



IOM International Organization for Migration
OIM Organisation Internationale pour les Migrations
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SUBMISSION TO THE WORKING GROUP ON ARBITRARY DETENTION ON THE BASIC PRINCIPLES AND GUIDELINES ON REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR DETENTION TO BRING PROCEEDINGS BEFORE COURTS

The International Organization for Migration (“IOM”), established in 1951, is an intergovernmental organization committed to the principle that humane and orderly migration benefits migrants and society. Currently, IOM has 155 member states around the world with more than 470 field locations to implement the Organization’s activities.

As the leading international organization for migration issues, IOM works to promote international cooperation on migration issues, assist in the search for practical solutions to manage migration phenomena and processes, encourage social and economic development through migration, uphold the human dignity and well-being of migrants, and provide humanitarian assistance to migrants in need. IOM works closely with governmental, intergovernmental, and non-governmental partners.

IOM works in four broad areas of migration management: migration and development, facilitating migration, regulating migration, and addressing forced migration. Cross-cutting activities include the promotion of international migration law, policy debate and guidance, protection of migrants’ rights, migration health, and the gendered dimension of migration. IOM’s offices worldwide contribute to international good practice for the implementation of services for migrants and governments while contributing to national capacity-building efforts and ensuring that the rights of migrants are respected, in accordance with applicable international and national standards.

In the context of its work, issues related to protection of human rights of the most vulnerable migrant groups have special priority in the Organization’s agenda. IOM is also specifically concerned with the protection of rights of migrants in detention. At the policy level, among the other activities detailed below, the IOM’s International Migration Law Unit issued an Information Note in 2011 on immigration detention and non-custodial measures¹ to provide its staff and other interested stakeholders with an overview of the international standards applicable to migration detention and alternatives to detention.

¹ See attached **Appendix A: IML Information Note on International Standards on Immigration Detention and Non-Custodial Measures**, International Organization for Migration (“IOM”) (Nov. 2011), also available at <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IML-Information-Note-Immigration-Detention-and-Non-custodial-Measures.pdf>.

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The Unit is currently working on an additional Information Note for upcoming publication on migrants' access to justice, which also addresses the specific issue of accessing the courts from detention.

Given IOM's current activities and priorities, the Working Group on Arbitrary Detention's ("Working Group") consultation for drafting basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to bring proceedings before courts comes very timely. This submission first provides an overview of the most common legal and practical challenges regarding access to justice from detention that migrants face in various regions of the world. The second section describes the general approach adopted by IOM to promote the right at stake and provides examples of some specific activities that IOM offices have carried out in a number of countries where this right is either not recognized in the legislation or poorly respected in practice. Lastly, IOM presents its recommendations to the Working Group on important messages that the *Basic Principles and Guidelines* should incorporate.

I. Right to Access Justice from Detention: Most Common Challenges Faced by Migrants

Arrested or detained migrants in many countries face similar obstacles preventing their full and effective enjoyment of access to justice in the courts and experience varying degrees of recognition in the national legislation of their rights to challenge detention or to have access to remedies for violations suffered during detention.

Coupled with the lack of clearly recognized and enforced legal remedies, the use of administrative detention as a means of migration management is an overarching problem severely impacting migrants' wellbeing and enjoyment of a number of rights. Administrative detention often falls in a legal void and affords far fewer guarantees with regard to access to justice as compared to criminal detention. Deprivations of liberty imposed on migrants are frequently not referred to as "detentions." This results in states using wider margins of discretion without considering the existing legal rules applicable to criminal detention as binding in these situations.

Furthermore, migrants are often not seen as equal under the law to nationals of the state. In some cases, the existing legislation or the judiciary prevent access to legal remedies for individuals who lack legal status in the country, thus excluding irregular or undocumented migrants from the existing system of judicial review. Sometimes, access to the courts and judicial review are granted to detained migrants, but only on an arbitrary, ad hoc basis. Migrants in some cases are even deported before they can exercise their right to access the available legal remedies. Additionally, some states consider detained migrants arrested for illegal entry at non-authorized border crossings as subject to the jurisdiction of military tribunals, the decisions of which cannot be appealed.

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In the context of migration management, detention is not generally considered to be a measure of last resort, and procedures leading to detention lack effective initial screening mechanisms. This, *inter alia*, can result in unnecessary detention of groups of migrants for whom deprivation of liberty would be prohibited under national legislation, such as victims of trafficking (“VOTs”). Once detained, these groups may then not be able to seek redress in courts.

In addition to the lack of a legally recognized right to a remedy for detained migrants, especially as compared to the national population, common challenges migrants face include a general lack in the availability of and access to quality legal aid, translation/interpretation services, and information about their rights and relevant procedures to challenge their detentions. Often, detention centers do not have the appropriate knowledge or understanding of the relevant legal provisions or lack necessary resources for ensuring enforcement of detained migrants’ rights in practice.

In some countries, migrants, including refugees and asylum seekers, are further faced with a general xenophobic attitude by public authorities; they are threatened by border guards or police officers with extrajudicial arrest, arbitrary detention and collective expulsions, against which they have no legal remedies. This same attitude causes reforms in national migration law to fall in the countries’ legislative priorities. In these countries, migrants may also encounter corrupt public officials who require bribes in exchange for release or access to better conditions and other privileges while detained.

Detention centers are often inadequate facilities that fail to satisfy international standards, and migrants who lack access to the courts are unable to seek legal remedies for any inhumane or degrading conditions of detention or abuses suffered.

II. IOM’s Work to Protect Detained Migrants’ Right to Access to Justice

Through its field work around the globe, IOM takes a multifaceted approach to protecting detained migrants’ right to access justice in the courts. IOM focuses on technical cooperation and capacity-building projects to improve knowledge of governments’ officials and enhance their skills, offers advice on proposed legislation to national governments, and trains government officials in many different functions (including police officers, detention or reception facilities staff), as well as various legal practitioners (such as prosecutors, judges, and lawyers), and members of NGOs working in relevant areas about the rights of migrants in detention. While recognizing states’ sovereignty in controlling borders, the Organization encourages states to put an end to migration detention – which has a negative impact both on migrants and societies at large – and promotes good practices of migration management, more respectful of the inherent dignity of each migrant as a human being. In some key countries, IOM also assists with the provision of legal assistance to migrants in detention, especially for groups at risk, such as VOTs, families with children, or unaccompanied children.

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This section provides a number of examples describing IOM's activities related to the right of migrants in detention to access legal remedies. Some of the projects mentioned below are directly aimed at improving migrants' access to justice from detention; others contribute to the general development and improvement of the legal guarantees or of the actual conditions of migrants in detention.

Central America and the Caribbean

IOM engages in multiple projects in Central America to improve the rights of detained migrants to access justice. Working together with the Costa Rican National Commission for the Improvement of the Access to Justice ("the Commission"), IOM conducted a series of training modules in order to improve detained migrants' exercise of their legal rights and access to justice from detention. The modules emphasize the right of detained migrants to access the courts. Currently, these training modules are used by the Commission to train and raise awareness of the issue with judges and public ministers around the country.

Additionally, IOM participated technically in and provided funding for the production of a Costa Rican national policy to promote the access of vulnerable populations to justice. This policy reiterated the right of detained migrants to access the courts. In December 2013, the Costa Rican Comprehensive Migration Policy was approved by the President. IOM actively participated in this initiative, and detained migrants' right to access justice through the courts was explicitly recognized in this policy as well.

IOM also advocated for the recognition of this right to migrant children in the Organization's *amicus curiae* submitted to the Inter-American Court of Human Rights as a background document for the preparation of the Court's forthcoming *Advisory Opinion on Migrant Children*.²

South America

Although in South America IOM does not work specifically with migrants in detention, it does engage in projects that address migrants' access to justice. IOM's work in this region includes projects aimed at assisting some migrant populations previously detained in other regions through the Organization's reintegration programs. IOM projects in the region addressing migrants' access to justice and rule of law focus on training important actors, such as police, consular, and other migration officials, in migrants' rights, the state's obligation to offer detained migrants the opportunity to contact their consular officials, and the consequences of failing to comply with this obligation. Trainings also focus on

² See attached **Appendix B: Amicus Curiae Submitted to the Inter-American Court of Human Rights by the International Organization for Migration (IOM) – Request for Advisory Opinion on Migrant Children CDH-OC-21-272** (17 Feb. 2012).

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the vital importance of screening detained migrants to identify potential VOTs, possible asylum seekers, children, and adolescents and on the implementation of measures aimed at addressing their specific needs.

Middle East and North Africa

Much of IOM's work in the Middle East and North Africa focuses on strengthening the rights of VOTs in detention, including their right to access to justice. This is accomplished through projects that involve local partners and multiple governmental agencies and actors. In the past year, IOM offices have conducted trainings on the rights and needs of VOTs for over 700 police officers, prosecutors, and judges in Egypt and Libya. IOM also works with migrants in detention to secure full access to their rights, as well as access to medical and psychological services and, generally, to improve conditions in detention.

Egypt

IOM Egypt engages substantially with its programming to protect migrants' access to justice through its multifaceted approach to migrants' rights, especially VOTs and vulnerable migrants. IOM Egypt leads two major projects focusing on the provision of legal assistance to VOTs and vulnerable migrants: "Supporting governmental and non-governmental partners to protect migrants' human rights along the East African Route (Protection) Project" and "Supporting the Government of Egypt's Efforts to Combat Human Trafficking by Protecting Victims of Trafficking and Enhancing Key Investigation and Prosecution Capacities- Phase III (J-TIP) Project."

Together with the Ministry of Interior and the Ministry of Justice, IOM has issued guidelines on the implementation of law on counter-trafficking and, over the last year, IOM trained over 600 police officers, prosecutors, and judges on this new law. Through existing cooperation mechanisms between IOM and its partners, IOM provides a variety of services to VOTs and vulnerable migrants that include, but not limited to, legal assistance, health services, psychological support, and Resettlement Status Determination. Legal assistance also includes taking the testimonies of VOTs to facilitate the prosecution of traffickers, guaranteeing the security of the victims through the Egyptian government's shelter, and providing transport and translation services when needed. IOM Egypt's current capacity-building projects for migrant-hosting facilities' staff members also focus on migrant-friendly approaches and work with facility physicians to raise awareness of the special medical needs of VOTs.

IOM Egypt is also in the process of expanding its programming by establishing a legal counseling service where migrants and refugees in detention can receive legal assistance by calling an IOM toll-free hotline number from their mobile phones.

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Libya

IOM Libya carries out a wide variety of activities, focused on different aspects of migrants in detention through trainings, legislative advice, and other programming designed to support migrants' rights, including that of legal counsel. IOM Libya has conducted counter-trafficking trainings for 102 Libyan judges and prosecutors to alert these key actors to the situation of potentially trafficked persons, a group not legally distinguished from irregular migrants in Libya. Other IOM Libya trainings have addressed the human rights of migrants, their needs, legal remedies as best practices, as well as international law sessions about Libya's obligations under various international instruments.

At exclusive invitation, IOM Libya has also assisted the Libyan government in its drafting of comprehensive legislation on trafficking in human beings, and IOM Libya's suggestions were included in the final draft. A number of these recommendations address the question of detention and of access to justice, including: explicitly stating that detention facilities are not suitable for VOTs; referring to the obligation to provide VOTs with specific information regarding administrative and judicial procedures in a language that the victims understands; recognizing their right to compensation; and to give preference to voluntary return, instead of forced removal.

Furthermore, IOM Libya established the START Program, a policy and legislative task force which brings together relevant governmental actors to comprehensively study existing laws and policies in order to address gaps in legislation. IOM Libya is also working with its regional partners to develop standard operating procedures between civil society entities and detention facilities to address the rights and needs of detained migrants.

Finally, IOM Libya is currently developing a biometric system for the management of migrant detention facilities to ensure that migrants are treated on an individualized basis while staying at the center. The biometric system will document detained migrants' access to food, medical services, and non-food items through a card supported by biometrics, and feeding a central database. With the development of the new software, there is a possibility for migrants to receive visits and legal assistance from legal representatives, and IOM Libya is committed to improving the access of legal assistance to migrants in detention in the future. The office is also working to develop standard operating procedures ("SOPs") for detention centers already using the biometric software. The SOPs will emphasize matters in a manner set to increase the access to services and therefore enhance the respect of the rights of migrants.

East and Horn of Africa

IOM activities in this region focus largely on capacity-building projects and trainings of key actors. In September 2013, the Organization participated in the International Detention Coalition's ("IDC") Regional Workshop on Alternatives to Immigration Detention, hosted in September in Johannesburg,

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South Africa. This workshop was IDC's third event in the region, but was the first to include government participants from Mozambique, South Africa, and Tanzania. In the same year, IOM also trained 200 Tanzanian immigration officials and police officers in Zanzibar on irregular migration, trafficking in persons, smuggling of migrants, and migration health. The training also addressed for each category of migrants the question of detention and access to justice. IOM additionally worked in 2013 to train 40 health professionals and local authorities about migration health, also discussing immigration detention and potential alternatives.

IOM continues to work in the region with multiple actors to raise awareness about the violations of migrants' rights taking place in the region, such as summary expulsions of migrants,³ and working with authorities on alternatives to detention. Future projects in the region also include focusing on health interventions in vulnerable spaces, such as mixed migration, in cooperation with IDC and local partners. In conjunction with the United Nations' Office of the High Commissioner for Human Rights, IOM will develop procedures for individual screening to identify protection needs, building on the tools already developed by IOM in Zambia. The screening procedures will also contribute to preventing unnecessary or arbitrary detention.

Eastern Europe and Central Asia

IOM projects in Eastern Europe and Central Asia focus on providing key government actors and staff with training on international migration law and the legal rights of detained migrants. Programming also includes capacity-building projects and advice to state governments in the region. IOM also works with local partners, both NGOs and local governmental bodies, to provide quality legal and translation services to detained migrants and VOTs.

Ukraine

IOM Ukraine, as part of its programming, also works to secure access to justice for detained VOTs. In cooperation with local NGO and local state administration the Office provides VOTs with safe accommodation, high-quality medical and psychological care, food, clothes, but also legal support and interpretation services. For example, the Office witnessed the case of three Pakistani VOTs who were found to have resided illegally in Ukraine and were detained in the Migrant Accommodation Center in Chernhiv to await the results of the expulsion procedures. The Office's provision of an attorney and translator resulted in the Zhytomyr Administrative Court of Appeal's cancellation of a deportation

³ See e.g., *Humanitarian Crisis Looms for Migrants Expelled by Tanzania*, IRIN News (19 Sept. 2013), available at <http://www.irinnews.org/report/98789/humanitarian-crisis-looms-for-migrants-expelled-by-tanzania>.

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decision and release from detention – a significant step forward for the protection of the rights of VOTs in Ukraine.

In another similar case, in the framework of its counter-trafficking programs, IOM assisted 24 Vietnamese VOTs who were given expulsion verdicts in the city of Odessa because they did not have passports and were subsequently detained in the Migrant Accommodation Center in Volyn. These VOTs were later able to appeal the decisions. In accordance with the Law of Ukraine on Combatting Trafficking in Human Beings, all 24 were recognized as victims of trafficking for forced labor. They were then released and accommodated in a social and psychological aid center.

Armenia

IOM Armenia works to address detained migrants' access to justice through its work in three main areas. First, IOM Armenia develops and delivers trainings to key government actors and staff on international migration law, with a significant focus on international legal standards applicable to migrants' detention, while advocating decreasing the use of immigration detention and promoting alternatives to detention. Secondly, the Office provides advice to the government and other related institutions on how to manage migration. For example, the Office has recently issue a needs assessment report of the special accommodation centers for foreigners, addressing issues which include the analysis of the content of legislation, the structure of the institutional framework addressing detention, the organizational procedures of these centers, detention conditions and respect of migrants' rights and the use of alternatives to detention. Final recommendations include the need to improve screening procedures and to provide better information to migrants, in a language they understand, including on availability of legal aid and general enjoyment of rights.

IOM Armenia is also in the process of developing standard operational procedures for migrant accommodation centers aimed at improving conditions of detention and migrants' access to rights from detention, including the right to file complaints for mistreatment or any other unlawful acts committed by the personnel of the center. Furthermore, IOM Armenia also works closely with its local NGO partners to ensure that detained migrants are provided with access to free legal advice and services in these facilities.

III. Recommendations to the Working Group on Arbitrary Detention

IOM recommends that the following principles are taken into consideration in drafting the Working Group's *Basic Principles and Guidelines on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings before Courts*.

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Reminder of Basic Principles Applicable to the Detention of Migrants in the Preamble

The preamble of the *Basic Principles and Guidelines* could be aimed at recognizing the most fundamental messages that the Working Group would like to establish with regard to detention. Reference should be made to the use of detention of migrants only as a measure of last resort. The detention of a migrant furthermore should not be punitive in nature.⁴ The principle of proportionality would not be respected if a migrant is detained when the only act he or she committed is the illegal entry in the state. Considering that immigration detention very often falls in a legal void where no guarantees are provided, it is important to clearly state in the preamble that the *Basic Principles and guidelines* are applicable to any type of deprivation or restriction to liberty of both criminal and administrative nature, irrespective of the place of detention or the legal terminology used in the legislation.⁵

Migrants should have a right to challenge any detention decision before courts. Effective initial screening procedures are crucial to preventing unnecessary detentions and may prevent violations of the right to access justice from occurring in the first instance. Individualized screening can also help ensure the respect of the principle of proportionality and that detention is truly used only as a measure of last resort. Effective screening procedures are particularly important to identify vulnerable groups which should not be detained, such as VOTs, children, and persons with health conditions. Further, such screenings to prevent unnecessary detention can reduce a decision-making body's burden and allow for improved administration of justice.

Recognition of the Right to Access the Courts in Legislation

To ensure that the access to justice from detention is effective, it is crucial that the right is expressly recognized in the national law and is applicable to everyone, including non-nationals. National legislation should also expressly recognize equality in law of non-nationals before the courts and tribunals.⁶ The law should expressly grant the right not only for those detained following a criminal arrest or conviction, but also for individuals held in administrative detention.

⁴ See *Vélez Loor v. Panama*, Inter-Am. Ct. H.R. (ser. C) No. 218 (23 Nov. 2010), at paras. 117-18.

⁵ *Amuur v. France*, App. No. 19776/92, 1996-III Eur. Ct. H.R. (25 June 1996), at para. 42.

⁶ International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families [hereinafter ICRMW], art. 18(1), UNGA 45/158 (18 Dec. 1990).

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Legal instruments and applicable procedures should have a sufficient degree of precision, be drafted in clear and unambiguous language, be realistically accessible,⁷ and the exact meaning of the relevant provisions and the consequences of its application should be foreseeable to a degree reasonable for the circumstances.⁸ The law should also establish that national security concerns do not present a valid reason to restrict the right to a remedy against unlawful detention.⁹

Availability of the Right to Access to Justice in Practice

It is not sufficient that the right to access to justice is recognized only in the legislation – states must ensure that enjoyment of this right is also available in practice by removing any barriers preventing migrants and non-nationals from exercising this right and establishing the necessary procedures to ensure its successful enjoyment.¹⁰ In order to ensure accessibility and effectiveness, the European Court of Human Rights (“ECtHR”) held that both the law authorizing detention and the procedures in place for review must be sufficiently certain, not only in theory but also in practice.¹¹

A number of measures can improve access to justice for migrants in detention in practice. First, training and capacity-building for the authorities responsible for enforcing the relevant procedures, as well as for the judiciary is crucial to ensure that the procedures exist and are actually applied, including to non-nationals. Migrants’ empowerment is also of primary importance. Services should be available to inform migrants of their rights and of the existing procedures and to assist them in going through the relevant procedures and preparing their defence.

Order of Detention and Judicial Review

⁷ *Čonka v. Belgium*, App. No. 51564/99, 2002-I Eur. Ct. H.R. (5 February 2002), at paras. 45-46 (stating that accessibility of a remedy implies that “the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.”).

⁸ *Amuur*, *supra* note 5, at para. 50 (stating that the procedures and laws creating a deprivation of liberty must have a legal basis in domestic law and the quality of the law must be compatible with the rule of law; “quality in this sense implies that where a national law authorizes deprivation of liberty – especially in respect of a foreign asylum-seeker – it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.”). *See also Sunday Times v. United Kingdom*, App. No. 6538/74, Eur. Ct. H.R. (ser. A)(26 Apr. 1979), at para. 49; Manfred Nowak, *U.N. International Covenant on Civil and Political Rights: CCPR Commentary*, 18 EJIL 213, 224 (2007).

⁹ *See Chahal v. United Kingdom*, App. No. 70/1995/576/662, 1996-II Eur. Ct. H.R. (11 November 1996), at para. 131; *Al-Nashif v. Bulgaria*, App. No. 50963/99, Eur. Ct. H.R. (20 June 2002), at paras. 94-98.

¹⁰ *See Z.N.S. v. Turkey*, App. No. 21896/08, 2010 Eur. Ct. H.R. (19 January 2010), at para. 60.

¹¹ *Id.*

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Any form of deprivation of an individual's liberty should be ordered by a tribunal and the state must ensure the legality of a detention can be challenged before an independent and impartial judicial body, as the right to be tried by an independent and impartial tribunal is absolute and without exception.¹² The authority adjudicating the case should have the power to issue legally binding judgments that lead to release if necessary.¹³

Timely Decisions

Migrants who are arrested or detained should be promptly brought before a judicial court. The judicial decision on detention should be rendered within a reasonable time. International bodies recommend that this timeframe for the decision to be made should be within several weeks.¹⁴ If a prompt decision is not possible, the migrant should be released. The released migrant could then be subject to guarantees to appear for trial if deemed necessary after an individualized assessment of the case.¹⁵

Regular Review of Detention Decisions and Release

The decision to keep a person in detention should be reviewed periodically to ensure that continued detention is justified.¹⁶ If detention is not justified or is found to be unlawful, the person must be released.¹⁷

Right to Compensation

Migrants who have been victims of an unlawful arrest or detention, including for violation of provisions relating to migration, shall have an enforceable right to compensation.¹⁸

¹² See *Bautista de Arellana v. Colombia*, CCPR Comm. No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (27 October 1995); *Al-Nashif v. Bulgaria*, App. No. 50963/99, Eur. Ct. H.R. (20 June 2002), at para. 133. See also ICRMW, *supra* note 6, at art. 16(6).

¹³ See *C. v. Australia*, CCPR Comm. No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (13 Nov. 2002), at para. 8.3; *Baban et al. v. Australia*, HRC, Comm. No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (18 Sept. 2003), at para. 7.2; *Suárez-Rosero v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 35 (12 Nov. 1997), at para. 63.

¹⁴ Nowak, *supra* note 8, at 236; *Z.N.S.*, *supra* note 10, at para. 62 (holding that a delay of two months and ten days in the instant case that did not raise a complex issue where the deciding court was well-positioned to observe the lack of sufficient legal basis for the applicant's detention was not permissible).

¹⁵ ICRMW, *supra* note 6, at art. 16(6).

¹⁶ *A. v. Australia*, CCPR Comm. No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 Apr. 1997), at para. 9.4.

¹⁷ *Baban*, *supra* note 13, at para. 7.2.

¹⁸ ICCPR, *supra* note 8, at art. 9(5) ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."); ICRMW, *supra* note 6, at art. 16(9); European Convention on Human Rights [hereinafter ECHR] art. 5(5), 4 Nov. 1950 ("Everyone who has been the victim of arrest or detention in

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Right to Information and Access to Legal Assistance

Migrants must be informed, at the time of arrest, and in a language they understand, of the reasons for detention and of any charges against them.¹⁹ All decisions in a migrant's case must be communicated in writing in a language the migrant understands.²⁰ Free legal assistance should be provided, at the minimum when is also available to nationals.²¹ The Inter-American Court of Human Rights ("IACtHR") reaffirmed this principle in *Vélez Looz v. Panama*, holding that in cases where "the consequence of the immigration procedures could be the deprivation of liberty of a punitive nature, free legal representation is an imperative for the interests of justice."²² More generally, migrants should not bear any costs related to detention for the purpose of verifying their migratory status.²³ When a migrant is facing any criminal charge, he or she must be allowed to adequate time and facilities for the preparation of his or her defense.²⁴

Assistance of an Interpreter

Migrants have the right to free assistance of an interpreter if they do not understand or speak the language used before the court.²⁵

Contact with Consular Authorities

Under article 36 of the Vienna Convention on Consular Relations ("VCCR"), migrants must be informed of their right and given the opportunity to contact their consular authorities without delay.²⁶ The

contravention of the provisions of this Article shall have an enforceable right to compensation." See also *Brogan and Others v. United Kingdom*, App. Nos. 11209/84, 11234/84, 11266/84, 11386/85, Eur. Ct. H.R. (ser. A145-B)(29 Nov. 1988), at para. 67 (finding that although the victims in this case were British citizens, based on the principle of equality between nationals and non-nationals before the courts, the same right recognized for nationals should also be recognized for non-nationals).

¹⁹ ICRMW, *supra* note 6, at art. 16(5). See also *Vélez Looz*, *supra* note 4, at paras. 179 and 272.

²⁰ ICRMW, *supra* note 6, at art. 22(3).

²¹ "Guideline 7(vii)," *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, UNHCR (2012), at p. 28, available at <http://www.refworld.org/pdfid/503489533b8.pdf>. See also ICRMW, *supra* note 6, at art. 18 (addressing defense of criminal charges).

²² *Vélez Looz v. Panama*, *supra* note 4, at para. 146.

²³ ICRMW, *supra* note 6, at art. 17(8).

²⁴ *Id.* at art. 18(3)(b).

²⁵ *Id.* at art. 18(3)(b) and 18(3)(f).

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object and purpose of this article is to enable “consular officials to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation.”²⁷ These rights are recognized in international law as individual rights.²⁸

State authorities, “on their own initiative,” must inform the arrested individual of his or her right to ask for his or her consulate to be notified.²⁹ A detained individual’s failure to request contact with his or her consular officials does not justify the detaining state’s non-compliance with the obligation to inform the individual, the obligation incumbent upon the arresting state.³⁰ The obligation to inform the arrested individual of his or her rights to contact consular officials is at issue from the moment of the arrest.³¹ Although the International Court of Justice interpreted “without delay” not to necessarily mean “immediately,” the duty of arresting authorities to inform the arrested individual of his or her VCCR rights arises “once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.”³² The Court has also found that later notification does not remove a violation of this right.³³

Additionally, states should ensure that domestic law and procedures do not prevent full effect from being given to the purposes for the rights accorded under article 36 of the VCCR, thereby violating the Convention.³⁴ States can also easily adapt domestic procedures to include early notification of the individual’s VCCR rights.³⁵

²⁶ Vienna Convention on Consular Relations [hereinafter VCCR] art. 36, 24 Apr. 1963, U.N. Treaty Series, vol. 596, p. 261.

²⁷ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. Reports 1, 12 (judgment), at para. 85.

²⁸ *LaGrand (Germany v. United States of America)*, 2001 I. C. J. Reports, 466 (judgment), at para. 77.

²⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2010 I.C.J. 2, 439 (merits judgment), at para. 95.

³⁰ *Id.* (noting that the person’s failure to request consular contact in some cases may in fact be *precisely because* [emphasis added] the person was not informed of his or her rights in this respect, and that the individual learning of these rights through other means does not remove any violation the detaining state committed by not informing the person of his or her rights without delay).

³¹ *Id.* at para. 96.

³² *Avena*, *supra* note 27, at para. 63. *See also id.* at paras. 63-64 (noting the U.S. Department of State’s booklet, *Consular Notification and Access*, suggested that an unfamiliarity with English could be an indication that the person may be a foreign national, and thus should be informed of his or her rights under the VCCR).

³³ *Diallo*, *supra* note 29, at para. 96.

³⁴ *LaGrand*, *supra* note 28, at 91 (holding that the United States’ procedural default rule, while itself not violative of article 36 of the VCCR, had the “effect of preventing ‘full effect [from being] given to the purposes for which the rights accorded under this article are intended,’ and thus violated” article 36(2) of the VCCR).

³⁵ *Avena*, *supra* note 27, at para. 64 (noting that, “in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquiry to routinely be made of the

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Contact with Assisting Organizations or Institutions

Detained migrants have the right to contact, and be contacted by, international NGOs; international organizations; national agencies or bodies, including ombudsman offices; human rights commissions; or national NGOs. These various organizations might be able to provide relevant information or legal assistance to migrants, and migrants must be free to communicate with these bodies. Migrants should be allowed confidential communication with representatives of the above-mentioned organizations or institutions.³⁶

Access to Remedies to Challenge Conditions of Detention or Lack of Access to Services

All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person. Access to justice for detained migrants should also include access to judicial review of all potential violations of their rights while detained, including lack of access to services.

In particular, states are obliged to adequately secure the health and well-being of individuals in detention by providing regular medical attention and adequate specialized care, when needed. In cases where a detained person suffers from serious health complications that cannot be effectively treated in a facility, the person should be released from detention.³⁷ If the person is not released, he or she must have access to a legal remedy to seek justice for the violation of his or her rights.

Access to Justice with Regard to Alternatives to Detention

Alternatives to detention have significant cost-benefit advantages and still report high rates of compliance.³⁸ Effective alternatives to detention include community management programs, open centers, release with registration requirements, reporting requirements, and the use of a guarantor.

individual as to his nationality upon detention...the provision of such information [of the individual's art. 36 VCCR rights] could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation," known as the "Miranda Rule" in the United States).

³⁶ See "Guideline 7(vii)," *supra* note 21, at p. 28.

³⁷ *C. v. Australia*, *supra* note 13, at para. 8.4.

³⁸ The 2011 study conducted by the International Detention Coalition surveying 28 countries reported that community management programs' compliance rates for asylum seekers and irregular migrants awaiting final outcomes ranged between 80 and 99 percent. *There are Alternatives*, International Detention Coalition 51-52 (2011), available at <http://idcoalition.org/cap/handbook/>.

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Alternatives to detention are more proportionate to the aim states want to achieve and, at the same time, may result in important financial and resource savings for states.³⁹

The existing alternatives to detention still constitute a restriction on the liberty of the individual to whom they are applied. Such alternatives should be subject to the same guarantees to which measures of deprivation of liberty are subject, as well as to the right to seek remedies whenever these guarantees are infringed. Alternative measures should be subject to legal review, and migrants should be granted the possibility to challenge such measures before a competent judicial authority.

Geneva, 25 February 2014

³⁹ *International Standards on Immigration Detention and Non-Custodial Measures*, IOM (Nov. 2011), available at <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IML-Information-Note-Immigration-Detention-and-Non-custodial-Measures.pdf>.

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