



DIGNITY AND JUSTICE FOR DETAINEES WEEK

Information Note No. 7

Migration, Asylum and Trafficking-Related Detention

Migrants, asylum seekers, refugees and trafficked persons are vulnerable to deprivation of their liberty, sometimes purely because of their status. Furthermore, as non-citizens they are particularly vulnerable to discrimination, racism and xenophobia.

Migrants can be deprived of their liberty in settings other than the formal penal institutions of the state. Refugees in closed camps, for instance, are subject to *de facto* detention.

The conditions of detention can be severe: migrants charged with immigration offences can be confined with convicted criminals. Some are subjected to cruel or degrading treatment, and others are held in overcrowded, unhealthy conditions.

The human rights of migrants, asylum seekers, refugees and trafficked persons will be a particular focus of the Dignity and Justice for Detainees Week (6 – 12 October 2008) proposed by the Office of the High Commissioner for Human Rights. The initiative is part of the commemoration of the 60th anniversary of the Universal Declaration of Human Rights.

This information note is directed at National Human Rights Institutions (NHRIs), governments, OHCHR field offices, United Nations organizations and country teams, civil society bodies, NGOs specializing in issues related to detention, police forces, judicial systems and the media.

All can work, in a manner appropriate to their expertise and the situation in the country of operations, to prevent the arbitrary or unlawful detention of these groups and improve conditions for those of them deprived of their liberty.

States retain a high degree of discretion in ordering the administrative detention of migrants. Far from being used as a last resort, as required by international standards, immigration detention can be mandatory in law or practice. It is usually intended to implement an administrative measure such as deportation. It can also be used to punish migrants for entering the country in an irregular manner, and to deter further arrivals to the territory of the State. It can be arbitrary, and in some cases is prolonged or even indefinite in duration.

Migrants, asylum seekers, refugees and victims of trafficking can be detained for various reasons and can suffer a range of human rights violations while deprived of their liberty. For instance:

- Migrants can be subject to administrative detention in connection with violations of immigration laws or procedures, such as not possessing valid identification documents. The detention of migrants can also be arbitrary, including when they are not afforded an effective opportunity to challenge their detention before an independent body. Lack of knowledge about the language and legal system of the host country, and lack of access to legal

counsel, can mean that many migrants and asylum seekers are unable to launch effective appeals and challenges to their detention.

- Asylum seekers are often detained while their claim for refugee status is being assessed, irrespective of whether or not there is a risk that they are likely to abscond. Many asylum seekers have no choice but to enter the country in an irregular manner in order to exercise their right to seek asylum, yet in many countries they are detained because they do not have valid identification documents.
- After being rescued from their traffickers, victims of trafficking are sometimes penalized by the State for the work they were forced to do by their traffickers, or because of their irregular immigration status. Prior to their deportation, they can be subject to prolonged detention and denied access to protection as victims of human rights violations.
- Migrant and asylum-seeking children can be subject to detention, including administrative detention. Many have limited or no access to adequate education in detention. Unaccompanied migrant and asylum-seeking children are often detained with adults.
- Migrant domestic workers and migrant workers in other sectors, particularly those who are in an irregular status and in conditions of debt bondage, are often locked inside their places of work by their employers. Persons who are trafficked for forced labour or sexual exploitation run an extremely high risk of such *de facto* detention by their "employers". The confiscation, withholding or destruction of identification documentation can compound this illegal detention. Those detained in this manner often have little privacy, suffer from inadequate food and access to health care, and can be subject to ill-treatment and sexual violence.
- The conditions in which displaced persons are detained can be severely inadequate; administrative detention centres can be overcrowded and unsanitary. Often, there is little provision of basic services to ensure protection of the right to health, safe drinking water and access to sanitation.

Ranged against such practices are international human rights standards, which provide that:

- **Everyone, including all migrants and displaced persons, has the right to liberty and security of the person, including protection from arbitrary arrest and detention, regardless of legal status.** The grounds and procedures for detention of migrants and displaced persons must be established by law. Any administrative detention of migrants and displaced persons should be for the shortest possible length of time, and never indefinite. *Article 9, Universal Declaration of Human Rights; Article 9, International Covenant on Civil and Political Rights; Article 16, Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and Article 37(b), Convention on the Rights of the Child.*
- Legislation in some countries criminalizes migrants and asylum seekers who enter that country in an irregular manner. Criminalizing irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and can lead to unnecessary detention.

The mere fact of being at odds with immigration procedures does not mean that the irregular migrant or the asylum seeker is a criminal. Refugees and asylum seekers are specifically protected against penalties on account of their irregular entry or presence.

Article 31(1), 1951 Convention relating to the Status of Refugees; Deliberation No. 5, concerning the situation regarding immigrants and asylum-seekers, Working Group on Arbitrary Detention.

- **Migrant workers and members of their families are entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions. It is unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy the identification documents of migrants.**
Articles 16 (2) and 21, Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
- The detention of asylum seekers is inherently undesirable and as a general principle asylum seekers should not be detained. **Detention should only take place after a full consideration of all possible alternatives.**
UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.
- **Trafficked persons should not under any circumstances be held in immigration detention or other forms of custody, and should not be prosecuted, detained or punished for the illegality of their entry or residence or for the activities in which they were involved while trafficked.** *OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking.*
- Conditions in all places of migration-related detention should conform to international norms. **All persons deprived of their liberty should be treated with humanity; no one should be subjected to torture or to cruel, inhuman and degrading treatment or punishment. Human rights law provides standards on health, education, food, water and work, to which all migrants and displaced persons are entitled while in detention.** *Article 17, Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Articles 7 (conditions of work), 11 (adequate standard of living), 12 (highest attainable standard of physical and mental health), and 13 (right to education), International Covenant on Economic, Social and Cultural Rights; Articles 10 and 7, International Covenant on Civil and Political Rights; Convention against Torture.*

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The Office of the United Nations High Commissioner for Human Rights (OHCHR), a part of the United Nations Secretariat, has been given a unique mandate to promote and protect all human rights. Headquartered in Geneva, the Office is also present in some 50 countries. Headed by the High Commissioner for Human Rights, a position established by the General Assembly in 1993 to spearhead the United Nations' human rights efforts, OHCHR takes action based on the unique mandate given it by the international community to guard and advocate for international human rights law. For more information please visit www.ohchr.org

On Human Rights Day 2007, the United Nations and OHCHR launched a year-long UN system-wide advocacy campaign to mark the 60th anniversary of the Universal Declaration of Human Rights (UDHR), under the theme: "**Dignity and justice for all of us**".