

## PICUM Oral Submission to the UN Working Group on Arbitrary Detention

### Stakeholders' consultation on remedies and procedures on the right to challenge the lawfulness of detention before court

1-2 September 2014, Geneva

The Platform for International Cooperation on Undocumented Migrants (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of more than 150 organisations and 170 individual advocates working with undocumented migrants in 33 countries, primarily in Europe as well as in other world regions, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With over ten years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

#### I. Introduction

This submission gathers PICUM's concerns regarding the need to promote consistent and coherent mechanisms to ensure the protection of migrants' rights to challenge the lawfulness of detention before court and to receive appropriate remedy in all situations of deprivation of liberty, including detention for migration purposes.\*

This submission also highlights key issues relating to migration and border management and includes two annexes providing testimonies from PICUM member organisations in relation to cases of systematic arbitrary detention in Spain and in Greece. Recommendations included in this submission aim at improving and developing effective systems for challenging the lawfulness of detention, ending the immigration detention of children and their families; and guaranteeing protection of undocumented migrants' procedural and substantial rights in law and in practice.

#### II. Panel 1: Framework, Scope and Content of the Right to Court Review of Detention

##### Ensuring protection both under criminal and administrative law

*PICUM stresses that the right to court review of detention is of universal application and applies to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings,*

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\* This submission builds on the two oral statements made by Maria Giovanna Manieri, Programme Officer, Platform for International Cooperation on Undocumented Migrants, at the Global Consultation on the Right to Challenge the Lawfulness of Detention before Court, 1-2 September 2014 in Geneva.

*but also situations of detention under administrative and other fields of law, as clarified on various occasions by the Working Group on Arbitrary Detention.<sup>1</sup>*

The right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful, is a key principle of human rights law.

The Working Group on Arbitrary Detention has clarified that the right to challenge the lawfulness of detention before court is of universal application and extends to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also all other forms of deprivation of liberty, including immigration detention.<sup>2</sup>

Aimed at regulating residence and cross-border movements, migration management, including the widespread use of immigration detention worldwide, is usually regulated, due to its very nature and substance, under the administrative law framework.<sup>3</sup> Administrative sanctions, issued as a consequence of the lack of compliance with specific administrative requirements, may be imposed by governing authorities, often without applying the strict procedural safeguards entailed by criminal law.

Criminal law has a very different role in democratic societies than administrative law. On the one hand, criminal law has, as its ultimate aim, the conviction and rehabilitation of offenders and their reintegration into society. Due to its punitive nature, criminal law provides for specific legal safeguards aimed at protecting the rights of every person facing criminal proceedings. On the other hand, administrative law aims at regulating specific activities in order to protect the public interest of the state. Sanctions imposed under administrative law mostly address irregularities and therefore are not shaped within the same legal safeguards as sanctions imposed under criminal law.

In the more general context of migration and border management, serious concern on the increasing use of administrative sanctions which very much resemble criminal sanctions - such as immigration detention or apprehensions - has to be raised, as this occurs in the absence of the specific procedural protections typical of the criminal law landscape.<sup>4</sup> Of particular concern is the extent to which basic procedural safeguards of criminal law and the principles of non-discrimination and fair access to justice are being circumvented by authorities making use of administrative sanctioning procedures to punish conducts related to irregular migration. The use of administrative law very often implies the use of unlimited detention, often provides no minimum standard for detention conditions, and may fail to stipulate monitoring or regulation of conditions of detention.

## **Ending child detention**

*PICUM stresses the importance of ensuring the non-detention of children, in line with the guidance of the UN Committee on the Rights of the Child. Detention of a child because of their or their parent's migration status always constitutes a child rights violation and contravenes the principle of the best interests of the child. Relevant national and regional legislative frameworks and migration policies should be adapted accordingly.*

As a general rule, a child should never be detained. When initially adopted in November 1989, the UN Convention on the Rights of the Child clearly stated in Article 37(b), that no child shall be deprived of his

or her liberty unlawfully or arbitrarily. The CRC also provides that, where a child is nevertheless deprived of liberty, arrest, detention or imprisonment shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

However, more recently, the United Nations Committee of the Rights of the Child has clarified that detention of children cannot be justified on the basis of their migration status.<sup>5</sup> Through General Comment n. 6 adopted in 2005, and, more recently, in February 2013,<sup>6</sup> the Committee clearly established that the detention of a child, whether they are unaccompanied, separated, or because of their or their parent's migration status, always constitutes a child rights violation and contravenes the principle of the best interests of the child.

Similarly, various regional bodies in recent months have weighed in on the issue, reaffirming that detention of children can never be justified on the basis of their or their family members' migration status.

<b>Inter-American Court of Human Rights</b>
When consulted on the interpretation of the "last resort" principle of detention as a preventive measure in the context of migration-related proceedings, the Inter-American Court of Human Rights recently stated in an Advisory Opinion that states may not resort to the deprivation of liberty of children as a precautionary measure to protect the objectives of immigration proceedings. <sup>7</sup> The Court also specified that States may not detain a child on the basis of a failure to comply with entry and residence requirements and urged states to adopt other less harmful alternatives and, at the same time, to protect the rights of the child integrally and as a priority.

<b>Council of Europe</b>
The Council of Europe's Parliamentary Assembly also recently adopted Resolution 2056 (2014), which urges member states to introduce and enforce laws banning the detention of children for immigration reasons. <sup>8</sup>

**Ensuring protection from violence against migrants in detention and access to justice and fair compensation**

<i>PICUM submits that, in order for the fundamental right to access justice to be effective and enforceable, policies and practices that tend to push undocumented migrants into the margins of society, augmenting their exposure to social exclusion and violence by limiting their autonomy and independence, need to be addressed. PICUM also highlights that, in many cases, the lack of access to just remedy and reparation in the case of undocumented migrants in detention is caused not only by extensive difficulties in accessing their right of information and access to legal aid, but it is also often caused most specifically by the fact that procedures before the courts against a measure of deprivation of liberty in the case of migrants in detention often does not have a suspensive effect against the removal order. Migrants are then deported before they have had a chance to access justice and claim just remedies and compensation.</i>
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The condition of isolation, inhumane and degrading treatment, and lack of reliable access to legal counsel and health care that often characterize immigration detention are particularly detrimental for migrants in vulnerable situations. Migrant detention centres are not designed to provide quality assistance to victims of violence, pregnant women, children, disabled migrants, migrants with serious illnesses or facing mental health issues, as well as those with other special needs.

For detained migrants, having access to a legal representative and legal aid may be the only link to the outside world and often provide the only safe opportunity to report complaints of past abuse or of violence inside the detention centres. Migrants who do not have access to legal representation face significant hurdles to advocating affectively for their own human rights, medical needs, and safety while in custody:

**United Kingdom: Addressing Cases of Violence against Migrants in Detention**  
In January 2013, a pregnant migrant woman held in Cedars detention centre near Gatwick Airport in the UK was in a wheelchair to assist her removal from the center. She had her wheelchair tipped up and her feet held by security officers of G4S when she resisted the “substantial force” that officials applied to her.<sup>9</sup> In the UK, officials are currently refusing to delay the removal of detainees who allege assault during removal when the assault is backed by medical evidence. They say complaints can be investigated after the detainee has been deported. In practice such investigations are likely to be extremely difficult to conduct as detainees are removed and often unable to maintain phone or email contact with the UK.

**Israel: Addressing Cases of Systematic Detention**  
On 24 September 2014, in response to a petition submitted by civil society organisations in Israel, the High Court of Justice established the closure of the detention centre “Holot”, in the South of Israel, on the basis of the need of individual assessments of the situation of each migrant and asylum seeker. The petition was presented to the High Court of Justice by civil society organisations working to protect undocumented migrants’ rights in the country, as a response to the systematic detention of undocumented migrant workers claiming severance compensation to their employers.<sup>10</sup>

**III. Panel 4: Migration-related Detention**

**Criminalisation of irregular migration**

*PICUM submits that informed public debate and evidence-based policy-making on migration and in particular the use of detention as a migration management tool have to be founded on clear and comparable data. The human and financial costs of the use of detention should be analysed and the issue of proportionality of the measures commonly used for migration management and border control should be addressed. PICUM submits that the criminalisation of irregular migration has not only negative implications for undocumented migrants, but also creates mistrust and marginalisation of all foreigners and puts social cohesion at stake.*

The misperception that irregular migration poses threats to national security and state sovereignty needs to be corrected through careful and objective analysis, contextualisation of available data and through the use of correct terminology. The Working Group on Arbitrary Detention has specifically deliberated on this issue, affirming that “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention”.<sup>11</sup> The political sensitivity of the issue of irregular migration generally outweighs its numerical significance.<sup>12</sup> Irregular migration does occur in significant numbers, but it represents a fairly small proportion of total migration<sup>13</sup> and consistent and inclusive policies that avoid further categorisation of vulnerable groups and that promote social inclusion shall therefore be adopted.

The increasing securitisation and criminalisation of cross-border movements of people and emphasis on border control in some regions, specifically in Europe, currently overshadows the relevance and need to address other causes of irregularity, such as inadequate visa and residence policies, administrative failures and difficulties in understanding the complex procedures of residence and work permits.<sup>14</sup>

The misperception that irregular migration poses threats on national security and state sovereignty needs to be corrected through careful and objective analysis and contextualisation of available data. For example, while detention is used worldwide as a mechanism for states to control migration, research has found that detention is not an effective deterrent of irregular migrants and asylum seekers in either destination or transit contexts.<sup>15</sup>

A study developed by the International Detention Coalition in 2011 highlights that detention fails to impact on the choice of destination country and does not reduce numbers of irregular arrivals, as undocumented migrants are usually not aware of detention policies in the country of destination and do not convey the deterrence message in their countries of origin.<sup>16</sup> The study also underlined that, rather than being influenced primarily by immigration policies such as detention, migrants usually 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.

In May 2011, a Global Roundtable organised by OHCHR and UNHCR on the issue of alternatives to migration-related detention concluded that there is no empirical evidence that detention deters irregular migration, despite the often significant cost to States of maintaining such a detention infrastructure.<sup>17</sup>

## **Implications of the language of criminalisation: reasons why terminology matters**

*PICUM submits that the use of correct and neutral terminology when describing migrants, asylum seekers, beneficiaries of international protection and undocumented migrants is of key importance. National governments and all relevant actors involved in policy-making should present a well-balanced and evidence-based analysis and approach to migration management and border control.*

The choice of correct terminology is crucial, as often language contributes to shape the reality which national authorities present to their population and the world. In a context where the use of language associates the concepts of migration and criminality, irregular migration becomes, beyond language, intrinsically considered as linked with security concerns. As a result, migrants, often on the sole basis of the fact that they “look” foreigners due to their ethnic origin, race or religion, become tainted by suspicion.

In this context, it is crucial to advocate for the use of correct terminology when referring to undocumented migrants. Hostile terminology where irregular migrants are referred to as “*illegal*” can lead to discriminatory behaviour, hinder public acceptance of migrants, and exacerbate social exclusion. This has also been underlined by academics, who have argued that “[...] *the countries that most pride themselves on their commitment to equality, human rights, and democracy (like the United States and the western European countries) are precisely those that, in the late twentieth century, invented a new status (‘illegal’) in order to deprive some of their residents of access to equality, human rights, and democracy. When we use the term ‘illegal’ in this way, we are implicitly accepting the idea that all people are not created equal, that all people do not deserve equal rights, and that the law should treat people differently depending on the category they are assigned to.*”<sup>18</sup>

Moreover, defining an individual or group as “illegal” is erroneous and incorrect from a juridical point of view, as neither could an individual be considered by nature as “illegal” (as on the contrary could be determined actions or objects), nor have the individuals necessarily committed a criminal offence under the national laws. Particular attention to the importance of avoiding the use of negative terminology has also been given by the UN Special Rapporteur on the Human Rights of Migrants, Francois Crépeau, who has highlighted that: “Using incorrect terminology that negatively depicts individuals as ‘illegal’ contributes to the negative discourses on migration, and further reinforces negative stereotypes of irregular migrants as criminals. Moreover, such language legitimates the discourse on criminalization of migration, which in turn, contributes to the further alienation, discrimination and marginalisation of irregular migrants, and may even encourage verbal and physical violence against them”.<sup>19</sup>

Preferring the use of “undocumented” or “irregular” to “illegal” is a position that is increasingly being taken by a multitude of actors, including the United Nations<sup>20</sup>, the Council of Europe<sup>21</sup>, the European Parliament<sup>22</sup>, and the European Commission, as well as numerous non-governmental organizations, local authorities, professionals from diverse fields, and undocumented migrants themselves.

**Promote evidence-based policy making**

*PICUM submits that efforts should be made to develop a system to collect both quantitative and qualitative data on migrants’ detention. Data disaggregated by age, sex, country of origin and other relevant information such as residence status, issuance of entry, and episodes of violence, abuse and deaths in detention should also be systematically collected. Reliable data on migration detention would ultimately support the creation of legal systems that guarantee undocumented migrants’ fundamental rights, including access to justice.*

Better data collection and estimates are of crucial relevance for policy-making in the context of migration management and protection of migrants’ fundamental rights. However, in most countries, data collection systems on the numbers of migrants and migrant children in detention and on fatalities or episodes of violence against migrants in detention are not available or are not systematically collected.<sup>23</sup> As a consequence, migration policies fail to take into account the specific situation faced by migrants in detention and to mainstream a human rights approach that would grant them protection and access to justice.

The collection of reliable qualitative and quantitative data on migrants in detention is a fundamental prerequisite for consistent policymaking on issues such as adequate protection for victims of crime, access to justice, and procedural rights.

**Council of Europe: The Importance of Collecting Quantitative and Qualitative Data on Detention**  
In its Recommendation 2056 (2014) the Council of Europe Parliamentary Assembly, while stressing that immigration detention of children contravene the principle of the best interests of the child and commit a child rights violation, has called on the Committee of Ministers to collect qualitative and quantitative data on child immigration detention and the use of non-custodial, community-based alternatives to detention for children and families.



## IV. Recommendations

In light of the reasons detailed above, PICUM calls for the Working Group on Arbitrary Detention to reiterate that, in order not to violate international human rights law, detention must always be prescribed by law, necessary, reasonable and proportional to the objectives to be achieved.

PICUM calls for the Working Group on Arbitrary Detention to also take into account and to give careful consideration to the following recommendations:

- 1. Reiterate that, in order not to violate human rights, detention must always be prescribed by law and be necessary, reasonable and proportional to the objectives to be achieved and urge States to put an end to the systematic use of immigration detention as a punitive measure and a tool for migration management;<sup>24</sup>**
- 2. Ensure the non-detention of migrants in vulnerable situations, including migrants with serious mental or/and physical health issues, disabled migrants, pregnant women, and children, in line with the guidance of the UN Committee on the Rights of the Child;**
- 3. Ensure the suspensive effect against removal orders of procedures challenging the lawfulness of detention;**
- 4. Ensure that procedural guarantees, including access to legal representation and legal aid, in decisions surrounding any deprivation of liberty, are fully implemented.**

## V. Annexes

1. Urgent Appeal to the UN Working Group on Arbitrary Detention presented by Andalucía Acoge and Asociación Pro Derechos Humanos de Andalucía on 20 August 2014, addressing the issue of the alleged unlawful detention of 170 migrants in Tarifa (Cadiz, Spain). Available in Spanish only.
2. [Letter from the European Council on Refugees and Exiles \(ECRE\), the Greek Council for Refugees \(GCR\) and Aitima to Ms. Cecilia Malmström](#), Commissioner for Home Affairs (European Commission), 6 May 2014 addressing the issue of systematic detention in Greece and challenging the Legal Opinion 44/2014 of the Greek Legal Council, allowing prolonged and systematic detention of migrants in Greece.
3. Platform for International Cooperation on Undocumented Migrants, "[Recommendations to the European Union to Urgently Address Criminalisation and Violence Against Migrants in Greece](#)", March 2014.

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## END NOTES

- <sup>1</sup> See: UN General Assembly, "Report of the Working Group on Arbitrary Detention. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court". 30 June 2014, available at: [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A\\_HRC\\_27\\_47\\_ENG.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A_HRC_27_47_ENG.doc). See also: UN Working Group on Arbitrary Detention, Stakeholders' Consultation: The right of anyone deprived of his or her liberty to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention, "Background paper on State Practice on Implementation of the Right", Geneva, 1 and 2 September 2014, available at: <http://www.ohchr.org/Documents/Issues/Detention/BPConsultation2014.pdf>.
- <sup>2</sup> See: UN Working Group on Arbitrary Detention, "The right of anyone deprived of his or her liberty to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention", Background Paper on State Practice on Implementation of the Right, 1-2 September 2014, available at: <http://www.ohchr.org/Documents/Issues/Detention/BPConsultation2014.pdf>.
- <sup>3</sup> In relation to Europe, see for example: International Organisation for Migration, "Laws for Legal Immigration in 27 EU Member States", International Migration Law no. 16, 2009, available at: [http://publications.iom.int/bookstore/free/IML\\_16.pdf](http://publications.iom.int/bookstore/free/IML_16.pdf). In relation to the legal frameworks adopted in the United States, Australia and Canada, see: Annmarie Zell, "Immigration Law – A Comparative Approach Guide to Immigration Law of Australia, Canada, and the United States", February 2011, available at: [http://www.nyulawglobal.org/globalex/Comparative\\_Immigration\\_Law1.htm](http://www.nyulawglobal.org/globalex/Comparative_Immigration_Law1.htm). See also: Jill. E. Family, "Administrative Law Through the Lens of Immigration Law", Administrative Law Review, Vol. 64, No. 3, 2012, Widener Law School Legal Studies Research Paper No. 12-04, available at: [http://www.americanbar.org/content/dam/aba/events/administrative\\_law/2013/06/8th\\_annual\\_homelandsecuritylawinstitute/innovationschallengesinimmigration\\_combined\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/administrative_law/2013/06/8th_annual_homelandsecuritylawinstitute/innovationschallengesinimmigration_combined_authcheckdam.pdf).
- <sup>4</sup> See: M Lee, "Human Trade and the criminalisation of irregular migration", International Journal of the Sociology of Law 33 (2005) 1 – 15. E Guild & P Minderhoud *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member states on Trafficking and Smuggling in Human Beings* Martinus Nijhoff, Leiden, 2006. R Cholewinski 'The Criminalisation of Migration in EU Law and Policy' in A Baldaccini, E Guild & H Toner, *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* Hart, Oxford, 2007 pp 301 – 336.
- <sup>5</sup> UN Committee on the Rights of the Child (UN CRC), General Comment No. 6 (2005), on the treatment of unaccompanied or separated children outside their country of origin, paragraph 61.
- <sup>6</sup> See: UN Committee on the Rights of the Child, "Report of the 2012 Day of General Discussion on The Rights of All Children in the Context of International Migration", para. 32, available at: <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>.
- <sup>7</sup> Inter-American Court of Human Rights, Advisory Opinion OC-21/14 of 19 August 2014, requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, available at: [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf).
- <sup>8</sup> Council of Europe Parliamentary Assembly, Resolution 2056 (2014), Provisional version, available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21296&lang=en>.
- <sup>9</sup> The Guardian, Diane Taylor, "UK Border Agency rejects calls to stop using force on pregnant detainees", 11 January 2013 (c.f. PICUM Bulletin, 22 January 2013).
- <sup>10</sup> For more information see: <http://www.kavlaoved.org.il/en/response-hcj-ruling-close-holot/>.
- <sup>11</sup> See: Working Group on Arbitrary Detention, Report of the Working Group, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/7/4, 10 January 2008, para. 53.
- <sup>12</sup> For example, it could be noted that, for the year 2013, the total number of visas issued at EU level (13.8 million), plus the number of new residence permits issued over the same period (2.5 million), amounts to a very low statistical rate, if compared to the total of 115,305 refusals at EU external borders reported by Frontex. (i.e. 0.7%). See Eurostat data on residence permits: [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Residence\\_permits\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Residence_permits_statistics). Data on visas issued at EU level is available at: Frontex Annual Risk Analysis 2013, p. 16: [http://www.frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2013.pdf](http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2013.pdf).
- <sup>13</sup> In 2009, the Clandestino project produced minimum and maximum estimates of the size of the irregular migrant population for 2008. The aggregate estimate presented by the Clandestino Project for the 27 EU Member States ranged from 1.9 to 3.8 million undocumented migrants. See: Clandestino project "Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe", European Commission, DG Research, Sixth Framework Programme, Priority 8: Scientific Support to Policies. The results of the Clandestino project are now cited, amongst other institutions, by Eurostat, the European Commission and the FRA. See for example: EU Fundamental Rights Agency, "Fundamental rights of migrants in an irregular situation in the European Union", 2011, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/1827-FRA\\_2011\\_Migrants\\_in\\_an\\_irregular\\_situation\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf).
- <sup>14</sup> For more information see: M. LeVoy and K. Soova, "How Relevant, Effective and Humane is the EU Border Control Regime?", Government Gazette, March 2013.
- <sup>15</sup> See: UN General Assembly, "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", 2 April 2012, available at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf). See also: Concluding Remarks by UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, FRA-ECtHR Seminar on European Law on Asylum, borders and immigration, 11 June 2013, available at: [https://fra.europa.eu/sites/default/files/echr-fra-handbook-seminar-crepeau\\_en.pdf](https://fra.europa.eu/sites/default/files/echr-fra-handbook-seminar-crepeau_en.pdf).
- <sup>16</sup> See: "There are alternatives. A handbook for preventing unnecessary immigration detention", International Detention Coalition, 2011, available at: [http://massivefishball.com/IDC\\_Handbook.pdf](http://massivefishball.com/IDC_Handbook.pdf).



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<sup>17</sup> See: OHCHR-UNHCR Global Roundtable on Alternatives to Detention, 11-12 May 2011, available at:

<http://www.ohchr.org/EN/Issues/Migration/Pages/Roundtable.aspx>.

<sup>18</sup> Aviva Chomsky, "Undocumented: How Immigration Became 'Illegal'", 2014. On the same issue see also: R. Cholewinski, "The Criminalisation of Migration in EU Law and Policy", in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart Publishing, 2007, pp. 301-336.

<sup>19</sup> See: Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau, "Regional study: management of the external borders of the European Union and its impact on the human rights of migrants", Human Rights Council, 24 April 2013, A/HRC/23/46, para. 35, available at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf).

<sup>20</sup> In 1975, the UN General Assembly requested "The United Nations organs and the specialised agencies concerned to utilise in all official documents the term 'non-documented or irregular migrant workers' to define those workers that illegally and/or surreptitiously enter another country to obtain work": General Assembly, Measures to ensure the human rights of all migrant workers, 3449, 2433rd plenary meeting, 9 December 1975, para 2, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=topic&toCID=4565c22541&toID=4565c25f4f1&publisher=UNGA&type=&coi=&docid=3b00f1bd68&skip=0>.

<sup>21</sup> See for example: Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), Human rights of irregular migrants, at point 7: "the Assembly prefers to use the term 'irregular migrant' to other terms such as 'illegal migrant' or 'migrant without papers'. This term is more neutral and does not carry, for example, the stigmatisation of the term 'illegal'. It is also the term increasingly favoured by international organisations working on migration issues", available at: <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17456&lang=EN>.

<sup>22</sup> See for example: European Parliament legislative resolution of 13 September 2011 on the proposal for a regulation amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), (COM(2010)0061 – C7&0045/2010 – 2010/0039(COD)): "The European Parliament stresses that the EU institutions should endeavour to use appropriate and neutral terminology in legislative texts when addressing the issue of third country nationals whose presence on the territory of the Member States has not been authorised by the Member States authorities or is no longer authorised. In such cases, EU institutions should not refer to "illegal immigration" or "illegal migrants" but rather to "irregular immigration" or "irregular migrants"', available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0344+0+DOC+XML+V0//EN>.

<sup>23</sup> The lack of reliable, exact, timely and comparable data relating to the number, living conditions and human rights of migrants is also reflected in recent studies concerning for example cases of fatalities at the border. As the IOM Head of Research Frank Laczko recently stated: "Although vast sums of money are spent collecting migration and border control data, very few agencies collect and publish data on migrant deaths". For more information on this issue see: IOM, "Fatal Journeys: Tracking Lives Lost During Migration", September 2014, available at: <http://www.iom.int/cms/render/live/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2014b/pbn-listing/iom-releases-new-data-on-migrant.html>.

<sup>24</sup> In the case of *Vélez Lóor v. Panama*, the Inter-American Court for Human Rights established the incompatibility with the American Convention of measures of deprivation of liberty of a punitive nature in order to control migratory flows, in particular those of an irregular nature. Specifically, it determined that the detention of an individual owing to failure to comply with the immigration laws should never be for punitive purposes so that the measures of deprivation of liberty should only be used when they are necessary and proportionate in a specific case in order to ensure the appearance of the person at the immigration proceedings or to guarantee the implementation of a deportation order and only for the shortest time possible. Consequently, finding them arbitrary, the Court objected to those immigration policies that focused on the mandatory detention of irregular migrants, without the competent authorities verifying in each specific case, and by an individualized assessment, the possibility of using less restrictive measures that would be effective to achieve the required objectives. See: Case of *Vélez Lóor v. Panama*, 23 November 2010, Series C No. 218, paras. 163-172.