



## International immigration detention trends and good practice

This briefing paper, prepared by the International Detention Coalition (IDC), looks at recent international developments related to the use of detention for migration-related purposes, which maintains the human rights, dignity and wellbeing of detainees. This includes trends concerning detention dialogue, policy reform, monitoring, training, alternatives and practice related to vulnerable populations. This is a non-exhaustive list of legislative, policy or practice examples identified by the IDC, who are currently undertaking further international research to explore these and other good practice examples.

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BRIEFING PAPER

### Summary

Since the IDC's last *International immigration detention trends and good practice* Briefing Paper was published in June 2009, a number of positive developments have emerged with regard to immigration detention that deserve highlighting. While there is still an alarming growth in the number of States taking steps to criminalize migration and imposing detention as a first resort, there is also a growing trend among States to explore and implement Alternatives to Detention (ATD), especially for particularly vulnerable groups; to limit the duration of immigration-related detention; and to ensure access to and monitoring of immigration detention facilities.

### International Dialogue

Much of the international good practice has been hastened by dialogue at the UN and regional levels around the obligation of States to protect the human rights of migrants. This includes efforts by OHCHR, UNHCR, the UN human rights treaty bodies, and Special Procedures of the UN Human Rights Council to bring attention to the issue of immigration detention and to clarify state obligations around ensuring that detention is never arbitrary; that any restrictions imposed on the right to liberty and security of the person are limited to those necessary, proportionate and of the shortest duration possible; that certain particularly vulnerable groups should never be subjected to immigration-related detention; and that ATD should be pursued as a first resort if and when restrictions on the right to liberty and security of the person are deemed necessary.

### UN General Assembly

- The General Assembly adopted resolution 67/172 on the Protection of Migrants, and called upon States to avoid the excessive detention of irregular migrants, noting that the adoption of alternatives to detention for undocumented migrants is a "practice that deserves consideration by all States." (2013)

- The General Assembly adopted resolution 66/172 on the Protection of Migrants, reiterating the call of States to avoid immigration detention and to seek to implement ATD. (2012)
- The General Assembly adopted resolution 65/212 on the Protection of Migrants and repeated its call for States to reduce the detention of undocumented migrants and to adopt ATD. (2011)
- The General Assembly adopted resolution 65/197 on the Rights of the Child, reiterating the principle of the best interests of the child and calling upon States to "ensure adequate alternative care . . . preferably in the form of family-based care" for children deprived of their home environment, particularly for unaccompanied children. (2011)
- The General Assembly adopted resolution 64/166 on the Protection of Migrants, calling on States to end arbitrary arrest and detention of migrants and to adopt alternative measures to detention. (2010)
- The General Assembly adopted resolution 64/139 on Violence Against Women Migrant Workers, recognizing the particular vulnerability of women and their children at all States of the migration process and urging States to respect the best interests of the child principle. (2010)

### OHCHR

- The UN High Commissioner for Human Rights highlighted the need for ATD for children in her speech at the 19th Session of the Human Rights Council in Geneva, and "call[ed] on Member States to explore effective alternatives to detention, particularly for children and other vulnerable groups." (2012)
- OHCHR held a Global Roundtable on Alternatives to Detention with UNHCR. (2011)
- OHCHR released a study on the rights of the child in the context of migration which emphasised the harm caused by detaining children and concluded that children should only

ever be detained as a last resort and encouraged the use of ATD. (2010)

- The OHCHR Strategic Management Plan for 2010–2011 noted “Immigrants are often routinely detained, at times without proper judicial safeguards, and increasingly face violence, arbitrary detention and expulsion.” The office pledged to “continue to advocate against the criminalization of irregular migrants and address concerns related to migration detention.” (2009)
- The UN High Commissioner for Human Rights remarked that the plight of “migrants, and particularly migrants in an irregular situation, is one of today’s most critical human rights challenges.” (2009)

#### Special Rapporteur on the HR of Migrants

- The Special Rapporteur conducted a Regional Thematic Study focusing largely on the detention of migrants in the EU and issued a report on “Management of the External Borders of the EU and its Impact on the Human Rights of Migrants.” (2013)
- The Special Rapporteur submitted his Annual Report focusing on the Detention of Migrants. In it, he called upon States to “progressively abolish[] the administrative detention of migrants.” (2012)

#### UNHCR

- UNHCR and the IDC signed a 5-year memorandum of understanding to work collaboratively on addressing immigration detention globally and seeking to develop and promote ATD in the context of refugees, asylum-seekers and stateless persons. (2013)
- UNHCR and IDC convened a thematic session on ATD at the 2013 UNHCR NGO Consultations entitled “Immigration Detention – Finding Alternatives.” (2013)
- UNHCR held several regional roundtables on ATD and revised its Guidelines on Immigration Detention. (2012)
- ExCom’s 2012 Note on International Protection stated “In the years ahead, UNHCR will embark on a global campaign to promote alternatives to the detention of asylum-seekers and refugees.” (2012)
- UNHCR commissioned a study into alternatives to the detention of asylum seekers and refugees entitled “Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants.” (2011)
- ExCom’s 2011 Note on International Protection stated that the issue of ATD was a continued priority. (2011)
- UNHCR held its first regional roundtable on Alternatives to Detention in East Asia. (2010)
- ExCom’s 2010 Note on International Protection stated that to “address unjustified detention, UNHCR advocates strongly for the use of effective alternatives to detention.” (2010)
- At Executive Committee (ExCom) meetings, UNHCR and the IDC held a side meeting on

Alternatives to Detention, attended by 30 governments during which Assistant High Commissioner for Protection, Ms. Erika Feller, announced that the issue of detention would be a priority over the next year. (2009)

#### Human Rights Council

- The HRC adopted resolution 19/37 on the Rights of the Child, calling upon States to ensure that migrant children and their parents receive special protection and assistance in accordance with their obligations under the Convention on the Rights of the Child, which includes a prohibition on child immigration detention in accordance with the best interest determination of the child. (2012)
- The HRC adopted resolution 20/3 on the Human Rights of Migrants, reaffirming that States have a duty to “ensure full respect for the human rights of migrants” when implementing migration and border security measures. (2012)
- The HRC adopted resolution 15/16 on the Human Rights of Migrants, calling upon States to end administrative arrest and detention and to adopt ATD. (2010)
- The Human Rights Council held a special panel discussion devoted to the human rights of migrants in detention centres. (2009)

#### Committee on the Rights of the Child

- In its most forceful statement to date on detention, the CRC clarified that detention based upon a child or their parent/guardian’s immigration status is never in the best interests of the child. The CRC called upon States to “expeditiously and completely cease the detention of children on the basis of their immigration status.” (2012)

#### International Detention Coalition (IDC)

- The IDC co-hosted a Western European Regional ATD Roundtable in Brussels, Belgium. (2011)
- The IDC convened a side meeting on ATD at the 2011 UNHCR NGO Consultations. (2011)
- An IDC Roundtable on good practice and ATD was held with USA, Canadian and Australian governments in Buffalo, New York. (2012)
- An IDC Roundtable on good practice and ATD was held in Thailand in conjunction with the Indonesian and Australian governments. (2012)
- The IDC held a Roundtable on ATD good practice with the European Commission. (2012)
- 45 participants from 8 countries attended an IDC Regional Workshop, “Immigration Detention in Transit and Destination Countries in the East and Southern Africa Migration Corridor” in Dar es Salaam, Tanzania. (2012)
- Over 20 organisations from 15 EU Member States attended an IDC European Union Regional Workshop on immigration detention in Athens, Greece. (2012)
- 40 NGO representatives from 12 countries attended an IDC Asia-Pacific Regional Immigration Detention Workshop in Bangkok,

Thailand. (2012)

- The IDC has held over 10 Regional Roundtables with numerous governments and civil society, including:

Africa - South Africa and Tanzania

Americas - Mexico, USA, Canada, Costa Rica;

Asia-Pacific - Malaysia, Thailand, Australia, New Zealand, South Korea, Taiwan, Japan, the Philippines, Hong Kong;

Europe - the United Kingdom, Sweden, Malta, Belgium, Greece, Turkey, Poland, Netherlands;

Middle East & North Africa - Lebanon, Yemen, Israel

### Alternatives to Detention (ATD)

Through the ongoing research and work of the IDC and our members over the past five years, a number of good practices have been identified with regard to States legislating and seeking practical implementation of Alternatives to Detention. The following is a non-exhaustive list of legislative, policy or practice examples identified by the IDC. We are also currently undertaking further international research to explore these and other good practice examples.

#### Presumptions against detention in law or policy

- Since 2009, a number of States have introduced legislation or policies to not detain certain classes of migrants (including refugees, asylum seekers and irregular migrants, and children) in the first instance, including Australia, Belgium, Brazil, Canada, Hungary, South Africa, and Sweden.
- Some States have specifically recognized trafficked persons as victims in law or policy and do not penalize or detain them for illegal entry related to acts of trafficking, including Australia, Belgium, Brazil, Canada, Hong Kong, Japan, Mozambique, Norway, Philippines, Sweden, and USA.
- Other States have legislated that ATD must be pursued prior to any detention decision, including (by the end of 2011) all western European countries other than Cyprus and Malta.

#### Procedural safeguards

When decisions to limit a migrant's right to liberty and security are deemed necessary, a number of States have implemented important procedural safeguards consistent with guidance from the Working Group on Arbitrary Detention, to ensure that detention decisions are not arbitrary.

- Many States have instituted limits on the time they are allowed to detain a migrant for administrative purposes, including Czech Republic, France, Hungary, Ireland, Italy, Luxembourg, Morocco, the Netherlands, Nicaragua, Oman, Portugal, Slovak Republic, Spain, Sweden, and Zambia.
- Often, States provide for independent judicial review of administrative detention decisions and the ability for a court to order release when detention is deemed arbitrary, including Argentina, Austria, Bangladesh, Canada,

Denmark, Egypt, Estonia, France, Hungary, India, Italy, Jordan, Kenya, Latvia, Lebanon, Luxemburg, Nepal, New Zealand, Pakistan, South Africa, Sweden, and the United Kingdom.

- In other States, ministerial discretion is accorded to grant the non-detention or release of migrants otherwise deemed eligible for non-arbitrary detention, including Australia, Tanzania, and Zimbabwe.

#### Individual screening and assessment

Risk assessment tools have been developed to assist immigration officers in making an informed decision regarding the necessity of immigration detention during the intake process. Such risk assessment tools limit unnecessary detention, improve consistency in decision making, and ensure that particularly vulnerable and low-risk individuals are never at risk of immigration detention. One example of an operational screening process is in the USA, where migrants are screened according to a nation-wide risk assessment tool. Other examples include Australia, Canada, Hong Kong and the United Kingdom.

#### Community release and support

Allowing migrants to retain their liberty and security of person while residing within the host community has proven to be one of the most effective and low-cost approaches to ATD. Community-based placements allow migrants to exhibit autonomy and self-sufficiency with often only minimal need for state intervention. They also allow local community-based organisations to provide vital support services, which have been shown to increase compliance with immigration decisions.

- Community release of registered refugees regularly happens in States such as Indonesia, Lebanon, and Sri Lanka, while open accommodation for asylum seekers are used in States including Austria, Belgium, Bulgaria, Denmark, Finland, Germany, Greece, Hong Kong, Hungary, Indonesia Ireland, Italy, Lithuania, Nepal, the Netherlands, Poland, Portugal, Romania, South Africa, Spain, Sweden, and Switzerland.
- In other States, migrants are released to their own recognizance, sometimes upon the posting of a bond/surety or other post-release supporting requirements, including in Australia, Canada, Hong Kong, Japan, Sweden, United Kingdom, and USA.
- Civil society, NGOs and community groups provide welfare services, health, social support, education and specialist care for vulnerable groups in States such as Australia, Canada, Hong Kong, Indonesia, Japan, Jordan, Lebanon, Mexico, Pakistan, Philippines, South Africa, South Korea, Sri Lanka, Thailand, and USA.
- Government funded community programs aimed at prevention and supporting trafficking victims occur in a number of States including Australia, Belgium, Bulgaria, Canada, Ethiopia, Hong Kong, Hungary, Indonesia, Italy, Jordan, the Netherlands, New Zealand, Norway, Panama, the Philippines, Romania, and Thailand.

- Release to a government caseworker has been implemented in States including Australia, Belgium, Sweden, and the United Kingdom.
- Release to community or religious groups— including groups providing a basis for transition into self-sufficiency within the community— occurs in a number of States, including Australia, Bahrain, Belize, Canada, Indonesia, Lebanon, Mexico, Malawi, Nepal, Oman, South Africa, Sri Lanka, Thailand, and USA.

### Particularly vulnerable groups

Some States have acknowledged that particularly vulnerable groups are never appropriate to be considered for immigration detention. Often, these individuals are instead referred to community-based support models, such as shelters, where they have access to legal assistance, medical care, educational opportunities, and psycho-social support.

- **Children** - Hong Kong, Hungary, Japan, Philippines, Belgium, Italy, Ireland, Philippines, Hungary, Bahrain, Bangladesh, Tanzania, Turkey, Oman, Yemen, Hong Kong, Australia, Denmark, Netherlands, the United Kingdom, France, Panama, New Zealand, Senegal, Morocco
- **Unaccompanied minors** - Netherlands, the United Kingdom, Australia, Holland, Belgium, Canada, Sweden, Hong Kong, Belgium, Italy, Ireland, Philippines, Hungary, Bahrain, Bangladesh, Tanzania, Turkey, Oman, Yemen, Hong Kong, Australia, Denmark, Netherlands, the United Kingdom, France, Panama, New Zealand, Senegal, Morocco
- **Refugees and asylum seekers** - Indonesia, Lebanon, Sri Lanka, Brazil, Argentina, Peru, Bolivia, Venezuela, Philippines, Colombia, Uganda, South Africa
- **Trafficking victims** - Lebanon, Yemen, Israel
- **Individuals unable to be removed** - Australia, Nicaragua
- **Individuals with imminent immigration outcomes** - Lebanon, Botswana, Egypt

### Training and capacity building

Training for detention service providers, police officers and border guards on legal standards regarding conditions of detention, rights and welfare of detainees and the asylum and legal processes available for detainees have been conducted in a number of States, including Tanzania, Hong Kong, Lebanon, Indonesia, Mexico, Pakistan, South Africa, Australia, US, Canada and the EU.

### Legal aid

Legal aid provision including legal orientation programs aimed at improving legal aid and increasing release outcomes are available in States including South Africa, Mexico, Lebanon, Indonesia, US, Australia, the United Kingdom, Belgium, Japan, Canada, South Korea. Sometimes this legal advice for migrants is funded by States themselves, while other times it is provided through the assistance of

pro bono attorneys.

## Detention Monitoring

### International

Eighty-seven countries have now signed or ratified the Optional Protocol on the Convention against Torture (OPCAT), including 42 States who have implemented National Preventative Mechanisms (NPMs).

Additionally, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment may conduct independent detention visits with the consent of the State party.

### Regional

A number of regional detention monitoring mechanisms also exist, including within the following regional systems or mechanisms:

- The Inter-American Commission on Human Rights (IACHR)
- The Special Rapporteur on the Rights of Persons Deprived of Their Liberty designated by IACHR
- The European Committee for the Prevention of Torture (CPT)
- The Special Rapporteur on Prisons and Conditions of Detention in Africa
- The Committee for the Prevention of Torture in Africa

### National

Independent, regular detention monitoring is conducted at the national level by the following:

- **National Human Rights Institutions (NHRI)** - Fiji, Australia, Uganda, Uruguay, South Africa, Switzerland, Nigeria, Nicaragua, Mexico, Mauritius, Mali, Honduras
- **Ombudsmen and independent commissions** - Argentina, Australia, Poland, the United Kingdom, Macedonia, Sweden, Spain, Slovenia, Serbia, Senegal, Moldova, New Zealand, Netherlands, Montenegro, Maldives, Hungary, Ecuador
- **Red Cross/Crescent National Societies** - Worldwide ICRC delegates, including over 150 national societies, visited detainees in 75 States in 2011
- **NGOs** - Bulgaria, Hungary, Lebanon, Spain, Mexico, South Africa, the United Kingdom

### Case Study: Japan

Japan has made considerable progress in the area of Alternatives to Detention in recent years. Following a regional roundtable on ATD in April 2010, Japan decided to release all children from detention and introduced a policy to prevent the detention of children in the future. It has also reduced its overall detention numbers, developing working partnerships with local non-governmental organisations and supported an alternative to detention pilot project for vulnerable groups.