

International Detention Coalition

Human rights for detained refugees,
asylum seekers and migrants

Draft Guiding Principles on the Right to Challenge the Legality of Arbitrary Detention

IDC SUBMISSION

www.idcoalition.org

Envisioning a world without unnecessary immigration detention

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ABOUT THE IDC

The International Detention Coalition (IDC) is a unique global network of over 300 non-governmental organisations, faith-based groups, academics and practitioners in more than 65 countries that advocate for and provide direct services to refugees, asylum-seekers and migrants in administrative detention. We are the only international organisation focused explicitly on immigration detention and alternatives to detention. With an international Secretariat based in Melbourne, Australia, the IDC works globally through Regional Coordinators in Africa, the Americas, Asia-Pacific, Europe, and the Middle East & North Africa (MENA).

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International Covenant on Civil and Political Rights

Article 9: Liberty and security of person

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

1. INTRODUCTION

“Migrants who are detained find themselves in an especially vulnerable situation, as they may not speak the language and therefore understand why they are detained, or be aware of ways to challenge the legality of their detention [...] migrants in detention are frequently denied key procedural safeguards, such as prompt access to a lawyer, interpretation/translation services, necessary medical care, means of contacting family or consular representatives and ways of challenging detention.”

Mr. François Crépeau, Special Rapporteur on the Human Rights of Migrants
A/HRC/20/24, para 15, April 2012

Countless millions of refugees, asylum-seekers and migrants are at risk of immigration detention each year. And while “effective legal assistance and the opportunity to adequately challenge the legality of detention are fundamental safeguards against arbitrary detention,”¹ in the context of immigration detention, we have seen that the ability to realize these fundamental safeguards is virtually non-existent in many areas of the world.

The use of immigration detention is growing and indeed already endemic to the management of complex mixed migration. Yet the right to challenge the legality of one’s detention in the immigration detention context is frequently bypassed and there remain serious systemic challenges to upholding this fundamental right with regard to refugees, asylum-seekers and migrants.² As the UN Special Rapporteur on the Human Rights of Migrants, Mr. François Crépeau, has stated, migrants are particularly vulnerable to a lack of procedural guarantees which protect against illegal, arbitrary and unnecessary immigration detention.³

In part, this is due to cultural or linguistic barriers, however more often it is due to a denial of fundamental procedural safeguards, and many states continue to treat administrative detention as outside the fundamental protections of the ICCPR and other international human rights instruments. There is, therefore, an urgent need to clarify article 9 as it applies specifically to the use and limits of administrative detention, and to safeguard the critical right of administrative detainees to challenge the legality of their arbitrary detention.

The IDC welcomes these *Draft Guiding Principles on the Right to Challenge the Legality of Arbitrary Detention* as a critical opportunity to clearly state the obligations of state parties to provide meaningful opportunities to challenge the legality of arbitrary detention in the context of immigration detention. We encourage the Working Group on Arbitrary Detention to continue to highlight the issue of immigration detention in its work and to make this a central issue within its forthcoming *Draft Guiding Principles*.

This submission will proceed in four parts. Beginning with this Introduction, it will seek to provide a general context for better understanding the issue of immigration detention. In section 2, it will share a number of emerging trends with regard to the use of immigration detention and the right to challenge the legality of arbitrary detention. Finally, in section 3 it will make concrete recommendations for inclusion in the Working Group on Arbitrary Detention’s *Draft Guiding Principles on the Right to Challenge the Legality of Arbitrary Detention*. A brief Conclusion will summarise the main points of this submission and additional resources are provided in an extensive Appendix.

¹ OHCHR, News and Events, *The right to challenge the legality of arbitrary detention: UN expert panel to develop new guiding principles*, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13977&LangID=E>.

² For the purposes of this Submission, “refugees, asylum-seekers and migrants” is used broadly to refer to the many legal, political and social categories of individuals at risk of immigration detention. This includes, but is not limited to, refugees, asylum-seekers, stateless persons (including in situ stateless persons), labour migrants, trafficked persons, smuggled persons, undocumented migrants, and visa holders.

³ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, para. 31, A/HRC/20/24.

The issue

Today the use of immigration detention as a migration management tool by many governments is on the rise. The detention of refugees, asylum-seekers and migrants represents a growing human rights challenge worldwide, despite detention only being permitted as a matter of international law where it is necessary, reasonable, and proportionate to a legitimate aim to be achieved, and then only after less coercive alternatives have been explored in each individual case.

In reality, refugees, asylum-seekers and migrants are often subjected to arbitrary or unlawful detention and are in a position of particular vulnerability with regard to immigration detention. Immigration detention is often characterised by little or no independent oversight, and in many countries, immigration detention is among the most opaque areas of public administration. Often, immigration detainees are outside their countries of origin or nationality, separated from families and support networks, unfamiliar with the domestic legal context, or unable to speak the local language.

Moreover, they may be detained in conditions that do not meet minimum standards or are unsuited to their particular circumstances. While practices and conditions of detention vary widely between states, more often than not, places of immigration detention closely resemble criminal detention and immigration detainees are often held together with criminal detainees. Furthermore, whether intentionally or otherwise, immigration detainees are frequently prohibited from access to procedures that are critical for resolving their immigration status, often with far-reaching human rights consequences.

Many human rights violations can and do occur in these circumstances and the physical and psychological impacts of even very limited immigration detention are well documented.⁴ Women and children are especially vulnerable to violence and abuse in places of immigration detention, and studies have shown that even short periods of immigration detention can have life-long mental and physical health impacts.⁵

Immigration detention can last for months or in some cases years, during which time men, women and children are deprived of their liberty, often in overcrowded and unhygienic conditions falling below international standards. In some cases immigration detention is clearly illegal, with no basis in law. In other cases, immigration detention is arbitrary with little or no due process afforded, limited or non-existent independent oversight of the reasons for detention or conditions of detention, denial of access to international protection mechanisms, opportunities for release, judicial review or meaningful and effective avenues to challenge one's detention.

Although immigration detention may be permissible in an individual case, governments often make broad policy justifications for the detention of refugees, asylum-seekers and migrants that overshadow the carefully circumscribed international standards around deprivations of liberty, including norms of necessity, proportionality, and non-discrimination.

As the Working Group on Arbitrary Detention has previously pointed out, the lack of procedural protections, access to effective legal assistance, and the ability to meaningfully challenge the legality of one's detention only contribute to this growing problem of unnecessary, illegal and arbitrary detention.

Who is detained in immigration detention?

Individuals detained in places of immigration detention include refugees, asylum-seekers, rejected asylum-seekers, stateless persons, trafficked persons, smuggled migrants, labour migrants, regular migrants who have breached their conditions of stay, and undocumented migrants, among others. They may be single men, women, families, or children—including unaccompanied or separated minors.

⁴ See, e.g. Silove D, Steel Z, Watters C., *Policies of deterrence and the mental health of asylum seekers*, JAMA, (2000); Medecins Sans Frontieres, *The Impact of Detention on Migrants' Health*, Briefing Paper, (2010); Coffey G, et al, *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*, Social Science & Medicine 70 (2010).

⁵ See, e.g. International Detention Coalition, *Captured Childhood*, (2012), available at: <http://idcoalition.org/ccap/>.

Where are refugees, asylum-seekers and migrants detained?

Refugees, asylum-seekers and migrants are frequently detained in criminal prisons or other prison-like settings inappropriate for non-punitive, administrative detention. Often, the conditions of immigration detention are even worse than those in designated criminal prisons.⁶ Refugees, asylum-seekers and migrants have been documented to be deprived of liberty in a number of physical contexts including, but not limited to:

- designated immigration detention facilities
- unofficial immigration detention centres
- removal or transit centres
- closed reception or processing centres
- semi-open reception or processing centres
- closed refugee camps
- islands
- airports, or international transit zones
- vehicles, airplanes, boats and other vessels
- criminal prisons, police lockups, or police stations
- military prisons or military bases
- houses, hostels, hotels and other locations where freedom of movement is restricted
- psychiatric institutions and hospitals
- disused warehouses
- shipping containers
- private security company compounds

For how long are refugees, asylum-seekers and migrants detained?

Duration of immigration detention varies enormously. In some jurisdictions, the national legal framework is highly permissive, enabling refugees, asylum-seekers and migrants to be detained for very long periods, even indefinitely. Where immigration detention is for the purposes of deportation, the period of immigration detention is more likely to be shorter, however where access to judicial procedures or removal are not practicable, immigration detention can be significantly prolonged, even indefinite. This is a particular concern with regard to rejected asylum-seekers and stateless persons who may not be able to be removed efficiently or without violating the right to *non-refoulement*.

Who detains refugees, asylum-seekers and migrants?

Most often, public authorities are entrusted with the power to detain refugees, asylum-seekers and migrants in places of immigration detention. This may include, but is not limited to, police, prison officers, immigration authorities, border guards, military forces, security forces, or the coastguard. However, increasingly, states are adopting the practice of outsourcing the immigration detention function to private companies, giving rise to important questions of accountability.⁷

⁶ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 31, A/HRC/20/24.

⁷ See, e.g. *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v. Australia*, HRC, Comm. No. 1020/2001, [7.2], available at: <http://www.unhchr.ch/tbs/doc.nsf/0/e9d23042cfec8e86c1256dad00535a94?Opendocument>; See also, Michael Flynn and Cecilia Cannon, *The Privatization of Immigration Detention: Towards a Global View*, (Sept. 2009), available at: http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf.

2. INTERNATIONAL AND REGIONAL TRENDS

"There is a culture of using deprivation of liberty as the norm and not as an exceptional measure reserved for serious offences as required by international human rights standards."

Mr. Roberto Garretón, Working Group on Arbitrary Detention
WGAD delegation visit to Brazil, March 2013

International Trends

The IDC has observed two parallel processes occurring globally in relation to the detention of refugees, asylum-seekers and migrants. One is the dramatic increase in the use of immigration detention by states as a first resort over the past 10-15 years. This includes increasingly criminal and punitive immigration detention policies in an attempt to manage, prevent or control migration movements. Second, is a more recent shift over the past 5 years by some states to implement a more human-centred approach to migration management, including the exploration and implementation of alternatives to detention (ATD) and the use of custodial detention in cases of last resort only.

However, the IDC remains concerned that governments are cooperating bilaterally and multilaterally to promote criminalization and detention initiatives that attempt to restrict refugee, asylum-seeker and migrant movement without considering the rights-based framework including, most importantly, article 9 of the ICCPR. Industrialized countries continue to fund, pressure and provide incentives to neighbouring countries to detain refugees, asylum-seekers and migrants, including non-signatories to the Refugee Convention or other human rights treaties, placing refugees, asylum-seekers and migrants at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.

Globally, immigration detention remains far less regulated, reviewed and monitored than criminal or other forms of administrative detention, and many countries are using a one-size-fits-all immigration detention model, where refugees, asylum-seekers and migrants are detained regardless of individual circumstances, age, protection needs or particular vulnerabilities. The expansion of attempts to restrict global migration movements is also exposing xenophobic and nationalistic anti-immigrant attitudes. This can be seen, for example in the prioritization of perceived national security concerns over fundamental human rights and individual human security.

As a result, there has been growing litigation and public concern regarding unlawful, arbitrary and unnecessary detention. There is also a growing body of evidence that punitive and criminal approaches to migration do not work; that they are ineffective at deterring migration and often violate rights in the process. And there has been an increasing recognition of the serious mental and physical health impacts of immigration detention, especially on children and other particularly vulnerable groups.

In response, a number of countries have undertaken detention reform, including legislative and policy change to limit the use of immigration detention and to establish safeguards in cases when immigration detention is deemed absolutely necessary. There has also been a noted rise in the exploration and use of alternatives to detention, including recommendations to avoid detention altogether with regard to certain particularly vulnerable groups, such as children, families, women, the elderly, the physically and mentally ill, refugees, asylum-seekers, and trafficking victims. These ATD models have been found to be more effective, less costly, and more humane than unnecessary and damaging immigration detention, and a number of UN bodies—including the General Assembly, Committee on the Rights of the Child (CRC), Human Rights Council, the Office of the High Commissioner for Refugees (UNHCR), and the Office of the High Commissioner for Human Rights (OHCHR)—have called upon states to explore and implement alternatives to detention as a matter of priority.

Although many states continue to view migration through a national security framework, we have seen a number of states adopt a human security approach, effectively managing, supporting and protecting refugees, asylum-seekers and migrants outside of immigration detention. This includes mechanisms such as the use of individual screening and assessment, access to protection mechanisms or due process procedures for challenging the legality of one's detention, community

reception models, regularization and various alternatives to detention, such as provisional release, reporting and case management.

Regional Trends

With regard to the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention, all regional treaties declare that right non-derogable, and the Working Group on Arbitrary Detention has stated that administrative detention may also be subject to the customary norm codified in article 14 of the ICCPR, for example, “in cases where sanctions, because of their purpose, character or severity, must be regarded as penal even if, under domestic law, the detention is qualified as administrative.”⁸

However, according to IDC members in 67 countries globally, there are a number of concerning regional trends with regard to the ability of refugees, asylum-seekers and migrants to challenge the legality of detention. Across all regions, refugees, asylum-seekers and migrants are infrequently told the reasons for their arrest or detention, let alone provided a legal basis and the necessary factual specifics to successfully challenge what may be unlawful or arbitrary detention. In the case of immigration detention on the basis of irregular entry, for example, the factual specifics may be nothing more than a discriminatory assumption on the part of the arresting official. There is also an increasing trend among state parties to invoke overly broad substantive grounds for arrest and detention, which leave refugees, asylum-seekers and migrants guessing at the legal basis of the arrest. “National security” grounds have been especially troubling, as state parties are often not legally obligated in their domestic legislation to provide the factual specifics of the arrest at all, leaving legal counsel unable to challenge the factual basis of their clients’ detention.

When sufficiently clear and detailed reasons for arrest are provided to refugees, asylum-seekers and migrants, they are infrequently provided in the native language of the arrested individual. Often, refugees, asylum-seekers and migrants are forced to rely on interpretation provided by other detained individuals. In cases of exploitative migrant smuggling, this may mean that migrants are dependent upon smugglers to provide interpretation. In cases of human trafficking, there is a serious concern that the lack of interpretation leaves trafficking victims further exploited and at the liberty of their traffickers. Furthermore, research shows that most refugees, asylum-seekers and migrants are unaware of the specific immigration policies of the countries where they are arrested or detained,⁹ and IDC members report that many persons in immigration detention have never been before an independent member of the judiciary, let alone been afforded independent legal counsel before a decision to detain was made. There exists in all regions a striking lack of access by legal aid providers to places of immigration detention.

Collective expulsion and expedited return procedures in a number of regions are leading to deportation and *refoulement* without the necessary due process protections. When independent judicial review of the decision to detain is granted, people in places of immigration detention are frequently unaware of the legal basis for their detention or the evidence against them, rendering potential legal challenges virtually impossible. This is often due to a lack of communication by the state entirely, however even when attempts to provide notice of the basis for arrest and detention are made, they are infrequently, if ever, placed in writing, sufficiently detailed in order to mount a defense, or accompanied by qualified interpreters and translators. These limitations on receiving notice of the basis for one’s detention—a first step and fundamental point of departure for any challenge to one’s arbitrary detention—point to deeper, concerning, and systemic challenges to the right to challenge arbitrary detention.

Additionally, we have received reports from a number of regions of group detention decisions, often based on ethnicity, language, or country of origin, clearly in violation of the principle of non-discrimination and the right to an individualized assessment. In such circumstances, the very basis for arriving at the decision to detain is a violation of the principle of non-arbitrariness. And even when individual detention assessments are provided, IDC members report that courts often loosely apply the norms of necessity and proportionality, or simply accept the recommendations of the state with

⁸ Working Group on Arbitrary Detention, para. 68, A/HRC/22/44.

⁹ International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention*, 11, (2011), available at: <http://idcoalition.org/cap/handbook/>.

little regard to the individual circumstances of the refugee, asylum-seeker or migrant in question.

Finally, IDC members have identified that in the context of the right to challenge the legality of one's detention there is infrequently an opportunity for periodic review of the initial decision to detain. While international law requires a review whenever circumstances justifying the detention have changed, refugees, asylum-seekers and migrants across all regions rarely have their decision reviewed when they take steps to seek international protection or otherwise to regularize their status, for example.

Similarly, migrants in a number of regions are discouraged from filing applications for review or protection by policies which force them to remain in detention throughout the duration of their legal challenge or status determination. These processes can take months or even years in some cases. So even those individuals with valid protection claims or opportunities to regularize their status may be forced to choose between continued immigration detention, often in deplorable conditions, or deportation and possible *refoulement*. They are, effectively, forced to forgo certain fundamental rights in order to claim others.

Africa

No legal advice is offered or made available to detainees as a matter of course and no information on the availability of such legal assistance is given to detainees at any point in the detention and deportation process."

Lawyers for Human Rights
Monitoring Immigration Detention in South Africa, June 2012

The Horn of Africa to Southern Africa migration corridor remains a sub-region of concern given increasing militarization, securitization, criminalisation of irregular movement and a nearly universal "migration control" approach to border management. Encampment continues to be a common response to refugees and asylum-seekers in East Africa and in parts of Southern Africa. Immigration detention is occurring in prisons and police cells, particularly for irregular migrants and refugees or asylum-seekers that leave closed refugee camps. Prison and police station populations are not generally screened to determine the presence of those with protection needs, and deportations or expulsions are documented with little or no access to due process or other protection mechanisms.

Key issues:

- Criminalization of irregular migrants
- Forced or closed encampment of refugees and asylum-seekers
- Increasing focus on militarization and security
- Lack of access to due process and/or protection mechanisms for those detained
- Use of criminal prisons and police stations as places of immigration detention
- Treatment and conditions in places of immigration detention
- Detention of particularly vulnerable groups
- Lack of community-based alternatives to detention
- Multiple detentions of the same person
- Push backs and mass deportations

At the regional level, the right to take proceedings before a court in order to decide on the lawfulness of detention is provided by article 7 of the African Charter on Human and Peoples' Rights. However, in practice, this right is frequently denied, and the Fahamu Refugee Program has made a concerted effort to document cases of denial of legal aid and the ability to challenge one's detention.¹⁰ IDC Member, Lawyers for Human Rights, has documented a "high incidence of unlawful detention, including substantive and procedural contravention of the law" and notes with particular concern, the inability of lawyers to access places of immigration detention and therefore assist individuals in challenging the legality of their detention.¹¹

¹⁰ For more information, see <http://www.refugeelegalaidinformation.org>.

¹¹ Lawyers for Human Rights, *Monitoring Immigration Detention in South Africa*, (June 2012), available at: http://www.lhr.org.za/sites/lhr.org.za/files/detention_report_2012.pdf.

Americas

“The lack of information, the inability to have free legal representation, the difficulty for lawyers to access the detention centers . . . as well as the little contact with the outside world, remain constant.”

Sin Fronteras
Ser Migrante no me Hace Delincuente, April 2013

The Americas region has two major detaining countries, Mexico and the USA, whose detention practices are of serious concern. Both countries are promoting their immigration detention and control policies to neighbouring states, especially the smaller Central American and Caribbean countries. Both Mexican and American law include provisions for mandatory detention, including of children. The USA alone detains nearly half a million migrants annually and has “mandatory minimum” provisions in law which require immigration officials to detain tens of thousands of migrants daily under threat of reduced funding allocations. Despite these policies, there continues to be regular mixed migration, particularly into the USA. In the past year, there has been an alarming rise in the number of unaccompanied minors entering the USA, with the total number expected to reach upwards of 35,000 in 2014.¹²

Key issues:

- Mandatory detention policies
- Lack of access to protection mechanisms for refugees and asylum-seekers
- Increased detention of extra-continental migrants in Central America and the Caribbean
- Detention being applied in a discriminatory manner
- Serious lack of access and ongoing monitoring of detention facilities
- Influence and expansion of North American immigration control and criminalisation policies
- Criminalization of irregular migrants
- Use of criminal prisons and police stations as places of immigration detention
- Treatment and conditions in places of immigration detention

At the regional level, the right to take proceedings before a court in order to decide on the lawfulness of detention is provided by article 7 of the American Convention on Human Rights. However, in the experience of Sin Fronteras, and other Americas regional IDC members, the ability to provide legal representation to individuals affected by immigration detention is “virtually impossible”, creating serious barriers for refugees, asylum-seekers and migrants to effectively access justice in the context of administrative detention.¹³ Individuals arriving irregularly—the vast majority of the refugees, asylum-seekers and migrants in the Americas—are often deported before access to a lawyer can be established.

In the *Case of Vélez Loo v. Panama*, the Inter-American Court of Human Rights (IACHR) considered a number of violations with regard to challenging the legality of detention. Among other things, Mr. Vélez Loo’s attorney’s argued that i) he was never notified of the proceeding instituted against him; ii) he was not provided with legal aid; iii) he was not informed of his rights; and iv) during the whole time the alleged victim was in Panamanian territory, he was held in custody by the State authorities and was never taken before a judicial authority.¹⁴ Unfortunately, IDC members report that such violations continue to be endemic to migration management in the Americas, despite the *Vélez Loo* jurisprudence.

¹² For more information, see Women’s Refugee Commission, *Forced from Home*, (Oct. 2012), available at: <http://womensrefugeecommission.org/forced-from-home-press-kit>.

¹³ Sin Fronteras, *Ser Migrante no me Hace Delincuente*, (April 2013), available at: http://www.sinfronteras.org.mx/attachments/article/1432/INFORME_EM_2013.pdf.

¹⁴ *Caso Vélez Loo vs. Panamá*, Inter-American Court of Human Rights (IACrHR), 23 November 2010, available at: <http://www.refworld.org/docid/4d2713532.html>.

Asia-Pacific

"Many people will be shocked to know that so many children are languishing behind bars."

Thomas Vargas, UNHCR Senior Regional Protection Advisor
APRRN/UNHCR regional detention consultation, November 2011

Immigration detention continues to be a growing concern across Asia-Pacific. A number of countries in the region have not signed the 1951 Refugee Convention, leaving refugees and asylum-seekers vulnerable to *refoulement*. Irregular migrants are increased at risk of abuse and have little voice in advocating for their rights. Of particular concern are mandatory detention policies adopted by some states within the region, and the "offshoring" of refugees, asylum-seekers and migrants by Australia in particular, to neighbouring states—including states that have not signed the 1951 Refugee Convention or other human rights conventions.

Key issues:

- Criminalisation of irregular migrants, including refugees and asylum-seekers
- The punitive and arbitrary nature of immigration detention throughout the region
- Lack of access and ongoing monitoring of detention facilities
- Lack of release options, including community-based alternatives to detention
- Impact of detention on particularly vulnerable groups, such as children, unaccompanied minors, pregnant women, those with physical and mental health conditions, the elderly, refugees, asylum-seekers and stateless persons
- Extremely poor detention conditions, including abuse, neglect, isolation, family separation, and the documented deterioration of physical and mental health of detainees

In Asia-Pacific, there is no regional human rights convention which protects the right to take proceedings before a court in order to decide on the lawfulness of detention, and rough estimates put the number of detained refugees, asylum-seekers and migrants at nearly 14,000 - up from 11,500 a year ago and some 7,800 in 2011.¹⁵ Many of those detained have been held for years with no prospect of release.

Worrying trends in recent months include the increasingly automatic detention of people arriving irregularly by boat in some countries—including men, women and children—and a rise in incidents of airport arrivals being detained and threatened with deportation despite having valid travel documents. Stateless people in the Asia-Pacific region, such as the Rohingya, are particularly vulnerable to arbitrary and indefinite detention as there are no clear solutions and nowhere to deport them to. Children and other particularly vulnerable groups also face increased hardship and exploitation in places of immigration detention.

Europe

"There are concerns about the principle of proportionality when you consider that these persons have not committed a crime and yet are being placed in prison-like conditions for a prolonged period of time without proper judicial review."

Mr. Vladimir Tochilovsky, Working Group on Arbitrary Detention
WGAD delegation visit to Hungary, October 2013

The IDC is very concerned by trends across Europe as they relate to immigration detention. There is an increasing use of immigration detention for refugees, asylum-seekers and migrants, particularly in European Union (EU) nations, such as Greece, where large numbers of irregular migrants are being detained in conditions falling well below international standards. Additionally, some EU states are seeking to externalise their criminalisation and migration control policies, frequently through bilateral agreements or direct funding of immigration detention centres in other states. Recent changes to EU legislation, including the latest recast of the Reception Conditions Directive, need to be monitored

¹⁵ According to the workshop report of the Asia-Pacific Refugee Rights Network (APRRN)/UNHCR regional detention consultations held in Bangkok (Nov. 2013). For more information, see <http://www.aprrn.info/1/index.php/news/250-unhcr-civil-society-warn-of-growing-detention-problem-in-asia-pacific?highlight=WyJkZXRIbnRpb24iXQ>.

closely to ensure that any deprivations of liberty are consistent with article 9 protections. There is also an urgent need for greater exploration and development of alternatives to detention.

Key issues:

- Detention conditions, particularly in some Eastern European and EU border countries, regularly fall below minimum human rights standards
- The growing use of detention in the first instance for removal purposes, rather than first seeking alternatives to detention
- Use of the Dublin Regulation within EU countries to detain and deport asylum-seekers
- Mandatory detention policies in some countries, including the UK and Malta
- The length of detention can be onerous, with some reports of detention lasting for years
- The detention of children and other particularly vulnerable groups, including asylum-seekers, UAMs and families

At the regional level, the right to take proceedings before a court in order to decide on the lawfulness of detention is provided by article 5, paragraph 4, of the European Convention on Human Rights. Yet in practice, we have seen that the infrastructure to detain and deprive individuals of their liberty in and at the external borders of Europe are proliferating much faster than the necessary accompanying due process safeguards. For example, in Malta, where the European Court of Human Rights has found the state lacks any “effective and speedy remedy” for challenging the lawfulness of detention,¹⁶ the state continues to detain virtually every migrant who arrives by boat for periods up to 18 months.¹⁷ This is despite a lack of individualized assessment or opportunity for meaningful judicial review.¹⁷

Likewise, a bill adopted by the Bulgarian Government in November 2013 introduced the systematic detention of asylum-seekers, including children and families, without a number of critical due process provisions such as timely judicial review of the detention, provision of the reasons for detention, and information regarding the right to challenge one’s detention.¹⁸ So, while international law clearly restricts detention to cases of exceptionality, states continue to pass immigration laws providing for sweeping detention decisions without access to critical safeguards such as the right to effectively challenge the legality of detention.

Middle East and North Africa

“Individuals returned . . . against their will are routinely subjected to human rights violations, including incommunicado detention, torture and other forms of ill-treatment.”

Amnesty International
Eritrea: Sent Home to Detention and Torture, 2009

The MENA region is experiencing a series of complex and large-scale mixed migration movements both as a result of increased civil and political conflict, but also due to ongoing economic migration, and an increase in human trafficking and smuggling operations. Immigration detention is increasingly being acknowledged as a critical protection issue for action, by both NGOs and UN agencies. Refugees, asylum-seekers and migrants are being held in criminal prisons, police stations, and dedicated immigration detention facilities across the Middle East and North Africa, with varying access to legal assistance, protection mechanisms, embassies, health care, family and community.

Key issues:

- Criminalisation of irregular entry and exit, including refugees, asylum-seekers, victims of human trafficking and other particularly vulnerable groups
- Criminalisation policies are leading to increasingly dangerous migration routes, often resulting in kidnapping, extortion and other serious human rights abuses

¹⁶ ECHR, *Louled Massoud v. Malta*, para. 46.

¹⁷ Human Rights Watch, *Malta: Boat Ride to Detention* (2012), available at: <http://www.hrw.org/node/108828/section/6>.

¹⁸ European Council for Refugees and Exiles (ECRE), *Draft bill provides for systematic detention of asylum seekers in Bulgaria*, available at: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/498-draft-bill-provides-for-systematic-detention-of-asylum-seekers-in-bulgaria.html>.

- Forced or closed encampment of refugees and asylum-seekers
- Lack of access to legal advice, asylum procedures and other protection mechanisms
- Poor physical conditions of detention, including overcrowding, lack of adequate health, sanitation and hygiene facilities
- *Refoulement* and forced return
- Lack of access to detention facilities and independent monitoring

At the regional level, the right to take proceedings before a court in order to decide on the lawfulness of detention is provided by article 14 of the Arab Charter on Human Rights. However, recent reports coming out of the region indicate that serious problems remain with regard to the ability to challenge the legality of one's detention. For example, a forthcoming report by Human Rights Watch indicates that Eritrean refugees, asylum-seekers and migrants are systematically being intercepted and denied their fundamental right to challenge the legality of detention. Instead, authorities are unlawfully trying some Eritreans in military tribunals for immigration offenses and detaining them indefinitely in Sinai police stations in inhuman and degrading conditions with no access to legal assistance, UNHCR or courts. Egyptian authorities have repeatedly claimed that all Eritreans intercepted in Sinai are "illegal" migrants, in attempts to deny them fundamental ICCPR¹⁹ protections.

¹⁹ Human Rights Watch, *Forthcoming Human Rights Watch report on Sudanese and Egyptian security force collusion with traffickers of Eritreans*.

3. RECOMMENDATIONS

I. General recommendations

1. Ensure that the right to challenge the legality of arbitrary detention applies to *all* refugees, asylum-seekers and migrants. This includes citizens as well as non-citizens, regular and irregular migrants, refugees, asylum-seekers, stateless persons, labour migrants, trafficking victims, smuggled migrants and all other groups or classes of migrants.²⁰
2. States should never criminalise the act of migration, even in cases of irregular entry and stay.²¹ However, if a refugee, asylum-seeker or migrant is criminalised for reasons related to their migration status, ensure that these individuals are afforded the fundamental article 9 protections of paragraphs 2 and 3, which apply to deprivations of liberty in connection with criminal charges.
3. Reiterate that the only legitimate objectives for the detention of refugees, asylum-seekers and migrants are the same as they are for anyone else, namely: when someone presents a risk of absconding from future legal proceedings or administrative processes, or when someone presents a danger to their own or public security.²²
4. Ensure that the purpose of administrative detention is never punitive, and that refugees, asylum-seekers and migrants are never subject to criminal, prison-like conditions or environments in places of immigration detention.²³
5. Ensure that states uphold their obligation to protect particularly vulnerable individuals against violations of their liberty and security of person by avoiding immigration detention altogether for such individuals and seeking less-restrictive alternatives to detention in accordance with the principles of necessity and proportionality.
6. Reiterate that the immigration detention of a child because of they or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.²⁴ Ensure that children are not separated from their families and caregivers for reasons related to immigration status, and that states adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life through legislation, policy and practices that allow children to remain with family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved.²⁵
7. Ensure that the procedural safeguards and guarantees established by international human rights law, specifically article 9 of the ICCPR, are implemented in national legislation and applied to all forms of detention. In particular, grounds for the detention of refugees, asylum-seekers and migrants must be established by law. Decisions to detain should only be taken under clear legal authority, and all individuals deprived of their liberty should be informed in a language they understand, in writing, of the reasons for the detention and be entitled to bring

²⁰ Human Rights Committee, General Comment No. 8; Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 5, A/HRC/20/24.

²¹ Working Group on Arbitrary Detention, para. 53, A/HRC/7/4; Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 13, A/HRC/20/24.

²² Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 9, A/HRC/20/24.

²³ *Id.* at para. 31.

²⁴ Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, 78, available at: http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGDChildrens_Rights_InternationalMigration.pdf.

²⁵ *Id.* At 79.

proceedings before a court, so that the court can decide on the lawfulness of the detention.

8. Ensure that refugees, asylum-seekers and migrants in detention are assisted, free of charge if necessary, by independent and qualified legal counsel and interpreters during administrative proceedings. Individuals and their legal counsel should have full and complete access to their legal files.
9. Ensure that refugees, asylum-seekers and migrants have prompt and regular access to consular or embassy representatives and family members, upon request.
10. Ensure that representatives of national human rights institutions, UN organisations, and NGOs are allowed access to all places of immigration detention and able to conduct regular, independent detention monitoring. All immigration detention facilities – whatever their form – should be subject to a common set of standards, policies and practices and should be monitored by an independent authority that is dedicated to ensuring compliance with international human rights standards.
11. Ensure that the *Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment* are applied to all refugees, asylum-seekers and migrants in immigration detention, including the right to assistance, free of charge if necessary, of an interpreter and legal counsel, as well as the right to communicate with the outside world, in particular family and legal counsel.
12. Encourage states to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and establish a national preventive mechanism mandated to visit all places of deprivation of liberty within their jurisdiction, including places where refugees, asylum-seekers and migrants may be detained.

II. Right to be informed at the time of the arrest of the reasons for the arrest and the right to be promptly informed of any criminal charges

13. Clear communication is essential for ensuring that detainees know their rights and responsibilities throughout the immigration process. Information should be provided at all critical points of the immigration process, both in writing and orally, and in a language and terms that are easily understood by detainees. This will frequently require the provision of information through qualified interpreters and translators.

Interpretation and translation provision

14. Information about the reason for arrest must be provided immediately upon arrest. While a delay of up to “several hours” in the provision of notice (due to interpretation and translation needs) may be appropriate in limited circumstances,²⁶ where states are actively engaging in the arrest and detention of refugees, asylum-seekers and migrants—for example at borders, during immigration enforcement sweeps, or during roadside checkpoints—the need for interpreters will be known ahead of time and should be anticipated, making any delays in notification an unacceptable violation of article 9.
15. Interpretation and translation have been shown to be important elements of successful migration management as they provide refugees, asylum-seekers and migrants with the information they need to be informed of their rights and responsibilities, in a language and cultural context they can understand. In addition to translated written materials, qualified interpreters improve communication with lawyers, case workers and immigration officials.²⁷

²⁶ Human Rights Committee, Draft General Comment No. 35, para. 27, CCPR/C/107/R.3.

²⁷ International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration*

Vulnerable groups

16. For some categories of vulnerable individuals, directly informing them is insufficient to meet the requirement of notice.²⁸ All refugees, asylum-seekers and migrants are vulnerable within the context of immigration, and especially with regards to arbitrary arrest and detention. Compared to national populations, migrants may lack a degree of linguistic or cultural competency, strong family ties or social networks in the host country, and knowledge of the domestic criminal or immigration laws. This heightened vulnerability will require additional safeguards to prevent violations of the right to notice. For example, immediate access to legal counsel, family or embassy contacts, and interpretation services.
17. In addition, there are a number of particularly vulnerable categories of migrants who will require further safeguards. Children and the mentally ill may require guardianship arrangements, for example. Refugees, asylum-seekers and stateless persons will require immediate access to UNHCR or other protection agencies. Torture and trauma survivors may require the provision of emotional or psychological counselling. Trafficking victims may require holistic shelter and case management services. Without such additional safeguards, the right to notice is likely to be ineffectual.

III. Right to be promptly brought before a judge in connection to arrest or detention on criminal charges

18. Article 9, paragraph 3 of the ICCPR requires that any person arrested or detained on a criminal charge be brought promptly before a judge or other officer authorized by law to exercise judicial power.²⁹ This requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.³⁰
19. This requirement applies equally to refugees, asylum-seekers and migrants arrested or detained under laws criminalizing, for example, irregular entry. However, this right is bypassed with regularity in the immigration detention context, leading to *refoulement* and violations of other fundamental rights of those deprived of liberty.

IV. Right to take proceedings before a court without delay to challenge the lawfulness of detention

20. States should implement in national law, provisions for the automatic judicial review of immigration detention. It is especially important in the immigration detention context that the procedural guarantees of judicial review are respected, particularly the right to have an independent, individual assessment conducted by a court or other designated judicial officer. Group determinations of refugees, asylum-seekers and migrants should be expressly forbidden and particular scrutiny should be applied to identical or repeated detention decisions that may indicate a violation of the right to an individualized detention assessment.
21. Summary expulsions or deportations while obstructing access to judicial review are a particularly serious concern. Many refugees, asylum-seekers and migrants are unable to file applications for review as they are limited from doing so while in immigration detention facilities.
22. Similarly, many migrants are discouraged from filing applications for review by policies which force them to remain in detention during the filing process, which can take months or even

detention, 33-34, (2011), available at <http://idcoalition.org/cap/handbook/>.

²⁸ Human Rights Committee, Draft General Comment No. 35, para. 28, CCPR/C/107/R.3.

²⁹ Human Rights Committee, Draft General Comment No. 33, para. 28, CCPR/C/107/R.3.

³⁰ *Id.*

years in some cases. So even those individuals with valid protection claims or opportunities to regularize their status may be forced to choose deportation or *refoulement* simply in order to exit immigration detention.

Independent judicial oversight including automatic review

23. Detention must be periodically reviewed in order to remain lawful. Decisions regarding detention are best regulated through automatic, prompt and regular independent judicial review.³¹ The use of courts to review the decision to detain not only establishes a system of independent and non-partisan oversight of the state's power, but ensures transparency and that the reasons for any decision to detain have been well established by the decision maker and that the individual facing detention has a chance to raise their own concerns regarding the decision.
24. In reviewing detention, the judge or other officer authorized by law to exercise judicial power must consider whether detention remains justified in all the changing circumstances of the detained individual's case, including health, family life, protection claims, or other attempts to regularize one's status.
25. Judicial oversight should be independent and impartial. Immigration detention tribunals managed entirely within the government department responsible for enforcing immigration regulations and/or immigration detention facilities implicate serious concerns of impartiality as state security concerns and increasing "border control" targets will frequently conflict with due process and protection functions.

Legal aid provision

26. The right to have legal representation in immigration detention proceedings is especially crucial for refugees, asylum-seekers and migrants because they are most often unfamiliar with the legal proceedings in the host country and may not speak the language of the host country. Access to impartial, timely and effective legal representation - beyond mere theoretical access - should be provided by state if not readily available, in order to avoid arbitrary detention.
27. We have also seen the importance of impartial, timely and effective legal aid provision as a way of ensuring that refugees, asylum-seekers and migrants have the ability to challenge their detention both upon entering detention, during their detention if their circumstances change, or through the automatic periodic review process. This is facilitated when lawyers have open access to the detention population to identify those who require legal support. In addition to protecting against arbitrary detention, the provision of effective legal aid puts refugees, asylum-seekers and migrants in a better position to comply with migration decisions.
28. Research shows that when provided with independent legal counsel throughout the immigration process, refugees, asylum-seekers and migrants are more likely to comply with authorities, understand their legal options, and be prepared for the futures that await them.³² The use of legal aid has also been seen to benefit the migration management system itself by increasing fairness, efficiency and reducing overall costs.³³
29. Positive practice examples with regard to providing legal aid have been noted in Argentina, Belgium, Canada, Hong Kong, Hungary, Spain, Sweden, the United Kingdom, and the U.S.A. among others.³⁴

³¹ International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention*, 46, (2011), available at <http://idcoalition.org/cap/handbook/>.

³² *Id.*

³³ *Id.*

³⁴ The benefits of legal counsel are described in detail in *There are alternatives: A handbook for preventing unnecessary immigration detention*, at Box 3 Hungary, Box 5 Hong Kong, Box 7 United Kingdom, Box 8 Spain, Box 9 Sweden, Box 11 U.S.A., Box 13 Belgium, Box 14 Canada, Box 15 Hungary and Box 17 Argentina, available

Case management

30. When paired with legal aid, IDC’s global research found that case management allowed for even better migration management outcomes. This includes high levels of compliance with migration decisions, less reliance on unnecessary custodial detention, and improved refugee, asylum-seeker and migrant health and wellbeing.³⁵ Case management that is centred on understanding and responding to the unique needs and challenges of individuals and their context can help protect refugee, asylum-seeker and migrant rights, and build resilience in the individual to deal with the range of outcomes before them.
31. The need for case management has also been echoed by the UN Special Rapporteur on the Human Rights of Migrants, who called on states to use case management as “a strategy for supporting and managing individuals while their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals.”³⁶
32. Practical examples of the use of case management within migration systems have been noted in Australia, Belgium, Canada, Hong Kong, Hungary, Spain, Sweden, and the U.S.A. among others.³⁷

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

³⁵ International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention*, 29, (2011), available at <http://idcoalition.org/cap/handbook/>.

³⁶ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 61, A/HRC/20/24.

³⁷ The benefits of case management are described in detail in *There are alternatives: A handbook for preventing unnecessary immigration detention*, at Box 3 Hungary, Box 5 Hong Kong, Box 8 Spain, Box 9 Sweden, Box 11 U.S.A., Box 12 Australia, Box 13 Belgium, Box 14 Canada, and Box 6 Case Studies, available at <http://idcoalition.org/cap/handbook/>.

4. CONCLUSION

The IDC welcomes the Working Group on Arbitrary Detention's *Draft Guiding Principles on the Right to Challenge the Legality of Arbitrary Detention* as a critical opportunity to clarify that article 9 squarely applies to administrative detention in all its forms, and to clearly state the obligations of state parties to provide meaningful opportunities to challenge the legality of arbitrary detention in the context of immigration detention. The IDC calls on the Working Group on Arbitrary Detention to continue to highlight the issue of immigration detention in its work and to make this issue a central part of its forthcoming *Draft Guiding Principles*.

We also encourage the Working Group on Arbitrary Detention to use the *Draft Guiding Principles* to make a clear and unequivocal statement that state parties should cease using immigration detention as a first resort, and more specifically that state parties must adhere to article 9 standards prohibiting arbitrary and illegal deprivations of liberty. To better protect the rights of all people to liberty and security of person, state parties must make a presumption against the use of immigration detention, provide meaningful and effective avenues for challenging the legality of arbitrary detention, and urgent priority should be given to exploring, developing and implementing alternatives to immigration detention at the national level.

Refugees, asylum-seekers and migrants should never be detained or penalized for merely entering a country irregularly or without proper documentation. They must not be detained in punitive or criminal detention settings, must have the opportunity to seek asylum and access protection procedures, and must be provided meaningful and effective opportunities to challenge the legality of arbitrary detention. Under no circumstances should they be subject to *refoulement* or returned to countries where they may be subject to torture or other violations of their security of person. State parties must also work to improve conditions of immigration detention and ensure that administrative detention is never punitive, either in purpose or effect.

Government concerns related to border protection and security cannot be resolved through criminalization and detention policies. These are complex issues that must be addressed through international, regional and national cooperation, ensuring that human rights and the protection of migrants are central considerations.

International Detention Coalition
13 December 2013

5. APPENDIX

Appendix 1: IDC Core Position

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

Available at http://idcoalition.org/wp-content/uploads/2008/12/idc_posterfinal.pdf

Appendix 2: IDC Guide: *Legal framework relating to the detention of refugees, asylum-seekers and migrants*

The International Detention Coalition has developed a legal resource for IDC members, stakeholders and governments working on immigration detention law, policy and practice. This guide outlines the legal framework and standards relating to the detention of refugees, asylum-seekers and migrants. It is an annotated guide to identify relevant supporting international legal authority relating to the detention of refugees, asylum-seekers and migrants.

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

Appendix 3: IDC Handbook: *There are Alternatives*

Governments around the world are increasingly using detention as a migration management tool, with refugees, asylum-seekers and migrants detained for prolonged periods. However, there are humane and cost effective alternatives to detention that prevent unnecessary and damaging detention and that ensure detention is only ever used as a last resort. The IDC has identified good practices from around the world and compiled them in a handbook, while also introducing CAP, the Community Assessment and Placement model, as a way for governments to uphold their article 9 responsibilities in the context of immigration detention.

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

Appendix 4: IDC Handbook: *Captured Childhood*

The immigration detention of children and families is a particularly concerning global practice and, indeed, is on the rise. Yet the goals of migration management can be better achieved and with fewer detrimental effects by seeking not to detain children and families. Some governments are seeking innovative ways in which to limit or prevent refugee, asylum-seeker and migrant children from being detained. This policy document details a number of these good practice examples, while also presenting a model for states to use to prevent child immigration detention. The Child-Sensitive Community Assessment & Placement (CCAP) model, involves three core principles:

- Child migrants are, first and foremost, children
- The best interests of the child must be a primary consideration in any action taken in relation to the child and the child's family
- The liberty of the child is a fundamental human right

This model presents states with concrete steps to manage migration while respecting their international obligations around child protection and article 9.

Available at <http://idcoalition.org/ccap/>