights of the Child also establishes in paragraph (c) 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.

Article 17 paragraph 3 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that “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”. Paragraph 7 of the same article states “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”.

II.3 National human rights institutions: an underestimated actor

National human rights institutions (NIs) are entities legally enabled to promote and protect human rights.

NIs can play a crucial role in the protection of human rights of migrants as they are the independent human rights antennas in a country and can act as early warning mechanisms to prevent human rights violations. NIs can analyze the legislation, monitor its implementation and its impact on the rights of migrants, and formulate concrete recommendations. This has proven to prevent abuses, arbitrary treatment and

Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

discrimination of migrants in the name of either the legislation or valid regulations. Ignorance is also frequently responsible for the application of the legislation by authorities who lack awareness of international obligations in relation to human rights, and the way these are to be applied to migrants. Some NIs can provide migrants with legal and psychological assistance.

With regard to the areas of concern addressed in this paper, NIs can prevent the administrative detention of migrants by raising awareness of their rights and by sensitizing, through their promotional and/or training mandates, government officials, civil society and even the private sector. With respect to protection, NIs can undertake a "watchdog" role to ensure that arbitrary detention of migrants does not occur, that conditions under administrative or other custodial detention meet with international standards, that victims of trafficking are not subject to detention, and pay attention to other vulnerable groups such as children in relation to detention. In particular, the mandate of many NIs to access detention centers and their possibility to liaise with consulates of the detainee's country to ensure consular protection offers NIs a crucial role to play.

NIs should be an integral part of the actors defending and promoting the existing legal framework to promote and protect the rights of migrants and in particular with respect to the administrative or arbitrary detention of migrants.

III. Issues of Concern

III.1 Protection from Arbitrary Detention

The legislation of a considerable number of countries provides that migrants who are the subject of judicial proceedings have the right to free legal counsel and interpretation, while the costs of these services (or of one of them) must be borne by the alien in administrative proceedings. The right to judicial or administrative review of the lawfulness of detention, as well as the right to appeal against the detention/deportation decision/order or to apply for bail or other non-custodial measures, are not always guaranteed in cases of administrative detention¹⁷.

Grounds for administrative detention of migrants vary greatly from country to country and within the same country according to the infraction or offence of which migrants are suspected. Often the legislative criteria allow a high degree of discretion in ordering administrative detention: foreign nationals can be detained when immigration officers have "reasonable" grounds to believe that the person is inadmissible, is a danger to the public, that the individual is unlikely to appear for an examination or a hearing, or where the officer is not satisfied about the identity of the person. Anti-terrorism legislation

¹⁷ This does not in anyway imply that such rights are widely guaranteed in the cases of judicial proceedings. It was in fact reported by special procedures and treaty bodies that migrants often suffer from de facto or de jure discrimination in judicial proceedings. See for example E/CN.4/2005/85/Add.1, communications sent by the Special Rapporteur on Trafficking to the Government of the Maldives and to the United States of America; ICCPR, A/57/40 vol. I (2002) 47 at para. 77 (20).

allows for the detention of migrants on the basis of vague, unspecified allegations of threats to national security¹⁸. The high degree of discretion and the broad power to detain accorded to immigration and other law enforcement officials, coupled often with a lack of adequate training can give rise to abuses and to human rights violations. The failure to provide legal criteria can result in de facto discriminatory patterns of arrest and deportation of irregular migrants¹⁹.

National laws often do not provide for judicial review of administrative detention of migrants. In other instances, the judicial review of administrative detention is initiated only upon request of the migrant. In these cases, lack of awareness of the right to appeal, lack of awareness of the grounds for detention, difficult access to relevant files, lack of access to free legal counsel, lack of interpreters and translation services and of information in a language they can understand on the right to instruct and retain counsel²⁰ and the situation of the facilities where migrants are being held can prevent them from exercising this right in practice²¹. In the absence of lawyers and interpreters, migrants often feel intimidated and obliged to sign papers without understanding their content.

Migrants and asylum-seekers are sometimes detained at airport transit zones²² and other points of entry, under no clear authority, either with the knowledge of government officials at the airport or simply on the instructions of airline companies²³, before being returned to their countries²⁴. The difficulty or impossibility of reaching any outside assistance impedes the exercise of the right of the persons concerned to challenge the lawfulness of the detention and deportation decision and to apply for asylum, even in the presence of legitimate claims.²⁵ This detention, in inadequate conditions, can last for prolonged periods of time²⁶.

III. 1 a Consular Protection

Consular posts are not always informed in a timely manner of detentions, often because detainees are not aware of their right to communicate with consular representatives²⁷. Consulates have in some cases be informed only when migrants are taken to prison after several days of detention in police posts. In some facilities, the absence of public

¹⁸ See the report of the Special Rapporteur on torture to the General Assembly (A/57/173).

¹⁹ See E/CN.4/2005/85/Add.1, communications sent to the Government of Costa Rica.

²⁰ See ICCPR, A/55/40 Vol. I (2000) 71 at para. 426.

²¹ See E/CN.4/2005/85/Add.1, communications sent to the Government of Thailand.

²² See E/CN.4/2003/85/Add.1, communications sent by the Special Rapporteur on the human rights of migrants to the Governments of Japan, South Africa and Spain.

²³ In some countries fines are imposed on companies that allow into the country people not in possession of valid papers.

²⁴ E/CN.4/2003/85/Add.1, letter dated 25 September sent by the Special Rapporteur on the human rights of migrants to the Government of South Africa.

²⁵ See CRC, CRC/C/114 (2002) 25 art paras 160.

²⁶ See CERD, A/49/18 (1994) at para 144 and CAT, A/56/44 (2001) 38 at paras. 87 and 88. See also E/CN.4/2005/85/Add.1, communications sent by the Special Rapporteur on the human rights of migrants to the Government of France and Spain and CRC/C/121 (2002) 70 at para. 355 and 356.

²⁷ See E/CN.4/2005/85/Add. 4, Report of the Special Rapporteur on the human rights of migrants on her visit to Peru.

telephones and the fact that the migrants have to pay for calls discourage or prevent contacts with consular representatives.

III.1 b Length of Administrative Detention

In the context of anti-terrorism measures adopted after 11 September 2001, the legislation of some countries allows for long periods of detention of non-nationals, without basic guarantees²⁸. Not always does the legislation specify a time limit beyond which deprivation of liberty should cease when deportation is not possible for reasons not imputable to the migrant. Even where time limits are prescribed by law, they are not always respected. Migrants often remain in administrative detention for long periods of time²⁹ awaiting deportation. The deportation procedure can in fact be very lengthy: consulates have to process travel documents, travel arrangements have to be made, asylum claims and appeals against deportation reviewed³⁰. The procedure can be particularly time consuming in circumstances such as the absence of diplomatic representation of the country of citizenship of the alien; the lack of means of the country of destination to finance the deportation; the refusal of the State of origin or the receiving country to accept the migrant³¹. The case of stateless detainees, i.e. those who crossed the border irregularly and whose Governments refuse to recognize them, is another circumstance that may lead to indefinite detention. At times migrants remain in detention because, owing to the situation in their countries of origin, they cannot be deported³² but the national immigration laws do not allow for their release.

Not always does the legislation provide for an automatic review of detention at set intervals to determine whether it should continue³³. In the majority of cases the review is not undertaken automatically, but mechanisms exist that allow the migrant to request it. However, access to such mechanisms can be seriously undermined by the lack of procedural safeguards. In these cases, and in the impossibility to deport, detention can continue indefinitely.

²⁸ See E/CN.4/2003/85/Add.1, communications sent by the Special Rapporteur on the human rights of migrants and the Special Rapporteur on the independence of judges and lawyer to the Governments of the United Kingdom of Great Britain and Northern Ireland and of the United States.

²⁹ See E/CN.4/2005/85/Add.1, communications sent by the Special Rapporteur on the human rights of migrants to the Government of Australia.

³⁰ See *Ibid.*, communication sent by the Special Rapporteur on the human rights of migrants to the Government of Australia. See also ICCPR, A/50/40 Vol. I (1995) 52 at paras 283 and 298; ICCPR, A/50/40 Vol. I (1995) 72 at para 422 and ICCPR, A/51/40 Vol. I (1996) at para. 87.

³¹ See ICCPR, A/57/40 vol. I (2002) 36 at para. 75 (16).

³² See E/CN.4/2003/85/Add.1, communications sent by the Special Rapporteur, together with the Special Rapporteur on torture to the Government of Greece.

³³ Among the factors considered in undertaking such reviews are the reasons for detention, elements to determine the length of time that detention is likely to continue, unexplained delays or lack of diligence on the part of the authority in charge or by the person concerned, the existence of alternatives to detention.

The excessive length of detention of migrants for administrative offences has been considered by the Working Group on Arbitrary Detention as a disproportionate punishment³⁴.

III. 1 c *Application of Non-Custodial Measures*

The legislation of several countries provides for alternatives to administrative detention, such as release on bail, release on parole, home detention, semi-liberty, payment of a certain sum as guarantee, police supervision, ban on leaving the country, obligation to reside at a given address with periodic reporting to the authorities, withdrawal of passport. However, there is an element of discretion in many countries as to when such measures can be granted, as often the law itself does not prescribe them in the presence of specific criteria. Often, in the absence of statistics it is not possible to assess how often alternative measures are granted. However, even when the law provides expressly for non-custodial measures, they are difficult to access³⁵. Bail, when granted, is usually set at a sum not affordable by migrants. The request for sureties is a further obstacle given the absence of relatives or friends who can stand surety for migrants. Similarly, home detention or social work is hard to obtain due to the fact that migrants often do not have stable work and lodgings.

III.1 d *Victims of Trafficking*

Victims of trafficking involuntarily commit administrative infractions, such as irregular entry, use of false documents and other violations of immigration laws and regulations, which make them liable to detention³⁶. Furthermore, the law of some countries punishes as criminal offences irregular entry, entry without valid documents or engaging in prostitution, including forced prostitution. Victims of trafficking are thus often detained and deported without regard for their specific needs for protection and without consideration for the risks they may be exposed to if returned to their country of origin³⁷.

III.1 e *Children*

Minors, including unaccompanied children, can be detained for long or undetermined periods and then deported under no clear authority and on discretionary grounds, with no possibility of challenging the lawfulness of the detention before a court or other competent, independent and impartial authority. When immigration laws and regulations are silent with respect to the detention of minors, including unaccompanied children,

³⁴ See opinion 18/2004 (E/CN.4(2005/6/Add.1) of 16 September 2004 on the case of Mr. Benatta who entered the United States on 31 December 2000 on a non-immigrant visa authorizing him to remain in the country until 30 June 2001 and subsequently detained for 14 months and still under detention at the time of the decision.

³⁵ See E/CN.4/2005/85/Add.3, Report of the Special Rapporteur on the human rights of migrants on her visit to Italy.

³⁶ See relevant provision in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (article 6 to 8).

³⁷ See for example E/CN.4/2005/85/Add.1, communication sent to the Government of Malaysia and to Kosovo.

decisions are taken on individual cases, often with reference to other national provisions and regional and international obligations. Even when administrative detention of migrant children is prohibited, other legislative provisions of the same country may allow for minors to be detained for criminal offences where breaches of immigration law are considered as such.

The legislation or regulations of several countries provide for “family detention”, whereby children under a certain age are detained with their parents, either in special facilities or in separate rooms within centres for migrants or penitentiaries. However, accompanied and unaccompanied children are often held in punitive and inadequate conditions, deprived of the care, protection and rights to which they are entitled under the Convention on the Rights of the Child and other international human rights norms, including the right to education, physical and mental health, privacy, information, and rest and leisure, among others³⁸.

While the legislation of the majority of countries provides that minors subjected to criminal proceedings should be detained only as a measure of last resort and protected by a set of judicial safeguards and guarantees to ensure that the children’s rights are protected, at the same time it can allow for administrative detention of foreign children without any such guarantees.

III.2 Conditions of Detention

Detention facilities for migrants vary from country to country and according to the type of regime to which migrants are subjected. Where violation of immigration laws is considered a criminal offence, migrants sentenced to imprisonment for such offences can be detained with common criminals and subjected to the same punitive regime and they are not always separated from the rest of the prison population, without arrangements for food appropriate to their culture and/or religion and to allow them to practice their faiths, at times exposed to racist attacks³⁹. Prison personnel in most of the cases do not receive specific training on how to deal with foreign detainees. At times also migrants under administrative detention are detained in common prisons, either because no other specific facility exists, or because those that exist are full, with severe restrictions on their freedom of movement, rights to communicate with families and receive visits, and limited access to outdoor recreational activities. There have also been reports of migrants held in solitary confinement⁴⁰.

Sometimes there are special facilities for administrative detention of migrants⁴¹. In other cases places such as schools, warehouses, airport terminals, sports stadiums and similar facilities have been converted into centres for the administrative custody of migrants.

³⁸ See for example E/CN.4/2005/85/Add.1, communications sent by the Special Rapporteur on the human rights of migrants to the Government of Spain.

³⁹ See report of the Special Rapporteur on the human rights of migrants on her visit to Peru (E/CN.4/2005/76/Add.4).

⁴⁰ See ICCPR, A/54/40 vol. I (1999) 26 at para. 161-

⁴¹ See reports of the Special Rapporteur on the human rights of migrants on her visits to Spain (E/CN.4/2004/76/Add.2); Italy (E/CN.4/2005/85/Add.3); and Iran (E/CN.4/2005/85/Add.2).

Both types of facility are usually thought of as being for the short term detentions, however, it often happens that migrants remain detained in these centres for months, and in some cases years. In most cases there is no provision for either education for children or for adequate recreational activities. Facilities converted into detention centres often lack basic infrastructures, such as ventilation systems, outdoor spaces, or rooms allowing for private conversations with lawyers or family members, and food and sanitary conditions can be inadequate⁴². Some migrants in administrative detention are allowed to meet with their relatives and friends only for very short periods, separated by glass and in the presence of immigration or other officials.

Special centres for the detention of migrants are often overcrowded⁴³, leading to a serious deterioration in living conditions, including lack of bedding, poor hygienic conditions, inadequate access to medical treatment and other services, the impossibility of separating men from women and adults from minors and of keeping families together, and lack of privacy. For security reasons, freedom of movement can be limited within the facility and migrants can remain locked up for most of the day.

Very few centres provide a medical check-up upon arrival. Some of the recently built facilities for migrants provide for a general doctor to visit detainees every day. In many instances, however, only urgent medical care is provided⁴⁴. Also, in some countries all medical expenses apart from general check-ups or emergency interventions must be borne by the detainees. Often, no translation or interpretation services are available, making it difficult for migrants to request medical attention and to understand medical prescriptions and diagnoses. Other inmates are sometimes used as interpreters. This practice breaches confidentiality, and when consent is sought and obtained, there are questions as to whether that consent is sufficiently informed. Furthermore, in these circumstances a detainee may be prevented from disclosing vital information about trauma suffered. Access to medical assistance is curtailed when migrants are detained in police stations and holding facilities that are not easily accessible.

Mechanisms of external oversight of migrant holding facilities are not always in place. Not all countries allow regular visits by external actors, such as the Red Cross, representatives of human rights institutions, NGOs, humanitarian organizations, the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), or regional mechanisms such as the European Committee for the Prevention of Torture. In some cases inspections are only carried out by representatives of hierarchically superior bodies of the ministry or department to which the police or the immigration service running the centre belongs. When administrative custody centres are not monitored and inspected by external mechanisms, abuse and violence are more frequent.

⁴² See E/CN.4/2005/85/Add.1, communications sent by the Special Rapporteur on the human rights of migrants to the Government of Malaysia. See also CERD A/57/18 (2002), para 380 and CRC/C/114 (2002) 25 at para 161.

⁴³ See E/CN.4/2003/Add.1, communication sent by the Special Rapporteur on the human rights of migrants together with the Special Rapporteur on torture to the Government of Thailand.

⁴⁴ See E/CN.4/2005/85/Add.1, communications sent by the Special Rapporteur on the human rights of migrants to the Government of Spain.

The regulations of some migrants holding facilities provide for internal complaint or grievance mechanisms. However, internal complaint mechanisms are not always easily accessible, due to linguistic barriers, and the lack of confidentiality of such procedures. The decisions of internal review mechanisms are usually final and such mechanisms frequently allow only for internal disciplinary measures.

Holding centres for migrants under administrative detention are often run by immigration or other police. In some countries migrant holding centres are staffed with or run by private personnel⁴⁵ who often do not receive adequate training and are not prepared to discharge their functions in a way that is respectful of the human rights of migrants. Incidents of abuse and discrimination, and even of ill-treatment and torture of migrants in detention facilities at the hands of prison guards, police and immigration officers and private staff have been reported⁴⁶.

IV. CONCLUSIONS

It is OHCHR's view that infractions of immigration laws and regulations should not be considered as criminal offences. Furthermore, detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.

OHCHR recommends that governments consider the possibility of progressively abolishing the administrative detention of migrants. When this is not immediately possible, it is recommended that measures be taken to ensure respect for the human rights of migrants in the context of deprivation of liberty, as per the international human rights standards mentioned in section II above, including by:

(a) Ensuring that procedural safeguards and guarantees established by international human rights law and national law in case of criminal proceedings are applied to administrative detention of migrants. 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. It is recommended that provisions be made for migrants in detention to be assisted, free of charge, by an interpreter and by legal counsel during administrative proceedings;

(b) 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

⁴⁵ See E/CN.4/2005/85/Add.3, Report of the Special Rapporteur on the human rights of migrants on her visit to Italy.

⁴⁶ See E/CN.4/2003/85/Add.1, communication sent by the Special Rapporteur on the human rights of migrants, together with the Special Rapporteur on torture, to the Government of Japan.

consular or embassy representative and members of their families. It is recommended that a briefing on the facility and information on the immigration and other relevant laws and regulations also be provided and that migrants and their lawyers be granted full and complete access to the migrants' files;

(c) Facilitating migrants' exercise of their rights, including by providing them with lists of lawyers offering pro bono services, telephone numbers of 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. Authorities may wish to conclude agreements with NGOs, universities, volunteers, national human rights institutions and humanitarian and other organizations to provide basic services, such as translation and legal assistance, when they cannot otherwise be guaranteed;

(d) Ensuring that consular and embassy personnel are adequately trained in providing assistance to nationals in distress, including irregular migrants, and that there is a mechanism to address cases of negligence in providing such assistance.

(e) Avoiding the use of detention facilities and of legal mechanisms and methods of interception and/or deportation that curtail judicial control of the lawfulness of the detention and other rights, such as the right to seek asylum;

(f) Ensuring that the law sets a limit on detention pending deportation and that under no circumstance detention is indefinite. Bilateral and multilateral agreements can help speed up documentation/deportation procedures and thereby reduce the length of detention. The decision to detain should be automatically reviewed periodically on the basis of clear legislative criteria. Detention should end when a deportation order cannot be executed;

(g) Ensuring that non-custodial measures and alternatives to detention are made available to migrants, including through providing for such measures in law and ensuring that the prescribed conditions are not discriminatory against non-nationals.

(h) Ensuring that the legislation prevents trafficked persons from being prosecuted, detained or punished for illegal entry or residence in the country or for the activities they are involved in as a consequence of their situation as trafficked persons. In this respect, Adherence to the OHCHR's Recommended Principles and Guidelines on Human Rights and Human Trafficking is recommended.

(i) Ensuring that the legislation does not allow for the administrative detention of unaccompanied children⁴⁷ 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. Ensuring also that children under custodial measures are separated from adults, unless they can be housed with relatives in separate settings and that they are provided with

⁴⁷ See CRC/C/114 (2002) 25 at para. 16, CRC/C/118 (2002) 29 at para 199, CRC/C/121 (2002) 141 at para. 141.

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, it is recommended that the most favourable treatment be accorded until it is determined whether he/she is a minor;

(j) 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 law⁴⁸. It is recommended that representatives of UNHCR, ICRC, NGOs and religious institutions be allowed access to the place of custody;

(k) Providing training to authorities with the power to detain on immigration laws and regulations and relevant international standards and personnel of detention centres on the 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;

(l) 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;

(m) 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;

(n) Ensuring the presence in holding centres of a doctor with appropriate training in psychological treatments. It is recommended that migrants should have the possibility of being assisted by interpreters in their contacts with doctors or when requesting medical attention. It is further recommended that administrative detention of migrants with psychological problems, as well as those belonging to vulnerable categories and in need of special assistance, be only allowed as a measure of last resort, and that they be provided with adequate medical and psychological assistance;

⁴⁸ See ICCPR, A/53/40 Vol. I (1998) 40 at para. 270.

(o) 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.