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Migration-Related Detention:

A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees.



Photograph of a container used to detain irregular migrants on Chios Island, Greece in 2005 © Refugee Solidarity Committee

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Introduction

Many countries in the world now detain those arriving at their borders in search of a new life. Migrants, asylum-seekers and refugees all suffer from violations of their human rights as states mistakenly regard detention as a deterrent against undesired migratory flows. Serious factors motivate individuals to depart their homes and travel to other countries, such as civil war, human rights violations, economic or environmental problems, and these factors are more decisive than any deterrent effect of detention.

Detention for the purposes of migration control can take many forms, including detaining people in penal institutions, specialized detention centres, restricted movement arrangements as well as in closed camp settings. In some countries detention in such situations is mandatory, and can be for prolonged or indefinite periods. In some, children are not spared and are also condemned to the harsh confinement of detention.

Whilst acknowledging that certain exceptional circumstances may exist where detention may not be able to be avoided, Amnesty International believes that as a general rule it should not occur. Amnesty International is opposed to most practices of migration-related detention due to their negative impact on the human rights of individuals detained and the fact that states often use detention as a means of punishment instead of dealing with the root causes of migratory movements.

This research guide seeks to highlight human rights standards relevant to the issue of migration-related detention.¹ It is aimed at providing individuals working on the issue of migration-related detention with information about the human rights standards which place limitations on this practice. The guide contains various international and regional standards relevant to migration-related detention as well as Amnesty International's policy on the issue, which is derived from these standards. The human rights standards contained in this document

¹ This document outlines resources to facilitate research on the international human rights standards relevant to migration-related detention of asylum-seekers, refugees and migrants. Migration-related detention is understood to mean detention for migration-related reasons, and not extending to detention of migrants for general criminal or penal reasons or for terrorism or national security related reasons separate from migration for forced or voluntary migrants. In addition to standards specifically relevant to migration-related detention, the guide includes some reference to standards relevant to other forms of detention or imprisonment, such as the Standard Minimum Rules for the Treatment of Prisoners.

bring to light the fact that international law contains a presumption against detention, places clear restraints on its usage and requires that where it does take place, the conditions are humane and the human rights of detainees are respected. Special attention is also given to standards relating to particular groups of concern, including children and other vulnerable categories.

In this guide the term migrant is used to indicate a person who is not an asylum-seeker or refugee, but a person who moves from one place to another to live and usually to work, either temporarily or permanently. Migrants, while distinct from the categories of asylum-seeker and refugee, may similarly have been compelled to leave, for example because they do not have access to adequate food, water or shelter, or in order to ensure the safety and security of themselves and their families. They may move to take up employment, or to be reunited with family members. Many migrants leave for a combination of reasons.

The terms refugee and asylum-seeker in this context refer to the specific categories of persons as recognised under international law which provide protection to persons fleeing persecution, conflict or human rights abuses. In addition to the standards contained in this guide that apply to all migrants, persons who fall into the categories of refugee or asylum-seeker also benefit from an additional set of specific standards.

Using this guide

This research guide is intended to facilitate research on selected human rights aspects of the migration-related detention of refugees, asylum-seekers and migrants. This document provides the reader with an overarching human rights framework against which practices in domestic settings can be compared, contrasted and critiqued. It aims to assist activists, researchers, decision-makers and lobbyists in their work on the issue of detention of forced and voluntary migrants by highlighting some of the relevant rights and protections encompassed in international law. It must be noted that this guide is not meant to be comprehensive of all standards relevant to migration-related detention. Selected rights have been chosen, and some human rights standards relating to migration-related detention are not covered by this document - for example, aspects of the conditions of detention including rights to education, privacy and religion,² as well as the issue of alternatives to detention,³ are not included in this document.

The guide firstly highlights Amnesty International's approach to the issue, setting out our policy on detention of asylum-seekers and refugees, and our policy on detaining migrants. Recent Amnesty International documents are also listed in this part of the guide. The research guide itself is focussed on setting out the international and regional human rights standards relevant to migration-related detention generally, and standards specifically applicable to refugees and asylum-seekers. These standards are set out in five parts:

1) *Presumption against detention*; 2) *Restraints on the usage of detention*; 3) *Conditions of detention*; 4) *Non-discrimination and proportionality*; 5) *Standards relating to particular groups*.

The human rights standards relevant to the issue of migration-related detention stem from a range of sources. International human rights law comes in a variety of forms, including what is known as "hard law": treaties and conventions, as well as taking the form of "soft law", or non-treaty standards such as General Assembly resolutions, reports of Special Rapporteurs or advisory opinions. Aiming to provide the reader with a comprehensive review of sources of human rights protection, this guide contains varying types of international standards. Whilst all sources can be useful for the purposes of human rights research, it is important to understand the different types of standards and the different weighting given to each type in the context of international law.

² For further information please refer to, among other things, UN *Standard Minimum Rules for the Treatment of Prisoners*; UN *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*; UNHCR's *Revised Guidelines on the Detention of Asylum-Seekers*.

³ For information on alternatives to detention please refer to, for example, UNHCR Legal and Protection Policy, Research Series, *Alternatives to Detention of Asylum Seekers and Refugees*, Ophelia Field and Alice Edwards, External Consultants, (2006), European Council on Refugees and Exiles (ECRE), *Research Paper on Alternatives to Detention: Practical alternatives to the administrative detention of asylum seekers and rejected asylum seekers*, (1997).

Treaties

The standards called covenants, conventions, charters and protocols are treaties which are legally binding on the states that have agreed to be bound by them. Some treaties, such as the International Covenant on Civil and Political Rights and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family ('Migrant Workers Convention'), are open to ratification by countries all over the world. Other treaties are open only to states that belong to a particular regional organization.⁴

States can agree to be bound by these treaties in one of two ways. They can use the two-step process of signature and ratification, or they can take the single step of accession. When a state signs a treaty, it formally declares its intention to ratify that treaty in the future. Once it has signed, the state may not engage in acts inconsistent with the object and purpose of the treaty. When it ratifies or accedes to the treaty, the state becomes a party to that treaty. A state party to a treaty promises to abide by all the provisions contained in the treaty and to fulfil its obligations under the treaty. Consideration of the ratification status of a treaty is an important factor when undertaking research. Some international instruments, such as the Convention on the Rights of the Child, are widely ratified⁵, whilst others, such as the Migrant Workers Convention, are ratified to a greater extent in some geographic regions than others.⁶ Information on the current status of ratifications of a particular treaty is available on the website of the Office of the High Commissioner for Human Rights.⁷

Treaty monitoring bodies

Guidance to interpreting the provisions contained in international treaties is provided by the comments, decisions and findings of treaty monitoring bodies and human rights courts.⁸ These are bodies established by the treaties or by the UN or regional bodies to monitor implementation of the treaty and to investigate complaints that the provisions of the treaty have been violated.

Other (non-treaty) standards

There are many human rights standards relevant to detention of migrants, refugees and asylum-seekers which are contained in non-treaty standards. Non-treaty standards are usually

⁴ These include the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the Arab Charter of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁵ As of June 2007 all countries in the world except for the United States of America and Somalia were parties to the Convention on the Rights of the Child.

⁶ As of June 2007 there were 37 ratifications and 15 signatures to the Migrant Workers Convention. Information on ratifications of the Migrant Workers Convention can be found at: <http://www.december18.net/web/general/page.php?pageID=79&menuID=36&lang=EN#eleven>. Ratification information on this and other treaties may also be found at: <http://www.ohchr.org>, however that site is not updated as regularly.

⁷ Available at <http://www.ohchr.org>.

⁸ Please note this guide does not cover jurisprudence of human rights courts in any significant manner. Reference is made at times to some relevant decisions, but this is not comprehensive.

called declarations, principles, rules and so on. The Universal Declaration of Human Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁹ and the Standard Minimum Rules for the Treatment of Prisoners¹⁰ are examples of non-treaty standards which set out important human rights guarantees. Although they do not have the legal power of treaties, they have the persuasive force of having been negotiated by governments over many years, and of having been adopted by political bodies such as the UN General Assembly, usually by consensus, and are useful guidance in interpreting the binding content of treaty provisions. Non-treaty standards sometimes reaffirm principles that are already considered to be legally binding on all states under customary international law.

Interpretations by other intergovernmental bodies, such as the UN Working Group on Arbitrary Detention, and Special Rapporteurs of the UN Commission on Human Rights, including the Special Rapporteur on the human rights of migrants, also provide authoritative guidance.¹¹ Furthermore, refugee-specific guidance is also provided by the United Nations High Commissioner for Refugees (UNHCR) by way of guidelines or through decisions of its Executive Committee.¹²

Policy

While policy statements are not binding on states or other parties, they are very influential and serve as persuasive guidance. They are generally grounded in international human rights standards and provide practical guidance on implementation of human rights standards.

National and regional laws and judgments

National and regional laws and judgments of domestic or regional courts are not covered in this guide but should also be used in any analysis of migration-related detention. At times these may serve as a source of human rights standards, and in other circumstances laws or judgments which run contrary to international law will need to be highlighted and critiqued.

⁹ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted by consensus by the UN General Assembly in 1988, contains an authoritative set of internationally recognized standards, applicable to all states on how detainees and prisoners should be treated. The principles set forth basic legal and humanitarian concepts and serve as a guide for shaping national legislation.

¹⁰ The Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), adopted in 1955 by the First UN Congress on the Prevention of Crime and the Treatment of Offenders and approved by the UN Economic and Social Council, set out what is "generally accepted as being good principle and practice" in the treatment of prisoners. In 1971, the UN General Assembly called on member states to implement these rules and to incorporate them in national legislation.

¹¹ These are known as UN thematic mechanisms. They are generally mandated to investigate complaints of a particular type of human rights violation in all countries, whether or not the state is bound by the relevant international human rights treaties. They can also carry out country visits, if the state concerned agrees. They can make inquiries, including on individual cases, submit reports with findings and recommendations to governments and report annually to the UN Human Rights Council.

¹² Currently made up of 72 member States, the Executive Committee of the High Commissioner's Programme (ExCom) meets in Geneva annually to review and approve UNHCR's programmes and budget, advise on international protection and discuss a wide range of other issues with UNHCR and its intergovernmental and non-governmental partners.

Amnesty International Policy

Amnesty International (AI) is a worldwide movement of people who campaign for internationally recognized human rights to be respected and protected. One very important aspect of our campaigning on human rights is the work towards securing the human rights of refugees, asylum-seekers and migrants. We do this principally through advocacy, research and campaigning, by exposing human rights abuses and protection failures of governments and agencies and advocating for policy and legal changes.

Working to protect the rights of uprooted people, AI has developed policy positions on a number of aspects relevant to the human rights of migrants and refugees. Policy on detention of refugees and asylum-seekers has been developed, as well as in relation to the practice of detaining voluntary migrants, including irregular migrants. These policy positions are grounded in the international legal standards which you will find set out in the research guide section of this document.

AI Policy: Refugees and asylum-seekers

Amnesty International is opposed to the detention of refugees and asylum-seekers apart from in the most exceptional circumstances as prescribed by international law and standards. Detention will only be lawful when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective to be achieved, that it is on grounds prescribed by law, and that it is for one of the specified reasons which international and regional standards recognize as legitimate grounds for detaining asylum-seekers.

Amnesty International also opposes the detention of people who have claimed asylum and whose claims have been rejected by the authorities, unless, for example, the detaining authorities can demonstrate that there is an objective risk that the individual concerned would otherwise abscond, and that other measures short of detention, such as reporting requirements, would not be sufficient.

Anyone held in detention must be promptly brought before a judicial authority and be provided with an effective opportunity to challenge the lawfulness of the decision to detain him or her. Detention should also be for the shortest possible time.

Should government authorities continue to operate a policy of detaining people who have sought asylum, Amnesty International urges, at minimum, the following recommendations be adopted:

- there should be a presumption against detention provided by law;

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- alternative non-custodial measures, such as reporting requirements, should always be considered before resorting to detention;
 - criteria for detention should be clearly set out on a legal basis;
 - the decision to detain should always comply with relevant international standards pertaining to the lawfulness of detention;
 - the decision to detain should always be based on a detailed and individualized assessment, including the personal history of, and the risk of absconding presented by, the individual concerned. Such assessment should consider the necessity and appropriateness of detention, including whether it is proportionate to the objective to be achieved;
 - each decision to detain should be automatically and regularly reviewed as to its lawfulness, necessity and appropriateness by means of a prompt, oral hearing by a court or similar competent independent and impartial body, accompanied by the appropriate provision of legal assistance;
 - detainees have the right to be informed of the reason for their detention in writing in a language which they understand;
 - detention should always be for the shortest possible time and must not be prolonged or indefinite;
 - there should be a maximum duration for detention provided by law which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released;
 - there should be a prohibition provided by law on the detention of vulnerable people who have sought asylum, including: torture survivors, pregnant women, those with serious medical conditions, the mentally ill and the elderly;
 - there should be a prohibition on the detention of unaccompanied children provided by law;
 - there should be a prohibition provided by law for those who have sought asylum at some stage and who are held solely under immigration-related powers to be held in prison;
 - any allegations of racism, ill-treatment and other abuses of those held in detention should be investigated immediately in compliance with relevant international standards and those responsible should be dealt with appropriately, including when warranted, by disciplinary or penal measures as appropriate;

- people who have sought asylum and are detained should be granted access to legal counsel, interpreters, doctors, refugee assisting organizations, members of their families, friends, religious and social assistance in addition to the United Nations High Commissioner for Refugees (UNHCR);
- those detained should have access to appropriate health care and psychological counseling where appropriate.

AI Policy: Migrants

As a general rule, Amnesty International is opposed to the use of detention for the purposes of migration control. It is our position that detention of migrants will only be lawful when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective to be achieved, that alternatives will not be effective, that it is on grounds prescribed by law, and when there is an objective risk of the person absconding. The individuals concerned should also be provided with an effective opportunity to challenge the decision to detain them.

Migrants have the right to liberty and to freedom from arbitrary detention. This means that detention should be subject to restraints, including the requirement that the detention is in accordance with the law, justified in the individual case as a necessary and proportionate measure that conforms with international law, be subject to judicial review and for the shortest time possible.

Should government authorities continue to operate a policy of detaining migrants, Amnesty International urges at a minimum, the following recommendations be adopted:

- detention of migrants should be used only if, in each individual case, it is demonstrated that it is a necessary and proportionate measure that conforms with international law;
- criteria for detention should be clearly set out in law;
- alternative non-custodial measures, such as reporting requirements, should always be considered before resorting to detention;
- the decision to detain should always be based on a detailed and individualized assessment, including the personal history of, and the risk of absconding presented by, the individual concerned. Such assessment should consider the necessity and appropriateness of detention, including whether it is proportionate to the objective to be achieved;
- each decision to detain should be automatically and regularly reviewed as to its lawfulness, necessity and appropriateness by means of a prompt, oral hearing by a court or similar competent independent and impartial body, accompanied by the appropriate provision of legal assistance;
- detainees have the right to be informed of the reason for their detention in writing in a language which they understand;

- detention should always be for the shortest possible time and must not be prolonged or indefinite;
- there should be a maximum duration for detention provided by law which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released;
- migrants should be granted access to legal counsel, consular officials (if desired), interpreters, doctors, members of their families, friends, and religious and social assistance;
- there should be a prohibition on the detention of unaccompanied children provided by law;
- any allegations of racism, ill-treatment and other abuses of those held in detention should be investigated immediately in compliance with relevant international standards and those responsible should be dealt with appropriately, including when warranted, by disciplinary or penal measures as appropriate;
- detention of migrants with psychological problems, as well as those belonging to vulnerable categories and in need of special assistance, should be only allowed as a measure of last resort;
- detainees should have access to adequate medical and psychological assistance.

Recent Amnesty International documents on migration-related detention

- South Korea: Open letter to the President of South Korea (ASA 25/002/2007)
- Japan: Open letter to the Minister of Justice of Japan, the Hon. Ngase Jinen: Detention of minors seeking asylum in Japan (ASA 22/002/2007)
- Spain and Morocco: Failure to protect the rights of migrants – Ceuta and Melilla one year on (EUR 41/009/2006)
- Greece: Out of the Spotlight, The rights of foreigners and minorities are still a grey area (EUR 25/005/2006)
- Italy: Invisible children - The human rights of migrant and asylum-seeking minors detained upon arrival at the maritime border in Italy (EUR 30/001/2006)
- United Kingdom: Seeking asylum is not a crime: detention of people who have sought asylum (EUR 45/015/2005)
- Spain: The Southern Border. The State turns its back on the human rights of refugees and migrants (EUR 41/008/2005)
- Malaysia: Human rights at risk in mass deportation of undocumented migrants (ASA 28/008/2004)
- The Netherlands: Concerns about Schiphol fire need urgent follow up (EUR 35/001/2006)
- Republic of Korea (South Korea): Migrant workers are also human beings' (ASA 25/007/2006)
- Malta: Investigation of incidents at Hal-Safi Detention Centre finds excessive use of force and ill-treatment of detainees by armed forces (EUR 33/002/2005)
- The human cost of "Fortress Europe": Detention and expulsion of asylum-seekers and migrants in the EU (Amnesty International Open Letter to the incoming UK Presidency on the occasion of World Refugee Day) (IOR 61/014/2005)
- Italy: Temporary Stay -- Permanent Rights: The treatment of foreign nationals detained in 'temporary stay and assistance centres' (EUR 30/004/2005)
- Australia: Detention regime in breach of international human rights (ASA 12/003/2005)
- Practices of Detention and Expulsion: Human Rights at Risk (POL30/017/2005)
- UN Committee on the Elimination of Racial Discrimination: Written submission to the CERD thematic discussion on non-citizens and racial discrimination (IOR 42/006/2004)

1. Human Rights Standards – presumption against detention

1.1 Right to Liberty

1.1.1 International human rights standards

1.1.1.1 Treaties

International Covenant on Civil and Political Rights, 1966

Article 9(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 [or her] liberty except on such grounds and in accordance with such procedure as are established by law.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, 1990

Article 16(1) Migrant workers and members of their families shall have the right to liberty and security of person.

1.1.1.2 Treaty Monitoring Bodies

General Comment No. 8 (1982) of the Human Rights Committee, Humane treatment of persons deprived of their liberty (Article 9 of the ICCPR)

Article 1 . . . The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc

1.1.1.3 General Assembly resolutions

Universal Declaration of Human Rights, 1948 (Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948)

Article 3 Everyone has the right to life, liberty and security of person.

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988 (Adopted by General Assembly resolution 43/173 of 9 December 1988) (“Body of Principles on Detention”)

Principle 2 Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Declaration on the Human Rights of Individuals who are not nationals of the country in which they live (Adopted by General Assembly resolution Adopted by General Assembly resolution 40/144 of 13 December 1985)

Article 5

(1) Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights:

(a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;

1.1.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples’ Rights, 1981¹³

Article 6 Every individual shall have the right to liberty and to the security of his person...

American Convention on Human Rights, 1969¹⁴

Article 7 (1) Every person has the right to personal liberty and security.

American Declaration of the Rights and Duties of Man, 1948

Article I Every human being has the right to life, liberty and the security of his person.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, (2004)

¹³ See also e.g. *Krischna Achutan (on behalf of Aleke Banda)*, *Amnesty International on behalf of Orton and Vera Chirwa*, *Amnesty International on behalf of Orton and Vera Chirwa v. Malawi*, (64/92, 68/92, 78/92 respectively), 8th Annual Report of the African Commission, 1994-1995, ACHPR/RPT/8th/Rev.I, where the African Commission ruled that the arrest and detention of a political figure who was detained "at the pleasure of the Head of State" without charge or trial for 12 years violated the right to liberty set out in Article 6 of the African Charter.

¹⁴ See also e.g. Inter-American Commission, Report on the Situation of Human Rights in Argentina, 1980, OEA/Ser.L/V/II.49, doc.19, at 189,193,291; Inter-American Commission, Report on the Situation of Human Rights in Chile, 1985, OAS/Ser.L/V/II.66, doc.17, at 134,139; Inter-American Commission, Report on the Situation of Human Rights in Nicaragua, 1981, OEA/Ser.L/V/II.53, at 65, where the Inter-American Commission considered that in certain circumstances house arrest, internal exile, and banishment (forced relocation) could violate the right to personal liberty guaranteed by Article 7 of the American Convention.

Article 14(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.
(2) No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.

European Convention on Human Rights and Fundamental Freedoms, 1950¹⁵

Article 5(1) Everyone has the right to liberty and security of person...

1.1.3 International refugee and asylum-seeker standards

1951 Geneva Convention Relating to the Status of Refugees

Article 31(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1,¹⁶ enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999

Paragraph 1 The detention of asylum-seekers is in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs...

¹⁵ See also e.g. *Amuur v. France*, European Court of Human Rights, Judgment of 25 June 1996, Appl. No. 19776/92 and *Guzzardi v. Italy*, European Court of Human Rights, Judgment of 6 November 1980, Appl. No. 7367/76

¹⁶ Article 1 provides the definition of the term "refugee" for the purposes of the 1951 Geneva Convention Relating to the Status of Refugees.

1.2 Freedom of Movement¹⁷

1.2.1 International human rights standards

1.2.1.1 Treaties

International Covenant on Civil and Political Rights, 1966

Article 12(1) Everyone lawfully¹⁸ within the territory of a state shall, within that territory, have the right of liberty of movement and freedom to choose his residence.

(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

International Convention on the Elimination of All Forms of Racial Discrimination (1969)

Article 5 (d)(i) The right to freedom of movement and residence within the border of the State.

1.2.1.2 Treaty Monitoring Bodies

General Comment No. 27 (1999) of the Human Rights Committee, Freedom of movement (Art.12 of the ICCPR)

Para 2 The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.

Para 4. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. . . The question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12.¹⁹ Once a person

¹⁷ For further see below at Section 2.2

¹⁸ See below at Section 1.2.1.2.

¹⁹ *Celepli v. Sweden*, Human Rights Committee Communication No. 456/1991, U.N. Doc. CCPR/C/51/D/456/1991 (1994). para. 9.2.

is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3.²⁰ It is, therefore, important that States parties indicate in their reports the circumstances in which they treat aliens differently from their nationals in this regard and how they justify this difference in treatment.

Para 14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

Para 15 The principle of proportionality²¹ has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

***Celepli v. Sweden*, Human Rights Committee Communication No. 456/1991**

A Turkish citizen of Kurdish origin was granted permission to stay in Sweden but not refugee status. He was subsequently subjected to a deportation order on the grounds of suspicion of involvement in terrorist activities. The expulsion order, however, was not enforced as it was believed that he (and his fellow suspects) could be exposed to political persecution in Turkey if returned. Instead, the Swedish authorities prescribed limitations and conditions concerning their place of residence. The HRC found that the person concerned, having been allowed to stay in Sweden, albeit subject to conditions was considered to be lawfully in the territory of Sweden for the purposes of article 12. Sweden justified its restrictions on the ground of national security under article 12(3), which was accepted by the Committee. (para. 9.2)

1.2.1.3 General Assembly resolutions

Universal Declaration of Human Rights, 1948

Article 13(1) Everyone has the right to freedom of movement and residence within the borders of each state.

1.2.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples' Rights, 1981

²⁰ General Comment No. 15, para. 8, in HRI/GEN/1/Rev.3, 15 August 1997, p. 20.

²¹ For further see below at Section 4.

Article 12(1) Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

American Convention on Human Rights 1969

Article 22(1) Every person lawfully in the territory of the State Party has the right to move about in it and to reside in it subject to the provisions of the law.

(2) Every person has the right to leave any country freely, including his own.

(3) The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

(4) The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.

Article 32(2) the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, 2004

Article 26(1) Everyone lawfully within the territory of a State party shall, within that territory, have the right to freedom of movement and to freely choose his residence in any part of that territory in conformity with the laws in force.

4th Protocol to the European Convention on Human Rights and Fundamental Freedoms, 1963²²

Article 2(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(2) Everyone shall be free to leave any country, including his own.

(3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of 'ordre public', for the prevention of crime, for the protection of rights and freedoms of others.

(4) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

²² See also e.g. *Guzzardi v. Italy*, European Court of Human Rights, Judgment of 6 November 1980, (1981) 61 I.L.R. 227; also (1981) E.H.R.R. 333

1.2.3 International refugee and asylum-seeker standards

1951 Geneva Convention Relating to the Status of Refugees

Article 26 Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 31(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

1.3 Prohibition of detention on the basis of illegal entry or presence

1.3.1 International human rights standards

1.3.1.1 Other

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Paragraph 43...detention should never be punitive in nature.

Recommendations

Paragraph 73 Infractions of immigration laws and regulations should not be considered criminal offences under national legislation. The Special Rapporteur would like to stress that irregular migrants are not criminals per se and they should not be treated as such. Detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.

Paragraph 74 Governments should consider the possibility of progressively abolishing all forms of administrative detention.

1.3.2 International refugee and asylum-seeker standards

1951 Geneva Convention Relating to the Status of Refugees

Article 31(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 2 As a general principle asylum-seekers should not be detained. According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognized as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter a territory illegally. However the position of asylum-seekers differs fundamentally from that of ordinary aliens in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.

Guideline 3 ...Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as punitive or disciplinary measures for illegal entry or presence in the country. Detention should also be avoided for failure to comply with administrative requirements or other institutional restrictions to residency at reception centres, or refugee camps.

UNHCR ExCom Conclusion No. 22 (XXXII) – 1981, Protection of Asylum Seekers in Situations of Large-Scale Influx

Paragraph 2 It is therefore essential that asylum-seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following minimum basic human standards:

(a) they should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected

to restrictions on their movements other than those which are necessary in the interest of public health and public order;

ExCom Conclusion No. 44 (XXXVII) – 1986, Detention of Refugees and Asylum-Seekers
Paragraph (a) Noted with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation;

ExCom Conclusion No. 55 (XL) – 1989 General Conclusion on International Protection
Paragraph (g) Noted with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation and reiterated its Conclusion No. 44 (XXXVII) which circumscribes the grounds for detention of such persons;

ExCom Conclusion No. 85 (XLIX) – 1998) Conclusion on International Protection
Paragraph (ee) Notes with concern that asylum-seekers detained only because of their illegal entry or presence are often held together with persons detained as common criminals, and reiterates that this is undesirable and must be avoided whenever possible, and that asylum-seekers shall not be located in areas where their physical safety is in danger;

ExCom Conclusion No. 97 (LIV) – 2003, Protection Safeguards in Interception Measures

Paragraph (a) (vi) [The Executive Committee recommends that] [i]ntercepted asylum-seekers and refugees should not become liable to criminal prosecution under the Protocol Against the Smuggling of Migrants by Land, Sea or Air for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met;

2. Human Rights Standards – Restrictions on the use of detention

2.1 Prohibition of arbitrary detention

2.1.1 International human rights standards

2.1.1.1 Treaties

International Covenant on Civil and Political Rights, 1966

Article 9(1) ...No one shall be subjected to arbitrary arrest or detention...

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, 1990

Article 16(4) Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.

2.1.1.2 Treaty Monitoring Bodies

General Comment No. 8 (1982) of the Human Rights Committee, Right to Liberty and Security of persons (Article 9 of the ICCPR)

Paragraph (1) . . .The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc

General Recommendation No.30 (2004) of the Committee on the Elimination of Racial Discrimination, Discrimination Against Non Citizens.

Paragraph (19) Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards;

A. v. Australia, Human Rights Committee Communication No 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993

The author, a Cambodian asylum-seeker, arrived in Australia and shortly thereafter applied for refugee status. His asylum application was refused and later 'A' appealed this decision and was detained for over four years whilst his refugee status was being determined. The author argued *inter alia* that he had been detained arbitrarily within the meaning of article 9(1).

The Committee concluded that:

"...the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context." (para. 9.2)

"The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1." (para. 9.4)

C. v. Australia, Human Rights Committee Communication No 900/1999: Australia. 13/11/2002, CCPR/C/76/D/900/1999

'C', an Iranian asylum-seeker was detained after his arrival in Australia and subsequent asylum claim, pending determination of his entitlement to asylum under Australian law. The author claimed *inter alia* that his detention breached article 9(1) of the ICCPR.

"...[T]he Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification²³... In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever

²³ *Lim v. Australia* (1992) 176 CLR 1 (High Court of Australia).

the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1." (para. 8.2)

2.1.1.3 General Assembly resolutions

Universal Declaration of Human Rights, 1948

Article 9 No one shall be subjected to arbitrary arrest, detention or exile.

General Assembly Resolution 59/194 on Protection of migrants (A/59/503/Add.2) of 18 March 2005

Paragraph (12) Urges all States to adopt effective measures to put an end to the arbitrary arrest and detention of migrants and to take action to prevent and punish any form of illegal deprivation of liberty of migrants by individuals or groups;

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990

Rule 11 For the purposes of the Rules, the following definitions should apply:

(b) The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

2.1.1.4 Other

Opinions adopted by the Working Group on Arbitrary Detention, Civil and Political Rights, Including Questions of: Torture and Detention, E/CN.4/1999/63/Add.1, Opinion No. 1/1998 (to the government of Cuba), 1999

Paragraph 3 The Working Group regards deprivation of liberty as arbitrary in the following cases:

- (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (Category I);
- (ii) When the deprivation of liberty is the result of a judgment or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights (Category II);
- (iii) When the complete or partial non-observance of international standards relating to the right to a fair trial, as set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to confer on the deprivation of liberty, of whatever kind, a[n] arbitrary character (Category III).

Working Group on Arbitrary Detention, Mandate²⁴

Criteria adopted by the Working Group to determine whether a deprivation of liberty is arbitrary

²⁴ Available at http://www.unhcr.ch/html/menu2/7/b/arb_det/ardintro.htm#membership

The question of when a deprivation of freedom is or becomes arbitrary is not clearly answered by the international instruments. The Universal Declaration of Human Rights merely provides in article 9 that "No one shall be subjected to arbitrary arrest, detention or exile". Article 9 (1) of the International Covenant on Civil and Political Rights is scarcely any clearer: "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."

To enable it to carry out its tasks on the basis of precise standards, the Working Group has adopted criteria for the consideration of cases submitted to it, drawing on the above-mentioned provisions of the Universal Declaration and the Covenant as well as on the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. According to these criteria, detention is considered arbitrary if a case falls into one, or more, of the following three categories:

1. Cases in which the deprivation of freedom is arbitrary as it manifestly cannot be linked to any legal basis (such as continued detention beyond the execution of the sentence or despite an amnesty act, etc.);
2. Cases of deprivation of freedom when the facts giving rise to the prosecution or conviction concern the exercise of certain fundamental freedoms which are protected by the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (for States Parties), and in particular:
 - * freedom of thought, conscience and religion (art. 18 of the UDHR and art. 18 of the ICCPR);
 - * freedom of opinion and expression (art. 19 of the UDHR and art. 19 of the ICCPR);
 - * the right of peaceful assembly and association (art. 20 of the UDHR and arts. 21 and 22 of the ICCPR);
3. Cases in which non-observance of all or part of the international provisions relating to the right to a fair trial is such that it confers on the deprivation of freedom, of whatever kind, an arbitrary character.

In cases other than those falling within one or more of the three categories specified above, the Working Group is not competent to declare whether a deprivation of freedom is arbitrary. In too many cases the Group receives communications requesting it to declare a detention "unfair", or to take a view on the value of evidence produced during a trial. These are areas which fall outside the Group's remit. It is not for the Group to convert itself into a kind of Supreme Court.

Working Group on Arbitrary Detention, Deliberation Number 5, E/CN.4/2000/4, Annex II, 2000

In order to determine the arbitrary character of the custody, the Working Group considers whether or not the alien is enabled to enjoy all or some of the following guarantees:

I. GUARANTEES CONCERNING PERSONS HELD IN CUSTODY

Principle 1: Any asylum-seeker or immigrant, when held for questioning at the border, or inside national territory in the case of illegal entry, must be informed at least orally, and in a language which he or she understands, of the nature of and grounds for the decision refusing

entry at the border, or permission for temporary residence in the territory, that is being contemplated with respect to the person concerned.

Principle 2: Any asylum-seeker or immigrant must have the possibility, while in custody, of communicating with the outside world, including by telephone, fax or electronic mail, and of contacting a lawyer, a consular representative and relatives.

Principle 3: Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.

Principle 4: Any asylum-seeker or immigrant, when placed in custody, must enter his or her signature in a register which is numbered and bound, or affords equivalent guarantees, indicating the person's identity, the grounds for the custody and the competent authority which decided on the measure, as well as the time and date of admission into and release from custody.

Principle 5: Any asylum-seeker or immigrant, upon admission to a centre for custody, must be informed of the internal regulations and, where appropriate, of the applicable disciplinary rules and any possibility of his or her being held incommunicado, as well as of the guarantees accompanying such a measure.

II. GUARANTEES CONCERNING DETENTION

Principle 6: The decision must be taken by a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law.

Principle 7: A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.

Principle 8: Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned.

Principle 9: Custody must be effected in a public establishment specifically intended for this purpose; when, for practical reasons, this is not the case, the asylum-seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law.

Principle 10: The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody.

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Paragraph 15 Deprivation of liberty of migrants must comply not only with national law, but also with international legislation. It is a fundamental principle of international law that no one should be subjected to arbitrary detention. International human rights norms, principles and standards define the content of that principle. Such norms, principles and standards apply to all individuals, including migrants and asylum seekers, and to both criminal and administrative proceedings.

Paragraph 35 ...Deprivation of liberty should never be indefinite. The Human Rights Committee found that “detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal”.²⁵ The Working Group on Arbitrary Detention further states that a maximum period should be set by law and the custody may in no case be unlimited or of excessive length.

Recommendations

Paragraph 75 When [abolishing all forms of administrative detention] is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:...

(g) Ensuring that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite. The Special Rapporteur recommends that States shall consider entering into bilateral and multilateral agreements to speed up documentation/deportation procedures and thereby reduce the length of detention... Detention should end when a deportation order cannot be executed for other reasons that are not the fault of the migrant;

Final Report of David Weissbrodt, UN Special Rapporteur on the Rights of Non-Citizens, E/CN.4/Sub.2/2003/23

Paragraph 27 All individuals, including non-citizens, must be protected from arbitrary detention.²⁶ States are obligated to respect the human rights of detainees, including legal protections, whether or not they are in the territory of the State in question.²⁷ So-called “international zones” administered by States to detain non-citizens, and where such non-citizens are denied legal or social assistance, are a legal fiction and a State cannot thereby avoid its international human rights responsibilities by claiming that such areas have extraterritorial status.²⁸ States may arrest or detain non-citizens against whom action is being taken with a view to deportation or extradition, regardless of whether such detention is reasonably considered necessary, for example, to prevent those non-citizens from committing offences or fleeing.²⁹ States may not, however, consciously facilitate the detention of non-citizens in a planned operation for the expulsion of non-citizens by encouraging them to report to authorities on the basis of a pretext.³⁰

²⁵ CCPR/C/D/560/1993, op.cit., para. 9.4.

²⁶ *Conka v. Belgium*, App. No. 00051564/99, Eur. Ct. H.R. (2002).

²⁷ E/CN.4/Sub.2/2003/23/Add.2 (2003) para. 81.

²⁸ 22 E.H.R.R. 533 (1996) para. 43.

²⁹ *Conka v. Belgium*, App. No. 00051564/99, Eur. Ct. H.R. (5 February 2002); *Chahal v. United Kingdom*, 1996-V Reports of Judgments and Decisions 1862, § 112 (1996).

³⁰ *Conka v. Belgium*, App. No. 00051564/99, Eur. Ct. H.R. (5 February 2002).

2.1.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples' Rights, 1981

Article 6 ...No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

American Convention on Human Rights, 1969

Article 7(3) No one shall be subject to arbitrary arrest or imprisonment.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, 2004

Article 14(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.

(2) No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.

European Convention on Human Rights and Fundamental Freedoms, 1950³¹

Article 5(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law.

2.1.3 International refugee and asylum-seeker standards

1951 Geneva Convention Relating to the Status of Refugees

Article 31(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999

Paragraph 1 ... Freedom from arbitrary detention is a fundamental human right, and the use of detention is in many instances, contrary to the norms and principles of international law...

³¹ See also e.g. *Saadi v United Kingdom*, European Court of Human Rights, Judgment of 11 July 2006, App. No. 1329/03; *Amuur v. France*, European Court of Human Rights, Judgment of 25 June 1996, Appl. No. 19776/92; *Guzzardi v. Italy*, European Court of Human Rights, Judgment of 6 November 1980, (1981) 61 I.L.R. 227; also (1981) E.H.R.R. 333

Guideline 1 ... UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. There is a qualitative difference between detention and other restrictions on freedom of movement. Persons who are subject to limitations on domicile and residency are not generally considered to be in detention. When considering whether an asylum-seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.

Guideline 3 Exceptional Grounds for Detention

Detention of asylum-seekers may exceptionally be resorted to ... as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments.³² There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non-discriminatory manner for a minimal period.³³

The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with ExCom Conclusion No. 44 (XXXVII) the detention of asylum-seekers may only be resorted to, if necessary:

(i) to verify identity.

This relates to those cases where identity may be undetermined or in dispute.

(ii) to determine the elements on which the claim for refugee status or asylum is based.

This statement means that the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim.³⁴ This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

³² Art. 9(1) ICCPR; Art. 37(b) UN Convention on the Rights of the Child; Art. 5(1) ECHR; Art. 7(2) American Convention on Human Rights, 1969; Art. 5 African Charter on Human and Peoples' Rights, 1981.

³³ Art. 9(1), Art. 12 ICCPR; Art. 37(b) CRC; Art. 5(1)(f) ECHR; Art. 7(3) American Convention; Art. 6 African Charter. EXCOM Conclusion No. 44 (XXXVII).

³⁴ EXCOM Conclusion No. 44 (XXXVII).

(iii) in cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum.

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or traveling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

(iv) to protect national security and public order.

This relates to cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he/she be allowed entry.

Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related residency at reception centers, or refugee camps. Escape from detention should not lead to the automatic discontinuation of the asylum procedure, or to return to the country of origin, having regard to the principle of non-refoulement.³⁵

UNHCR ExCom Conclusion No. 44 (XXXVII) - 1986 – Detention of Refugees and Asylum-seekers

Paragraph (i) Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order;

UNHCR ExCom Conclusion No. 50 (XXXIX) – 1988, General Conclusion on International Protection

Paragraph (i) The Executive Committee [c]alled upon states, the High Commissioner and other concerned parties to take all necessary measures to ensure that refugees are protected from arbitrary detention and violence;

UNHCR ExCom Conclusion No. 85 (XLIX) – 1998

³⁵ Sub Committee of the Whole of International Protection Note EC/SCP/44, para. 51(c).

(cc) *Recalls* Article 31 of the 1951 Convention relating to the Status of Refugees and reaffirms Conclusion No. 44.(XXXVII) on the detention of refugees and asylum-seekers; (dd) *Deplores* that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.

2.2 Exceptional grounds for detention

2.2.1 International human rights standards

2.2.1.1 Treaties

International Covenant on Civil and Political Rights, 1966

Article 9(1) ...No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law....

Article 12(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, 1990

Article 16(4) Migrant workers and members of their families shall not be...deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.

2.2.1.2 Treaty Monitoring Bodies

General Comment No. 8 (1982) of the Human Rights Committee, Humane treatment of persons deprived of their liberty (Article 9 of the ICCPR)

Paragraph 4 Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.

A. v. Australia, Human Rights Committee Communication No 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993

The author, a Cambodian asylum-seeker, arrived in Australia and shortly thereafter applied for refugee status. His asylum application was refused and later 'A' appealed this decision and was detained for over four years whilst his refugee status was being determined. The author argued *inter alia* that he had been detained arbitrarily within the meaning of article 9(1).

“In any event, detention should not continue beyond the period for which the state can provide appropriate justification. For example the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.” (para. 9.4)

2.2.1.3 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988

Principle 4 Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by... a judicial or other authority.

2.2.1.4 Other

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Recommendations

Paragraph 75 (c) Ensuring that procedural safeguards and guarantees established by international human rights law and national law in case of criminal proceedings are applied to any form of detention. In particular, deprivation of liberty should be allowed only on the basis of criteria established by law. A decision to detain should only be taken under clear legal authority, and all migrants deprived of their liberty, whether under administrative proceedings or in cases of preventive detention for reasons of public security, should be entitled to bring proceedings before a court, so that the court can decide on the lawfulness of the detention. Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings;

2.2.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples' Rights, 1981

Article 6 ...No one may be deprived of his freedom except for reasons and conditions previously laid down by law...

American Convention on Human Rights, 1969

Article 7(2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

American Declaration of the Rights and Duties of Man, 1948

Article XXV No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, 2004

Article 14(2) No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.

European Convention on Human Rights and Fundamental Freedoms, 1950³⁶

Article 5(1) No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2.2.3 International refugee and asylum-seeker standards

1951 Geneva Convention Relating to the Status of Refugees

³⁶ See also e.g. *Chahal v. United Kingdom*, European Court of Human Rights Judgment of 15 November 1996, Appl. No. 22414/93 where the Court recalled that 'any deprivation of liberty under Article 5 paragraph 1(f) will be justified only as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 paragraph 1(f).' (para. 113); *Conka v. Belgium*, European Court of Human Rights, judgment of 5 February 2002, Appl. No. 51564/99 where the Court reiterates that the list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision. (para. 42); *K.-F. v. Germany*, ECHR judgment of 27 November 1997, (para 70). Also see *Kenmache v. France* (No. 3), (45/1993/440/519), 24 November 1994 where the European Court stated that the phrase "in accordance with a procedure prescribed by law" in Article 5(1) of the European Convention refers to domestic law, but that the domestic law itself "must be in conformity with the principles expressed or implied in the [European] Convention".

Art 31(2) The Contracting State shall not apply to the movements of such refugees [that is, those referred to in article 31(1), including asylum-seekers] restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

UNHCR ExCom Conclusion No. 44 (XXXVII) – 1986, Detention of Refugees and Asylum Seekers

No. 44 (XXXVII) – 1986 – Detention of Refugees and Asylum-Seekers.

Paragraph (b) ...If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order;

UNHCR ExCom Conclusion No. 7 (XXVIII) – 1977, Expulsion

Paragraph (e) [The Executive Committee] [r]ecommended that an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged.

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999

Guideline 3 Exceptional Grounds for Detention

Detention of asylum-seekers may exceptionally be resorted to ... as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments.³⁷

There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non-discriminatory manner for a minimal period.³⁸

³⁷ Art. 9(1) ICCPR; Art. 37(b) UN Convention on the Rights of the Child; Art. 5(1) ECHR; Art. 7(2) American Convention on Human Rights, 1969; Art. 5 African Charter on Human and Peoples' Rights, 1981.

³⁸ Art. 9(1), Art. 12 ICCPR; Art. 37(b) CRC; Art. 5(1)(f) ECHR; Art. 7(3) American Convention; Art. 6 African Charter. EXCOM Conclusion No. 44 (XXXVII).

The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with ExCom Conclusion No. 44 (XXXVII) the detention of asylum-seekers may only be resorted to, if necessary:

(i) to verify identity.

This relates to those cases where identity may be undetermined or in dispute.

(ii) to determine the elements on which the claim for refugee status or asylum is based.

This statement means that the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim.³⁹ This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

(iii) in cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum.

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or traveling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

(iv) to protect national security and public order.

This relates to cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he/she be allowed entry.

Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related residency at reception centers, or refugee camps. Escape from detention should not lead to the automatic discontinuation of the asylum procedure, or to return to the country of origin, having regard to the principle of non-refoulement.⁴⁰

³⁹ EXCOM Conclusion No. 44 (XXXVII).

⁴⁰ Sub Committee of the Whole of International Protection Note EC/SCP/44, para. 51(c).

2.3 Right to be informed of the reasons for detention

2.3.1 International human rights standards

2.3.1.1 Treaties

International Covenant on Civil and Political Rights, 1966

Article 9(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.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, 1990

Article 16(5) Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.

2.3.1.2 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988

Principle 11(2) A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefore.

Principle 13 Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14 ...A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information [relating to any charges against him].

2.3.1.3 Other

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Recommendations

Paragraph 75 (d) [Governments should take measures to ensure] that migrants deprived of their liberty are informed in a language they understand, if possible in writing, of the reasons for the deprivation of liberty...

Working Group on Arbitrary Detention, Deliberation Number 5, E/CN.4/2000/4, Annex II, 2000

Principle 8 Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure...

2.3.2 Regional human rights standards

American Convention on Human Rights, 1969

Article 7(4) Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, (2004)

Article 14 (3) Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.

European Convention on Human Rights and Fundamental Freedoms, 1950

Article 5(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

2.3.3 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 5(i) [If detained, asylum-seekers should be entitled] to receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;

2.4 Right to challenge the lawfulness of detention before a judicial body

2.4.1 International human rights standards

2.4.1.1 Treaties

International Covenant on Civil and Political Rights, 1966

Article 2(3) Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 9(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.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990

Article 16(8) Migrant workers and members of their families who are deprived of their 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 their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

2.4.1.2 Treaty Monitoring Bodies

General Comment No. 8 (1982) of the Human Rights Committee, Right to Liberty and Security of persons (Article 9 of the ICCPR)

Paragraph 1 Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3)

are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.

Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

C. v. Australia, Human Rights Committee Communication No 900/1999: Australia. 13/11/2002. CCPR/C/76/D/900/1999,

‘C’, an Iranian asylum-seeker was detained after his arrival in Australia and subsequent asylum claim, pending determination of his entitlement to asylum under Australian law. The author claimed *inter alia* that his detention breached article 9(1) of the ICCPR. Addressing the arbitrariness of the detention, the Human Rights Committee found *inter alia* that Australia had “not demonstrated that, in the light of the author’s particular circumstances, there were not less invasive means of achieving the same ends. . .” and that in order to establish that detention is necessary and reasonable in all the circumstances, consideration of this must be undertaken. The Committee concluded with regards to the case that “[i]n accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy.” (para 10)

A. v. Australia, Human Rights Committee Communication No 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993

‘A’, a Cambodian asylum-seeker, arrived in Australia and shortly thereafter applied for refugee status. His asylum application was refused and later ‘A’ appealed this decision and was detained for over four years whilst his refugee status was being determined. The author argued *inter alia* that he had been detained arbitrarily within the meaning of article 9(1).

The Committee stated that “...every decision to keep a person in detention should be open to review periodically so that the grounds justifying it can be assessed.” (para 9.4) “In the Committee’s opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering of release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant [ICCPR]... The Committee concluded that the author’s right to have his detention reviewed by a court, was violated.” (para 9.5)

Torres v. Finland, Human Rights Committee Communication No 291/1988: Finland. 05/04/90. CCPR/C/38/D/291/1988

Torres, a Spanish citizen asylum-seeker, was detained in Finland whilst his asylum claim was assessed and rejected and pending the execution of an extradition order to Spain. The author made a complaint *inter alia* under Article 9(4) regarding the fact he was not provided an opportunity to have recourse to a judicial body, and that the judicial proceedings were unreasonably prolonged.

In its decision the Human Rights Committee found that “article 9, paragraph 4. . . envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control. The Committee further notes that while the author was detained under orders of the police, he could not have the lawfulness of his detention reviewed by a court. Review before a court of law was possible only when, after seven days, the detention was confirmed by order of the Minister. As no challenge could have been made until the second week of detention, the author's detention . . . violated the requirement of article 9, paragraph 4; of the Covenant that a detained person be able "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" (emphasis added).”

2.4.1.3 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 1988

Principle 4 Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be... subject to the effective control of, a judicial or other authority.

Principle 9 The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 11(1) A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority...

Principle 11 (3) A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 32(1) A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

(2) The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining

authority shall produce without unreasonable delay the detained person before the reviewing authority.

2.4.1.4 Others

Conclusions and Recommendations of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 2004

Paragraph 85 The Working Group considers that the right to challenge the legality of detention or to petition for a writ of habeas corpus or remedy of amparo is a personal right, which must in all circumstances be guaranteed by the jurisdiction of the ordinary courts.

Paragraph 86 The Working Group considers that, even where illegal immigrants and asylum-seekers are concerned, any decision to place them in detention must be reviewed by a court or a competent, independent and impartial body in order to ensure that it is necessary and in conformity with the norms of international law and that, where people have been detained, expelled or returned without being provided with legal guarantees, their continued detention and subsequent expulsion are to be considered as arbitrary.

Report of the Working Group on Arbitrary Detention; Deliberation No. 5 (Situation regarding immigrants and asylum-seekers), Annex II, E/CN.4/2000/4

Principle 8 Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned.

Report of Working Group on Arbitrary Detention, E/CN.4/2004/3/Add.3, 2004

Recommendations

Paragraph 75 An effective judicial remedy should be provided for administrative orders for the detention of foreigners with a view to their expulsion from the country. Any person detained for reasons related to immigration should have an opportunity to request a court to rule on the legality of his or her detention before the expulsion order is enforced...

Report of the Working Group on Arbitrary Detention, E/CN.4/1996/40

Recommendations

Paragraph 124(4) The Working Group suggests that the Commission should ask States to incorporate the remedy of habeas corpus in their legislation, as an individual right, which has been shown capable of ending arbitrary detention, or at least preventing its harmful consequences.

Commission on Human Rights Resolution: 2004/39, 'Arbitrary detention', 2004

Paragraph 3(c) [The Commission on Human Rights encourages the Governments concerned] [t]o respect and promote the right of anyone who is deprived of his/her liberty by arrest or

detention to be entitled to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful, in accordance with their international obligations;

Commission on Human Rights, Report of the Special Rapporteur on Torture, E/CN.4/2003/68

Paragraph 26 (i) Provisions should give all detained persons the ability to challenge the lawfulness of the detention e.g. through habeas corpus or amparo. Such procedures should function expeditiously;

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Recommendations

Paragraph 75 When [abolishing all forms of administrative detention] is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:...

Paragraph 75 (c) ...A decision to detain should only be taken under clear legal authority, and all migrants deprived of their liberty, whether under administrative proceedings or in cases of preventive detention for reasons of public security, should be entitled to bring proceedings before a court, so that the court can decide on the lawfulness of the detention...

(g) Ensuring that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite...[t]he decision to detain should be automatically reviewed periodically on the basis of clear legislative criteria.

(h) Avoiding the use of detention facilities and of legal mechanisms and methods of interception and/or deportation that curtail judicial control of the lawfulness of the detention and other rights, such as the right to seek asylum;

2.4.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples' Rights, 1986⁴¹

Article 7(1) Every individual shall have the right to have his cause heard. This comprises: **(a)** the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

American Convention on Human Rights, 1969

Article 2(1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this

⁴¹ See also e.g. *Rencontre Africaine pour la defense de droits de l'homme v. Zambia*, (71/92), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th where the African Commission decided that denying detainees considered irregular aliens the opportunity to appeal to national courts violated Article 7(1)(a) of the African Charter as it deprived them of the right to have their case heard.

Convention, even though such violation may have been committed by persons acting in the course of their official duties.

(2) The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted.

Article 7(5) Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

(6) Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

American Declaration of the Rights and Duties of Man, 1948

Article XXV No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law... Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, (2004)

Article 14 (5) 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. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.

(6) Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.

European Convention on Human Rights and Fundamental Freedoms, 1950⁴²

Article 5(3) Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article 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 pending trial. Release may be conditioned by guarantees to appear for trial.

⁴² See also e.g. *Chahal v. United Kingdom*, European Court of Human Rights, Judgment of 15 November 1996, Appl. No. 22414/93; *Dougaz v. Greece*, European Court of Human Rights, Judgment of 6 March 2001, Appl. No. 40907/98,

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 13 Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

2.4.3 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 5 If detained, asylum-seekers should be entitled to the following minimum procedural guarantees ... (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend;

UNHCR ExCom Conclusion No. 44 (XXXVII) – 1986, Detention of Refugees and Asylum Seekers

Paragraph (e) [The Executive Committee] [r]ecommended that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review;

2.5 Access to counsel and right to legal assistance and interpretation

2.5.1 International human rights standards

2.5.1.1 Treaties

International Convention on the Protection of Human Rights' of All Migrant Workers and Members of their Families, 1990

Article 16(7) When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner: . . .

(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

Article 18(3)(d) [Migrant workers and members of their families shall have the right] [t]o be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay;

2.5.1.2 Treaty Monitoring Bodies

General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, (Article 7 of the ICCPR)

Paragraph 11 ...The protection of the detainee also requires that prompt and regular access be given to...lawyers...

Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 06/12/2001.CCPR/CO/73/UK

Paragraph 16 The Committee is concerned that ... the practice of dispersing asylum-seekers may have adverse effects on their ability to obtain legal advice and upon the quality of that advice...

2.5.1.3 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988.

Principle 11(1) ...A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

Principle 14 A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to ... have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 17(1) A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

(2) If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18(1) A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

(2) A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

(3) The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

(4) Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

(5) Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

2.5.1.4 Economic and Social Council Resolutions

UN Standard Minimum Rules for the Treatment of Prisoners, 1977⁴³

Rule 93 For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

⁴³ Please note that while these standards are relevant to prisoners, not migrants, refugees or asylum-seekers they are included to highlight the basic minimum standard relevant to prisoners that migration-related detention must not fall below.

2.5.1.5 Other

Basic Principles on the Role of Lawyers, 1990

Principle 5 Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

Report of the Working Group on Arbitrary Detention, E/CN.4/1998/44

Paragraph 33 With reference to [asylum seekers whose detention is considered necessary by the authorities] the following issues require to be addressed: ...

(e) Access to legal counseling and representation... is of exceptional importance. Aliens seeking immigration or asylum are ill equipped to pursue effectively their legal rights or remedies that they might have under the applicable legislation. They would invariably suffer from material constraints or constraints of language disabling them from representing their cause effectively. Many might not be informed of the legal remedies available.

Report of Working Group on Arbitrary Detention (Visit to Argentina), E/CN.4/2004/3/Add.3, 2004.

Recommendations

Paragraph 70 The right of detainees to communicate freely with their defense lawyer should be guaranteed. The shortage of telephones in detention centers, the lack of telephone cards or money to buy them and detainees' financial problems should not prevent them from communicating freely and easily with their lawyer. Access to a free or court-appointed defense lawyer or to one provided free of charge by a bar association or law faculty should be facilitated. Ownership of a property should not be an obstacle to the use of these services.

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Recommendations

Paragraph 75 When [abolishing all forms of administrative detention] is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

(c) [Ensuring that]...Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings;

(d) Ensuring that migrants deprived of their liberty are informed in a language they understand, if possible in writing, of the reasons for the deprivation of liberty, of the available appeal mechanisms and of the regulations of the facility. Detained migrants shall also be accurately informed of the status of their case and of their right to contact a consular or embassy representative and members of their families. A briefing on the facility and information on the immigration law should also be provided. Migrants and their lawyers should have full and complete access to the migrants' files;

(e) Facilitating migrants' exercise of their rights, including by providing them with lists of lawyers offering pro bono services, telephone numbers of all consulates and organizations providing assistance to detainees and by creating mechanisms, such as toll-free numbers, to inform them of the status of their case. Efforts should be made to conclude agreements with NGOs, universities, volunteers, national human rights institution and humanitarian and other organizations to provide basic services, such as translation and legal assistance, when they cannot otherwise be guaranteed;

Report of Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, E/CN.4/2003/68, 2003

Paragraph 26(g) ...Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention. In accordance with the Basic Principles on the Role of Lawyers, all persons arrested or detained should be informed of their right to be assisted by a lawyer of their choice or a State-appointed lawyer able to provide effective legal assistance... In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association.

Commission on Human Rights, Resolution 1994/37, 1994

That the right to have access to a lawyer is one of the basic rights of a person who is deprived of his liberty and that restrictions on this rights should therefore be exceptional and always subject to judicial control...Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention.

2.5.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples' Rights, 1981

Article 7(1)(c) [Every individual shall have] the right to defense, including the right to be defended by counsel of his choice.

2.5.3 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 5 If detained, asylum-seekers should be entitled to the following minimum procedural guarantees:...

(ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;

2.6 Right to compensation

2.6.1 International human rights standards

2.6.1.1 Treaties

International Covenant on Civil and Political Rights, 1966⁴⁴

Article 2(3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 9(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990

Article 16(9) Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.

2.6.1.2 Treaty Monitoring Bodies

General Comment No 3 (1981) of the Human Rights Committee on Implementation at the national level (Article 2 of the ICCPR)

The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. This is obvious in a number of articles (e.g. art. 3 which is dealt with in General Comment 4 below), but in principle this undertaking relates to all rights set forth in the Covenant.

***C. v. Australia*, Human Rights Committee Communication No 900/1999: Australia. 13/11/2002. CCPR/C/76/D/900/1999**

⁴⁴ Note the French and Spanish texts of the ICCPR use the broader term reparation; the term compensation used in the English text is an element of reparation.

‘C’, an Iranian asylum-seeker, was detained after his arrival in Australia and subsequent asylum claim pending determination of his entitlement to asylum under Australian law. In relation to the author’s complaints, the Committee concluded that “[a]s to the violations of articles 7 and 9 [of the ICCPR] suffered by the author during the first period of detention, the State party should pay the author appropriate compensation.” (para. 10)

A. v. Australia, Human Rights Committee Communication No 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993

“A”, a Cambodian asylum-seeker, arrived in Australia and shortly thereafter applied for refugee status. His asylum application was refused and later ‘A’ appealed this decision and was detained for over four years whilst his refugee status was being determined. In relation to the author’s complaint the Committee concluded that “[u]nder article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy. In the Committee’s opinion, this should include adequate compensation for the length of the detention to which A was subjected.” (para. 11)

2.6.1.3 General Assembly Resolutions

Universal Declaration of Human Rights, 1948

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 1988

Principle 35(1) Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.

(2) Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

2.6.2 Regional human rights standards

Arab Charter on Human Rights (revised), adopted by the League of Arab States, 2004

Article 14 (7) Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.

American Convention on Human Rights, 1969

Article 63(1) If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his

right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

(2) In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

European Convention on Human Rights and Fundamental Freedoms, 1950

Article 5(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

3. Human Rights Standards – Conditions of detention

3.1 Protection against torture, cruel, inhuman or degrading treatment

3.1.1 International human rights standards

3.1.1.1 Treaties

International Covenant on Civil and Political Rights, 1966

Article 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...

Article 10(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Article 2 (1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

(2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

(3) An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 16 (1) Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the

substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

3.1.1.2 Treaty Monitoring Bodies

General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR)

Paragraph 2 The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

Paragraph 3 The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

Paragraph 6 The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. . .

Paragraph 7 Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

3.1.1.3 General Assembly Resolutions

Universal Declaration of Human Rights, 1948

Article 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988

Principle 6 No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

3.1.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples' Rights, 1981

Article 5 Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

American Convention on Human Rights, 1969

Article 5 Right to Humane Treatment

(1) Every person has the right to have his physical, mental, and moral integrity respected.

(2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, 2004

Article 20(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

European Convention on Human Rights and Fundamental Freedoms, 1950⁴⁵

Article 3 No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

⁴⁵ See also e.g. *Soering v. UK*, European Court of Human Rights Case No 1/1989/161/217; *Cruz Varas v. Sweden*, App. No. 15576/89, Judgment of 20 March 1991 (para. 70); *Vilvarajah and Others v. UK*, App. No. 13163/87;13164/87;13165/87, Judgment of 30 October 1991, p. 32, (para. 103) and *Chahal v. the United Kingdom*, App. No. 22414/93, Report of 27 June 1995.

3.2 Humane conditions in detention

3.2.1 International human rights standards

3.2.1.1 Treaties

International Covenant on Civil and Political Rights, 1966

Article 10(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

International Convention on the Protection of Human Rights of All Migrants and Their Families, 1990

Article 17(1) Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

(3) Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.

(7) Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

3.2.1.2 Treaty Monitoring Bodies

General Comment No. 21 (1992) of the Human Rights Committee, Replaces general comment 9 concerning humane treatment of persons deprived of liberty

Paragraph 3 . . . Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

General Comment No. 15 (1986) of the Human Rights Committee, The position of aliens under the ICCPR

Paragraph 7 If lawfully deprived of their liberty, [aliens] shall be treated with humanity and with respect for the inherent dignity of their person.

General Comment No. 9 (1982) of the Human Rights Committee: Humane treatment of persons deprived of liberty, (Article 10 of the ICCPR)

Paragraph 1 The humane treatment and the respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely on material resources. While the Committee is aware that in other respects the modalities and

conditions of detention may vary with the available resources, they must always be applied without discrimination, as required by article 2 (1).

Ultimate responsibility for the observance of this principle rests with the State as regards all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions.

General Recommendation No.30: Discrimination Against Non Citizens: The Committee on the Elimination of Racial Discrimination, 01/10/2004.

Paragraph (19) Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards;

C. v. Australia, Human Rights Committee, Communication No 900/1999: Australia. 13/11/2002. CCPR/C/76/D/900/1999,

‘C’, an Iranian asylum-seeker, was detained after his arrival in Australia and subsequent asylum claim pending determination of his entitlement to asylum under Australian law. The author complained *inter alia* of a breach of article 7 of the ICCPR.

The Committee concluded that the author’s psychiatric illness developed as a result of the protracted period of immigration detention. In the Committee’s view, the continued detention of the author when the State party was aware of the author’s mental condition and failed to take the steps necessary to ameliorate the author’s mental deterioration constituted a violation of his rights under article 7 of the Covenant [ICCPR].

3.2.1.3 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988

Principle 1 All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 3 There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 6 No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance

* The term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

Principle 28 A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

3.2.1.4 Other

Report of the Working Group on Arbitrary Detention on Visit to Mexico, E/CN.4/2003/8/Add.3

Recommendation 72(d) ...[The Working Group recommends that the Government should consider] providing guarantees to ensure that detainees are treated with respect for their dignity...

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Paragraph 54 Administrative detention should never be of a punitive nature. Furthermore, as enshrined in article 10 of ICCPR, all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This implies not only the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, but also that migrants deprived of their liberty should be subjected to conditions of detention that take into account their status and needs...

Recommendations

Paragraph 75 Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by...

(i) Ensuring that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law...;

(j) Providing training to authorities with the power to detain on psychological aspects relating to detention, cultural sensitivity and human rights procedures, and ensuring that centres for the administrative detention of migrants are not run by private companies or staffed by private personnel unless they are adequately trained and the centres are subject to regular public supervision to ensure the application of international and national human rights law;

UN Sub-Commission on the Promotion and Protection of Minorities, 'The rights of non-citizens', Final report of the Special Rapporteur David Weissbrodt, E/CN.4/Sub.2/2003/23, 2003

Paragraph 27 ... [C]onditions of detention faced by undocumented migrants and asylum-seekers should meet international standards.⁴⁶

Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban Programme of Action, A/CONF.189/12, 2001

Article 30 (d) Urges States: . .

To ensure that migrants, regardless of their immigration status, detained by public authorities are treated with humanity and in a fair manner, and receive effective legal protection and, where appropriate, the assistance of a competent interpreter in accordance with the relevant norms of international law and human rights standards, particularly during interrogation;

3.2.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples' Rights, 1981⁴⁷

Article 5 Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

American Convention on Human Rights, 1969

Article 5 Right to Humane Treatment

(1) Every person has the right to have his physical, mental, and moral integrity respected.

(2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

American Declaration of the Rights and Duties of Man, 1948

Article XXV [Every individual] has the right to humane treatment during the time he is in custody.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, 2004

Article 20(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

European Convention on Human Rights and Fundamental Freedoms, 1950⁴⁸

⁴⁶ E/CN.4/Sub.2/2003/23/Add.1 (2003) para. 9.

⁴⁷ *Organisation mondiale contre la torture, Association internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'homme v. Rwanda*, (27/89, 46/91, 49/91, 99/93 respectively), 10th Annual Report of the African Commission, 1996-1997, ACHPR/RPT/10th where the African Commission found that refugee women, children and elderly people were held in deplorable conditions in Rwanda, in violation of Article 5 of the African Charter.

Article 3 No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

3.2.3 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 10 Conditions of detention for asylum-seekers should be humane with respect for the inherent dignity of the person. They should be prescribed by law. The following points in particular should be emphasised:

- (i) the initial screening of all asylum-seekers at the outset of detention to identify trauma or torture victims, for treatment in accordance with Guideline 7.
- (ii) the segregation within facilities of men and women; children from adults (unless these are relatives);
- (iii) the use of separate detention facilities to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups;
- (iv) the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;
- (v) the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate;
- (vi) the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities;
- (vii) the opportunity to continue further education or vocational training;
- (viii) the opportunity to exercise their religion and to receive a diet in keeping with their religion;
- (ix) the opportunity to have access to basic necessities i.e. beds, shower facilities, basic toiletries etc.;
- (x) access to a complaints mechanism, (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

⁴⁸ See also e.g. *Peers v Greece*, European Court of Human Rights No. 28524/95 Judgment of 19th April 2001; *Dougoz v Greece*, European Court of Human Rights No. 40907/98 Judgment of 6th March 2001 App. No. 40907/98, Judgment of 6 March 2001; *Kalashnikov v. the Russian Federation* App. No. 47095/99, Judgment of 15 July 2002; and *Van der Ven v. the Netherlands*, App. No. 50901/99, Judgment of 4 February 2003.

UNHCR ExCom Conclusion No. 44 (XXXVII) – 1986, Detention of Refugees and Asylum Seekers⁴⁹

Paragraph (f) [It is] stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered;

UNHCR ExCom Conclusion on International Protection No. 85 (XLIX) – 1998

(ee) Notes with concern that asylum-seekers detained only because of their illegal entry or presence are often held together with persons detained as common criminals, and reiterates that this is undesirable and must be avoided whenever possible, and that asylum-seekers shall not be located in areas where their physical safety is in danger;

UNHCR ExCom Conclusion No. 22 (XXXII) – 1981, Protection of Asylum Seekers in Situations of Large-Scale Influx

Paragraph 2 It is therefore essential that asylum-seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following minimum basic human standards: . . . *(d)* they should be treated as persons whose tragic plight requires special understanding and sympathy. They should not be subjected to cruel, inhuman or degrading treatment;

⁴⁹ See also ExCom Conclusion No. 68 (XLIII) – 1992, paragraph (e); ExCom Conclusion No. 71 (XLIV) – 1993, paragraph (ee).

3.3 Communication with the outside world (family and organizations)

3.3.1 International human rights standards

3.3.1.1 Treaties

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, 1990

Article 17(5) During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

3.3.1.2 Treaty Monitoring Bodies

General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR)

Paragraph 11 ... The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

3.3.1.3 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 1988

Principle 15 Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16(1) Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

(2) If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission⁵⁰

⁵⁰ Please note contact with consular or diplomatic officials is not appropriate for asylum-seekers or refugees due to the principle that refugee protection provides for people whose state is either unwilling or unable to provide protection to them. Any contact with such officials could put an asylum-seeker or refugee at risk.

of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

(4) Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 19 A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20 If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 29(2) A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment [to supervise the strict observance of relevant laws and regulations therein]... subject to reasonable conditions to ensure security and good order in such places.

3.3.1.4 Economic and Social Council Resolutions

UN Standard Minimum Rules for the Treatment of Prisoners, 1977

Rule 37 Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

Rule 38(1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong⁵¹.

(2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

Rule 39 Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless

⁵¹ Please note contact with consular or diplomatic officials is not appropriate for asylum-seekers or refugees due to the principle that refugee protection provides for people whose state is either unwilling or unable to provide protection to them. Any contact with such officials could put an asylum-seeker or refugee at risk.

transmissions, by lectures or by any similar means as authorized or controlled by the administration.

3.3.1.5 Other

Report of Working Group on Arbitrary Detention, Deliberation Number 5: Situation regarding immigrants and asylum-seekers, E/CN.4/2000/4, Annex II, 2000

Principle 10 The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody.

Report of Working Group on Arbitrary Detention on its visit to the UK on the issue of immigrants and asylum seekers, E/CN.4/1999/63/Add.3 1999

Paragraph 31 Detainees should be given adequate access to their legal representatives, relatives and officials of the Office of the United Nations High Commissioner for Refugees.

Paragraph 38 Specialized non-governmental organizations, the Office of the United Nations High Commissioner for Refugees and legal representatives should have access to all places of detention, including transit zones at international ports and airports.⁵²

Report of Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, E/CN.4/2004/56, 2004

Paragraph 43 With regard to access to the outside world, the Special Rapporteur reiterates that persons deprived of their liberty shall be permitted to have contact with, and receive regular visits from, their relatives, lawyers and doctors and, when security requirements so permit, third parties such as human rights organizations or other persons of their choice.

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Recommendations

Paragraph 75 (i) ...Representatives of UNHCR, ICRC, NGOs and churches should be allowed access to the place of custody.

3.3.2 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 5 If detained, asylum-seekers should be entitled to the following minimum procedural guarantees [such as] (v) to contact and be contacted by the local UNHCR Office,

⁵² For similar standards see Report of Working Group on Arbitrary Detention, E/CN.4/1999/63/Add.4., paras. 52, 53.

available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available;

Guideline 10 The following points in particular should be emphasised [regarding conditions of detention for asylum-seekers]:... (iv) The opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;

UNHCR ExCom Conclusion No. 44 (XXXVII) – 1986, Detention of Refugees and Asylum Seekers

Paragraph (g) Recommended that refugees and asylum-seekers who are detained be provided with the opportunity to contact the Office of the United Nations High Commissioner for Refugees or, in the absence of such office, available national refugee assistance agencies;

3.4 Communication with consular officials – relevant to migrants only

3.4.1 International human rights standards

3.4.1.1 Treaties

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, 1990

Article 16(7) When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:

- (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefore;
- (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;
- (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

Article 23 Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired...

Vienna Convention on Consular Relations, 1963⁵³

Article 36 (1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison,

⁵³ Please note that the Vienna Convention on Consular Relations is *only* relevant to migrants who do not have any protection concerns (i.e. not refugees or asylum-seekers) as implicit in refugee status is the fact that state protection is not available, and any contact with a state official can place a person at risk of persecution.

custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation... Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

3.4.1.2 General Assembly Resolutions

General Assembly Resolution 59/194 on Protection of migrants (A/59/503/Add.2) of 18 March 2005

Paragraph (6) Reaffirms emphatically the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations of 1963, in particular with regard to the right of all foreign nationals to communicate with a consular official of the sending State in the case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform without delay the foreign national of his or her rights under the Convention;

UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 1988

Principle 15 Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16(1) Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

(2) If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission⁵⁴ of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

(4) Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

⁵⁴ See above at footnotes 50,51 & 53, contact with consular or diplomatic officials is not appropriate for asylum-seekers or refugees.

3.4.1.3 Economic and Social Council Resolutions

UN Standard Minimum Rules for the Treatment of Prisoners, 1977

Rule 38(1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong. (2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

3.4.1.4 Other

Report of Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, E/CN.4/2003/68, 2003

Paragraph 26(g)...Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay... The right of foreign nationals to have their consular or other diplomatic representatives notified must be respected... In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours.

3.5 Access to medical care

3.5.1 International human rights standards

3.5.1.1 Treaties

International Covenant on Economic, Social and Cultural Rights, 1966

Article 12 (1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: . . .

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990

Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

3.5.1.2 Treaty Monitoring Bodies

General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, (Article 7 of the ICCPR)

Paragraph 11 ...The protection of the detainee also requires that prompt and regular access be given to...doctors...

General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health, (Article 12 of the ICESCR)

Paragraph 34. In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.

C. v. Australia, Human Rights Committee, Communication No 900/1999: Australia. 13/11/2002. CCPR/C/76/D/900/1999,

‘C’, an Iranian asylum-seeker, was detained after his arrival in Australia and subsequent asylum claim pending determination of his entitlement to asylum under Australian law. The author complained that he had suffered a violation of article 7 of the ICCPR. He was detained in such a way and for such a prolonged period (from his arrival on 22 July 1992 until 10 August 1994) as to cause him mental illness, from which he did not earlier suffer. The medical evidence was unanimous in concluding that his severe psychiatric illness was brought about by his prolonged incarceration. The Committee concluded that:

“Despite increasingly serious assessments of the author’s condition in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author’s illness had reached such a level of severity that irreversible consequences were to follow. In the Committee’s view, the continued detention of the author when the State party was aware of the author’s mental condition and failed to take the steps necessary to ameliorate the author’s mental deterioration constituted a violation of his rights under article 7 of the Covenant.” (para 8.4)

3.5.1.3 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988

Principle 24 A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25 A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26 The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982

Principle 1

Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.

Principle 2

It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.

Principle 3

It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health.

Principle 4

It is a contravention of medical ethics for health personnel, particularly physicians:

- (a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments;
- (b) To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.

Principle 5

It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.

3.5.1.4 Economic and Social Council Resolutions

UN Standard Minimum Rules for the Treatment of Prisoners, 1977

Rule 22 (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or

nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

Rule 23(1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

Rule 24 The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

Rule 25 (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

Rule 26 (1) The medical officer shall regularly inspect and advise the director upon:

(a) The quantity, quality, preparation and service of food;

(b) The hygiene and cleanliness of the institution and the prisoners;

(c) The sanitation, heating, lighting and ventilation of the institution;

(d) The suitability and cleanliness of the prisoners' clothing and bedding;

(e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.

(2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

3.5.1.5 Other

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Recommendations

Paragraph 75 (k) Ensuring that the Body of Principles for the Protection of All Persons under any Form of Detention and Imprisonment are applied to all migrants under administrative detention. The Principles include the provision of a proper medical examination as promptly as possible and of medical treatment and care whenever necessary and free of charge; the right to obtain, within the limits of available public resources, educational, cultural and informational material;

the provision for regular visits of places of detention by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment, in order to supervise the strict observance of relevant laws and regulations;

(m) [Governments should take measures to ensure] the presence in holding centers of a doctor with appropriate training in psychological treatments. Migrants should have the possibility of being assisted by interpreters in their contacts with doctors or when requesting medical attention. Detention of migrants with psychological problems, as well as those belonging to vulnerable categories and in need of special assistance, should be only allowed as a measure of last resort, and they should be provided with adequate medical and psychological assistance;

3.5.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples' Rights, 1981

Article 16(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, 2004

Article 14 (4). Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.

3.5.3 International refugee and asylum-seeker standards

1951 Geneva Convention Relating to the Status of Refugees

Article 23 The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 10(v) [Those detained should have] the opportunity to receive appropriate medical treatment, and psychological counseling where appropriate;

3.6 Place of detention

3.6.1 International human rights standards

3.6.1.1 Treaty Monitoring Bodies

General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR)

Paragraph 11 In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State party should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

3.6.1.2 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 1988

Principle 12(1)(d) There shall be duly recorded: . . .
Precise information concerning the place of custody.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

3.6.1.3 Economic and Social Council Resolutions

UN Standard Minimum Rules for the Treatment of Prisoners, 1977

Rule 8 The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

- (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;
- (b) Untried prisoners shall be kept separate from convicted prisoners;
- (c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;
- (d) Young prisoners shall be kept separate from adults.

3.6.1.4 Other

Report of the Working Group on Arbitrary Detention, Deliberation No. 5, Annex II, E/CN.4/2000/4

Principle 9 Custody must be affected in a public establishment specifically intended for this purpose; when, for practical reasons, this is not the case, the asylum-seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law.

Report of the Working Group on Arbitrary Detention (on its visit to the UK on the issue of immigrants and asylum seekers), E/CN.4/1999/63/Add.3

Recommendation 30 Detainees should be held in special immigration detention centres in conditions appropriate to their status and not with persons charged with or convicted of criminal offences (unless so charged or convicted themselves).

Report of Working Group on Arbitrary Detention, (Visit to Argentina) E/CN.4/2004/3/Add.3, 2004

Recommendation 75 ...The...practice of detaining foreigners for reasons related to immigration together with individuals charged with ordinary offences should be halted.

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Paragraph 75(i) Ensuring that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law.

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2001/83

Paragraph 119 All Governments are urged to increase human rights training for immigration officials, the police and bodies that prevent violations of human rights. Officials dealing with

migrants who are in detention or who have been subjected to trafficking or degrading work because they have no documentation must receive special training relating to the situation of these persons. Codes of conduct must be drafted so that professional attention may be given to this problem.

Paragraph 122 The Special Rapporteur urges States to work together with organs of civil society on the human rights situation in detention centres. Links between States and NGOs must be strengthened with a view to assistance for migrants in detention centres...

3.6.2 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 1 For the purpose of these guidelines, UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. There is a qualitative difference between detention and other restrictions on freedom of movement. Persons who are subject to limitations on domicile and residency are not generally considered to be in detention. When considering whether an asylum-seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.

Guideline 8 Where women asylum-seekers are detained they should be accommodated separately from male asylum-seekers, unless these are close family relatives. In order to respect cultural values and improve the physical protection of women in detention centres, the use of female staff is recommended.

Guideline 10 Conditions of detention for asylum-seekers should be humane with respect for the inherent dignity of the person. They should be prescribed by law. . .

The following points in particular should be emphasised [regarding conditions of detention for asylum-seekers]:...

(ii) the segregation within facilities of men and women; children from adults(unless these are relatives);

(iii) the use of separate detention facilities to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups;

UNHCR ExCom Conclusion No. 44 (XXXVII) – 1986, Detention of Refugees and Asylum Seekers⁵⁵

Paragraph (f) [It is] stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered;

⁵⁵ See also ExCom Conclusion No. 68 (XLIII) – 1992, paragraph (e); ExCom Conclusion No. 71 (XLIV) – 1993, paragraph (ee).

3.7 Record keeping and inspection

3.7.1 International human rights standards

3.7.1.1 Treaty Monitoring Bodies

General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, (Article 7 of the ICCPR)

Paragraph 11 . . . To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.

3.7.1.2 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988

Principle 12(1) There shall be duly recorded:

- (a) The reasons for the arrest;
 - (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
 - (c) The identity of the law enforcement officials concerned;
 - (d) Precise information concerning the place of custody.
- (2) Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 23 (1) The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

(2) A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 26 The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

Principle 29(1) In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

(2) A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 33(1) A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

(2) In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

(3) Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

(4) Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34 Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35 (2) Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

3.7.1.3 Economic and Social Council Resolutions

UN Standard Minimum Rules for the Treatment of Prisoners, 1977

Rule 7 (1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:

(a) Information concerning his identity;

(b) The reasons for his commitment and the authority therefor;

(c) The day and hour of his admission and release.

(2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register. Separation of categories

3.7.1.4 Other

Report of Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, E/CN.4/2003/68, 2003

Paragraph 26(f) Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Independent non-governmental organizations should be authorized to have full access to all places of detention, including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas, detention units of medical and psychiatric institutions and prisons, with a view to monitoring the treatment of persons and their conditions of detention. When inspection occurs, members of the inspection team should be afforded an opportunity to speak privately with detainees. The team should also report publicly on its findings. In addition, official bodies should be set up to carry out inspections, such teams being composed of members of the judiciary, law enforcement officials, defence lawyers and physicians, as well as independent experts and other representatives of civil society. Ombudsmen and national or human rights institutions should be granted access to all places of detention with a view to monitoring the conditions of detention. When it so requests, the International Committee of the Red Cross should be granted access to places of detention. Non-governmental organizations and other monitoring bodies should also be granted access to non-penal State-owned institutions caring for the elderly, the mentally disabled and orphans as well as to holding centres for aliens, including asylum-seekers and migrants.

(g) Information regarding the time and place of arrest as well as the identity of the law enforcement officials having carried out the arrest should be scrupulously recorded; similar information should also be recorded regarding the actual detention, the state of health upon arrival at the detention centre, as well as the time the next of kin and lawyer were contacted and visited the detainee... Security personnel who do not honour such provisions [regarding access to legal counsel and foreign nationals' right to have their consular or other diplomatic representatives notified] should be disciplined...

(k) When a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place and, unless the allegation is manifestly ill-founded, the public officials involved

should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings.

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Recommendations

Paragraph 75 Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by...

(l) Ensuring the existence of mechanisms allowing detained migrants to make a request or complaint regarding their treatment, in particular in case of physical and psychological abuse, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to judicial authorities;

Report of Working Group on Arbitrary Detention, E/CN.4/1999/63/Add.3, 1999

Paragraph 40 National authorities should provide detailed information on relevant policy, practice and statistics in order to ensure transparency [regarding detention].

Commission on Human Rights, Resolution 1994/37, 1994

Security personnel who do not honor such provisions [regarding access to a lawyer] should be disciplined.

3.7.2 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 10(x) [Everyone shall have] access to a complaints mechanism, (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

4. Human Rights Standards – General: Non-Discrimination and Proportionality

4.1 International human rights standards

4.1.1 Treaties

International Covenant on Civil and Political Rights, 1966

Article 2(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 12 (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Article 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, 1990

Article 7 States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Article 39 (1) Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.

(2) The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security,

public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

4.1.2 Treaty Monitoring Bodies

General Comment No. 31 (2004) of the Human Rights Committee on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant (ICCPR)

Paragraph 10 . . . the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.

General Comment No. 27 (1999) of the Human Rights Committee, Freedom of movement (Art.12 of the ICCPR)

Para 2 The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.

Para 4. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. . . The question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12.⁵⁶ Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3.⁵⁷ It is, therefore, important that States parties indicate in their reports the circumstances in which they treat aliens differently from their nationals in this regard and how they justify this difference in treatment.

Para 14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

Para 15 The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.

⁵⁶ Communication No. 456/1991, *Celepli v. Sweden*, para. 9.2.

⁵⁷ General comment No. 15, para. 8, in HRI/GEN/1/Rev.3, 15 August 1997, p. 20.

States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

General Comment No. 18 (1989) of the Human Rights Committee on Non discrimination (ICCPR)

Paragraph 1 Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

General Comment No. 15 (1986) of the Human Rights Committee on the Position of Aliens under the Covenant (ICCPR)

Paragraph 1 Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.

Paragraph 2 Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.

A. v. Australia, Human Rights Committee Communication No 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993

The author, a Cambodian asylum-seeker arrived in Australia and shortly thereafter applied for refugee status. His asylum application was refused and later 'A' appealed this decision and was detained for over four years during his refugee status was being determined. The author argued *inter alia* that he had been detained arbitrarily within the meaning of article 9(1).

The Committee concluded that:

"...the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore,

remand in custody could be considered arbitrary if it is not necessary in all circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.” (para. 9.2)

4.1.3 General Assembly Resolutions

Universal Declaration of Human Rights, 1948

Article 1 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2 Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 1988

Principle 5(1) These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

4.1.4 Economic and Social Council Resolutions

UN Standard Minimum Rules for the Treatment of Prisoners, 1977

Rule 6(1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

4.1.5 Other

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2005/85

Recommendations

Paragraph 75 The Special Rapporteur has strenuously promoted the idea that the only way to halt the continuing deterioration in immigrants’ situation, particularly that of illegal immigrants, is to recognize the human rights of this group and apply the principle of non-discrimination.

4.2 Regional human rights standards

African [Banjul] Charter on Human and Peoples' Rights, 1981

Article 2 Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

American Convention on Human Rights, 1969⁵⁸

Article 1(I) The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

American Declaration of the Rights and Duties of Man, 1948

Article II All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Arab Charter on Human Rights (revised), adopted by the League of Arab States, 2004

Article 3 (I) Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.

European Convention on Human Rights and Fundamental Freedoms, 1950⁵⁹

Article 14 The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁵⁸ See also I-A Court HR, Gangaram Panday Case v. Suriname, judgment of January 21, 1994, in OAS doc. OAS/Ser.L/V/III.31, doc. 9, Annual Report of the Inter-American Court of Human Rights 1994, p. 32, para. 47.

⁵⁹ The principle of proportionality is incorporated into European Community law by way of Article 3 of the EU Amsterdam Treaty, which states: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty", and Protocol (30) on the application of the principles of subsidiarity and proportionality annexed to the Treaty on the European Union and to the Treaty establishing the European Community explicitly refers to this: "(Each EU institution) shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty." It also runs through the caselaw of the European Court of Human Rights. For more see e.g. Nicholas Emiliou, *The Principle of Proportionality in European Law, A Comparative Study* (Kluwer Law International, 1996)

4.3 International refugee and asylum-seeker standards

1951 Geneva Convention Relating to the Status of Refugees

Article 31 (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 3 . . . In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period.

UNHCR ExCom Conclusion No. 22 (XXXII) – 1977, Treatment of Asylum Seekers in Situations of Large-Scale Influx

Paragraph II(B)(2) ...[A]sylum seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following minimum basic human standards: ... (e) There should be no discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity

5. Human Rights Standards – Standards relating to particular groups

5.1 Children

5.1.1 International human rights standards

5.1.1.1 Treaties

UN Convention on the Rights of Child, 1990

Article 2(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 9 (1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

(2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

(3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

(4) Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State

Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 20 (1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

(2) States Parties shall in accordance with their national laws ensure alternative care for such a child.

(3) Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 22(1) States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Article 37 States Parties shall ensure that...

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

5.1.1.2 General Assembly Resolutions

UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 1988

Principle 15(3) If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990

Rule 2 Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).⁶⁰ Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

Rule 4 The Rules should be applied impartially, without discrimination of any kind as to race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability. The religious and cultural beliefs, practices and moral concepts of the juvenile should be respected.

Rule 13 Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty.

Rule 14 The protection of the individual rights of juveniles with special regard to the legality of the execution of the detention measures shall be ensured by the competent authority, while the objectives of social integration should be secured by regular inspections and other means of control carried out, according to international standards, national laws and regulations, by a duly constituted body authorized to visit the juveniles and not belonging to the detention facility.⁶¹

Rule 18 The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:

- (a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;
- (b) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention;

⁶⁰ Adopted by General Assembly resolution 40/33 of 29 November 1985. Full text and commentary to the Rules can be found at: http://www.unhchr.ch/html/menu3/b/h_comp48.htm

⁶¹ See also Rule 87 regarding respect for human dignity and fundamental human rights.

(c) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.⁶²

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985

Rule 13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical - that they may require in view of their age, sex and personality.

15.1 Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

15.2 The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

17.1 The disposition of the competent [adjudication] authority shall be guided by the following principles:

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

⁶² Adopted by General Assembly resolution 45/113 of 14 Dec 1990.

http://www.unhcr.ch/html/menu3/b/h_comp37.htm

See also Rule 6 (right to interpreter); Rule 11 (definition of 'juvenile' and 'deprivation of liberty'); Rule 19 (maintaining confidentiality of individual legal and medical records and those of disciplinary proceedings); Rule 20 (prohibition against receiving juvenile at detention facility without valid commitment order); Rule 21-23 (Complete and secure information on each juvenile received, reason for commitment, known health problems, provision of information on admission, transfer and release to parents and guardians); Rule 24, 75-78 (provision to juveniles of rules governing the detention facility, their rights and obligations, and address of the authorities competent to receive complaints); Rule 25 (understanding of organisation of the facility, goals and methodology of the care provided, disciplinary requirements, authorised methods of seeking information and of making complaints); Rule 28 (conditions must take account of juveniles' needs according to age, personality, sex, type of offence and mental and physical health). Rule 29 (separation from adults); Rule 31 (meeting requirements of health and human dignity); Rule 38 (right to education); Rule 44 (application of national and international standards on child labour and young workers); Rule 48 (religious rights); Rule 49-50 (preventive and remedial medical care, examination by a physician upon admission to record any prior ill-treatment); Rule 59-61 (communication with the outside world, right to receive visitors); Rule 62 (opportunity to keep themselves informed of the news); Rule 66 (extent and objectives of disciplinary measures); Rule 72-74 (regular inspection and reports on facility and records by independent and qualified personnel, including medical officers); and Rule 81, 85 (qualified personnel and training to carry out their responsibilities effectively).

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

5.1.1.3 Other

Report of the Working Group on Arbitrary Detention on its visit to the UK on the issue of immigrants and asylum seekers), E/CN.4/1999/63/Add.3

Paragraph 37 Unaccompanied minors should never be detained.

Sub-Commission on the Promotion and Protection of Human Rights Resolution 2002/23, 'International Protection of Refugees', 2002

Paragraph 4 [The Sub-Commission] encourages states to explore alternatives to detention and to ensure that children under 18 are not detained.

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Paragraph 54 ...In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

Recommendations

Paragraph 75 When [abolishing all forms of administrative detention] is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

(a) Ensuring that the legislation does not allow for the detention of unaccompanied children and that detention of children is permitted only as a measure of last resort and only when it is in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child, including access to education and health. Children under administrative custodial measures should be separated from adults, unless they can be housed with relatives in separate settings. Children should be provided with adequate food, bedding and medical assistance and granted access to education and to open-air recreational activities. When migrant children are detained, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice should be strictly adhered to. Should the age of the migrant be in dispute, the most favourable treatment should be accorded until it is determined whether he/she is a minor;

5.1.2 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 6 In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, **minors who are asylum-seekers should not be detained.**

In this respect particular reference is made to the Convention on the Rights of the Child in particular:

- Article 2 which requires that States take all measures appropriate to ensure that children are protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members;
- Article 3 which provides that in any action taken by States Parties concerning children, the best interests of the child shall be a primary consideration;
- Article 9 which grants children the right not to be separated from their parents against their will;
- Article 22 which requires that States Parties take appropriate measures to ensure that minors who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance;
- Article 37 by which States Parties are required to ensure that the detention of minors be used only as a measure of last resort and for the shortest appropriate period of time.

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for while longer term solutions are being considered.

All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.

If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time.

If children who are asylum-seekers are detained at airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families.

During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play which is essential to a child's mental development and will alleviate stress and trauma.

Children who are detained, benefit from the same minimum procedural guarantees (listed at Guideline 5) as adults. A legal guardian or adviser should be appointed for unaccompanied minors.⁶³

UNHCR ExCom Conclusion No. 47 (XXXVIII) – 1987, Refugee Children

Paragraph (d) [The Executive Committee] stressed that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity;

Paragraph (e) Condemned the exposure of refugee children to physical violence and other violations of their basic rights, including through sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention, and called for national and international action to prevent such violations and assist the victims;

UNHCR ExCom Conclusion No. 85 (XLIX) – Conclusion on International Protection

Paragraph (dd) *Deplores* that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention;

UNHCR Agenda for Protection, 2002

States more concertedly to explore appropriate alternatives to the detention of asylum-seekers and refugees, and to abstain, in principle, from detaining children.

⁶³ An adult who is familiar with the child's language and culture may also alleviate the stress and trauma of being alone in unfamiliar surroundings.

5.2 Women

5.2.1 International human rights standards

5.2.1.1 Economic and Social Council Resolutions

UN Standard Minimum Rules for the Treatment of Prisoners, 1977

Rule 8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;

Rule 53(1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.

5.2.2 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 8: Detention of Women

Women asylum-seekers and adolescent girls, especially those who arrive unaccompanied, are particularly at risk when compelled to remain in detention centres. As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom may have special needs, should be avoided.

Where women asylum-seekers are detained they should be accommodated separately from male asylum-seekers, unless these are close family relatives. In order to respect cultural values and improve the physical protection of women in detention centres, the use of female staff is recommended.

Women asylum-seekers should be granted access to legal and other services without discrimination as to their gender, and specific services in response to their special needs. In particular they should have access to gynaecological and obstetrical services.

5.3 Other vulnerable categories

5.3.1 International human rights standards

5.3.1.1 Other

Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85

Paragraph 50 Often elderly people, persons with disabilities, pregnant women and ill people, including the mentally ill, are detained without any particular regard for their conditions and specific needs. It was reported that detention has a heavy impact on pregnant women and their children, as well as the elderly, disabled and mentally ill. Pregnant women, for example, need to have access to proper nutrition for the well-being of the baby and to medical and support service that are not available in detention facilities.

Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1

20 May 2002

Guideline 2, paragraph 6 Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.

Guideline 4, paragraph 5 Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

Guideline 6, paragraph 1 States and, where applicable, intergovernmental and non-governmental organizations, should consider: 1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.

5.3.2 International refugee and asylum-seeker standards

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

Guideline 7: Detention of Vulnerable Persons

Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories listed:

- Unaccompanied elderly persons.
- Torture or trauma victims.
- Persons with a mental or physical disability.

In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation, medication counselling etc. should it become necessary.

Guideline 9: Detention of Stateless Persons

Stateless persons, those who are not considered to be nationals by any State under the operation of its law, are entitled to benefit from the same standards of treatment as those in detention generally. Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.

6. Standards and bodies cited in this guide

- African [Bangul] Charter on Human and Peoples' Rights (African Charter)
- African Commission
- American Convention on Human Rights (American Convention)
- American Declaration of the Rights and Duties of Man (American Declaration)
- Arab Charter on Human Rights (revised) (Arab Charter)
- Basic Principles on the Role of Lawyers
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)
- Committee on Economic, Social and Cultural Rights
- Committee on the Elimination of Racial Discrimination
- Commission on Human Rights
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)
- Convention on the Rights of the Child
- Convention relating to the Status of Refugees (1951 Geneva Convention relating to the status of refugees)
- Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live
- (European) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)
- European Court of Human Rights (European Court)
- Human Rights Committee
- Inter-American Commission on Human Rights (Inter-American Commission)
- International Convention on the Elimination of All Forms of Racial Discrimination (Convention against Racism)
- International Covenant on Civil and Political Rights (ICCPR)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family (MWC)
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Medical Ethics Principles)
- Protocol No.4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 4 to the European Convention)
- Special Rapporteur on the human rights of migrants
- Special Rapporteur on torture
- Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules)
- Sub-Commission on the Promotion and Protection of Human Rights
- Sub-Commission on the Promotion and Protection of Minorities
- UNHCR Executive Committee

- UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (UNHCR Revised detention guidelines)
- UN General Assembly
- UN Rules for the Protection of Juveniles Deprived of their Liberty
- UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)
- Universal Declaration of Human Rights (Universal Declaration)
- Vienna Convention on Consular Relations
- Working Group on Arbitrary Detention