

Draft General Comment No. 35 on Article 9 of the  
International Covenant on Civil and Political Rights

IDC SUBMISSION

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*Envisioning a world without unnecessary immigration detention*

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### **ABOUT THE IDC**

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

## CONTENTS

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1. Introduction	5
2. International and regional trends	7
3. Recommendations	10
I. General remarks	
II. Arbitrary detention and unlawful detention	
III. Notice of reasons for arrest and any criminal charges	
IV. Judicial control of detention in connection with criminal charges	
V. The right to take proceedings for release from unlawful or arbitrary detention	
VI. The right to compensation for unlawful or arbitrary arrest or detention	
VII. Relationship of article 9 with other articles of the covenant	
4. Conclusion	18
5. Appendix	19

## International Covenant on Civil and Political Rights

### Article 9: Liberty and security of person

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

## 1. INTRODUCTION

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The importance of article 9 of the ICCPR in the context of immigration detention cannot be overstated. It is the principal legal protection for the countless millions of refugees, asylum-seekers and migrants<sup>1</sup> at risk of immigration detention each year. However, while the use of immigration detention is growing and indeed already endemic to the management of complex mixed migration, it has not received the attention that other forms of arbitrary or illegal detention have received to date. There is, therefore, an urgent need to clarify article 9 as it applies specifically to the use and limits of immigration detention. This General Comment No. 35 provides a critical opportunity to clarify that article 9 squarely applies to immigration detention in all its forms, and to clearly state the obligations and boundaries of any deprivations of liberty in the context of immigration detention.

This submission will proceed in four parts. Beginning with this Introduction, it will seek to provide a general context for better understanding the issue of immigration detention. In section 2, it will briefly share a number of emerging and alarming trends with regard to the use of immigration detention both globally and regionally. Finally, in section 3 it will make a number of specific recommendations for inclusion in the Human Rights Committee's General Comment No. 35, using the existing framework of the Draft General Comment as a guide. A brief Conclusion will summarise the main points of this submission and additional resources are provided in an extensive Appendix.

### What is immigration detention?

States worldwide are increasingly using various forms of immigration detention as a one-size-fits-all approach to migration management. States are criminalizing violations of immigration regulations in an attempt to discourage irregular migration. This leads to refugees, asylum-seekers and migrants being subject to criminal detention, which is punitive in nature, for infractions such as irregular entry, the failure to have proper identification documents, or administrative breaches of conditions of stay.

Additionally, a great number of states are resorting to the use of administrative detention of refugees, asylum-seekers and migrants. While the purpose of administrative detention is never meant to be punitive, often the effect is indistinguishable from criminal detention. Administrative immigration detention is being used in connection with violations of immigration regulations; in preparation for deportation or expulsion from a state; in conjunction with conducting initial screening and assessment of migrant populations; for purposes of assessing international protection claims such as refugee and asylum-seeker status; and often on vague and secretive grounds of "national security".

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

Many human rights violations can and do occur in these circumstances and the physical and psychological impacts of even very limited immigration detention are well documented.<sup>2</sup> Women and children are especially vulnerable to violence and abuse in immigration detention, and studies have shown that even short periods of immigration detention can have life-long health impacts.<sup>3</sup>

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<sup>1</sup> For the purposes of this Submission, "refugees, asylum-seekers and migrants" is used broadly to refer to the many legal, political and social categories of migrants. "Refugees" refers primarily to those who have been recognized—either by a state or UNHCR—as deserving of protection under the 1951 Refugee Convention or applicable regional refugee convention, while noting that formal refugee status is declaratory, rather than constitutive. "Asylum-seekers" refers to any person who is seeking formal refugee status, but has not yet been recognized or afforded such protection. Finally, the general term "migrant" is used in recognition that *all* migrants are entitled to protection under international human rights law, especially with regards to arbitrary, illegal or unnecessary immigration detention. This includes, but is not limited to, stateless persons, labour migrants, trafficked persons, smuggled persons, irregular/undocumented migrants, and visa holders.

<sup>2</sup> See, e.g. Silove D, Steel Z, Watters C., *Policies of deterrence and the mental health of asylum seekers*, JAMA (2000); Medecins Sans Frontieres, *The Impact of Detention on Migrants' Health*, Briefing Paper (2010); Coffey G, et al, *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*, *Social Science & Medicine* 70 (2010).

<sup>3</sup> International Detention Coalition, *Captured Childhood*, (2012) available at <http://idcoalition.org/ccap/>.

Although immigration detention may be permissible in an individual case, governments often make broad policy justifications for the detention of refugees, asylum-seekers and migrants that overshadow the carefully circumscribed international standards around deprivations of liberty, including norms of necessity, proportionality, and non-discrimination. When detaining arriving refugees, asylum-seekers and migrants, states often give little consideration to specific vulnerabilities such as age, gender, mental and physical health, or individual protection needs. For these reasons, refugees, asylum-seekers and migrants are particularly vulnerable to illegal and/or arbitrary deprivations of liberty.

### Who is detained in immigration detention?

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

### Where are refugees, asylum-seekers and migrants detained?

Refugees, asylum-seekers and migrants are frequently detained in criminal prisons or other prison-like settings inappropriate for non-punitive detention. Often, the conditions of migrant detention are even worse than those in designated criminal prisons.<sup>4</sup> Refugees, asylum-seekers and migrants have been documented to be deprived of liberty in a number of physical contexts including, but not limited to:

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

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

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

### Who detains refugees, asylum-seekers and migrants?

Most often, public authorities are entrusted with the power to detain refugees, asylum-seekers and migrants in places of immigration detention. This may include, but is not limited to, police, prison officers, immigration authorities, border guards, military forces, security forces, or the coastguard. Some States have adopted the practice of outsourcing the immigration detention function to private companies, giving rise to important questions of accountability.<sup>5</sup>

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<sup>4</sup> Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 31, A/HRC/20/24.

<sup>5</sup> UN Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles

## 2. INTERNATIONAL AND REGIONAL TRENDS

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### International Trends

The IDC, through its international membership in 67 countries, has observed two parallel processes occurring globally in relation to the detention of refugees, asylum-seekers and migrants. One is the dramatic increase in the use of immigration detention by states as a first resort over the past 10-15 years. This includes increasingly criminal and punitive immigration detention policies in an attempt to manage, prevent or control migration movements. Second, is a more recent shift over the past 5 years by some states to implement a more human-centred approach to migration management, including the exploration and implementation of alternatives to detention and the use of custodial detention in cases of last resort only.

However, the IDC remains concerned that governments are cooperating bilaterally and multilaterally to promote criminalization and detention initiatives that attempt to restrict refugee, asylum-seeker and migrant movement without considering the rights-based framework including, most importantly, article 9 of the ICCPR. Industrialized countries continue to fund, pressure and provide incentives to neighbouring countries to detain refugees, asylum-seekers and migrants, including non-signatories to the Refugee Convention or other human rights treaties, placing refugees at risk of *refoulement* and other fundamental human rights abuses.

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

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

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

While many States continue to view migration through a national security framework, we have seen a number of States take a human security approach, effectively managing, supporting and protecting refugees, asylum-seekers and migrants outside of immigration detention. This includes mechanisms such as the use of individual screening and assessment, community reception models, regularization and various alternatives to detention, such as provisional release, reporting and case management.

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on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, UN Doc A/HRC/17/31, 21 March 2011, available at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf). See also *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v. Australia*, HRC, Comm. No. 1020/2001, [7.2], available at: <http://www.unhchr.ch/tbs/doc.nsf/0/e9d23042cfec8e86c1256dad00535a94?Opendocument>.

## Regional Trends

Following IDC regional and global consultations in 2013 with our more than 250 members, partners and stakeholders in 67 countries, we have identified the following regional trends.

### Africa

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

#### Key issues:

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

### Americas

The Americas region has two major detaining countries, Mexico and the USA, whose detention practices are of serious concern. Both countries are promoting their immigration detention and control policies to neighbouring state parties, especially the smaller Central American and Caribbean countries. Both Mexican and American law include provisions for mandatory detention, including of children, while the USA detains nearly half a million migrants annually and has “mandatory minimum” provisions in law which require immigration officials to detain tens of thousands of migrants daily. Despite these policies, there continues to be regular mixed migration, particularly into the USA. In the past year, there has been an alarming rise in the number of unaccompanied minors entering the USA, with the total number expected to reach nearly 45,000 in 2014.

#### Key issues:

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

### Asia-Pacific

Immigration detention continues to be a growing concern across Asia-Pacific as the detention of refugees, asylum-seekers and migrants is endemic to the region. A number of countries in the region have not signed the 1951 Refugee Convention, leaving refugees and asylum-seekers vulnerable to *refoulement*. Irregular migrants are at risk of abuse of their rights and have little voice in advocating for their own rights. Of particular concern are mandatory detention policies adopted by some governments within the region, and the “offshoring” of refugees, asylum-seekers and migrants by

Australia in particular, to neighbouring states—including states that have not signed the 1951 Refugee Convention or other human rights conventions.

Key issues:

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

### Europe

The IDC is very concerned by trends across Europe as they relate to immigration detention. There is an increasing use of immigration detention for refugees, asylum-seekers, and irregular migrants, particularly in European Union (EU) nations, such as Greece, where large numbers of irregular migrants are being detained in conditions falling well below international standards. Additionally, some EU states are seeking to externalise their criminalisation and migration control policies, frequently through bilateral agreements or direct funding of immigration detention centres in other states. Recent changes to EU legislation, including the latest recast of the Reception Conditions Directive, need to be monitored closely to ensure that any deprivations of liberty are consistent with article 9 protections. There is also an urgent need for greater exploration and development of alternatives to detention.

Key issues:

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

### Middle East and North Africa

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

Key issues:

- Criminalisation of irregular migrants, including refugees, asylum-seekers and victims of human trafficking
- Criminalisation policies are leading to increasingly dangerous migration routes, often resulting in kidnapping, extortion and other serious human rights abuses
- Detention of particularly vulnerable groups
- Forced or closed encampment of refugees and asylum-seekers
- Lack of access to legal advice, asylum procedures and other protection mechanisms
- Poor physical conditions of detention, including overcrowding, lack of adequate health, sanitation and hygiene facilities
- *Refoulement* and forced return

- Lack of access to detention facilities and independent monitoring

### 3. RECOMMENDATIONS

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Using the existing framework of the Draft General Comment as a guide, we now make a number of specific recommendations regarding the text of the final General Comment No. 35. Importantly, **we recommend that the Committee mainstream the unique challenges of immigration detention throughout the General Comment in addition to highlighting specific concerns in para. 18.**

#### I. General remarks

1. *No recommendation.*
2. *No recommendation.*
3. Due to the growing use of liberty restrictions to attempt to control migration, it is important to clearly state that article 9 applies to migrants of all classes. “Everyone” includes citizens as well as non-citizens, regular and irregular migrants, refugees, asylum-seekers, stateless persons, labour migrants, trafficking victims, smuggled migrants and all other groups or classes of migrants.<sup>6</sup>
4. States should never criminalise the act of migration, even in cases of irregular entry and stay.<sup>7</sup> However, if a refugee, asylum-seeker or migrant is criminalised for reasons related to their migration status, states are not exempt from affording migrants the article 9 protections of paragraphs 2 and 3, which apply to deprivations of liberty in connection with criminal charges.
5. *No recommendation.*
6. Refugees, asylum-seekers and migrants have been documented to suffer liberty deprivations in a number of unique administrative detention contexts. It is therefore important to mention these unique contexts in order to clarify that article 9 still applies. These unique forms of liberty deprivation include, but are not limited to: administrative detention in criminal prisons, police lockups, or police stations; designated immigration detention facilities; unofficial immigration detention centres; removal or transit centres; closed reception or processing centres; semi-open reception or processing centres; closed refugee camps; islands; airports, or international transit zones; vehicles, airplanes, boats and other vessels; military prisons or military bases; houses, hostels, hotels and other community-based locations where freedom of movement is restricted; psychiatric institutions and hospitals; disused warehouses; shipping containers; and private security company compounds.
7. Refugees, asylum-seekers and migrants are often coerced into accepting arbitrary restrictions of liberty under the threat of custodial detention or expulsion by the state. It is important to note that in such circumstances, free consent is not present. In the case of refugees and asylum-seekers, such arrangements may amount to *refoulement* or violate the right to seek and enjoy asylum. Examples may include but are not limited to: closed refugee, asylum-seeker or migrant visa processing centres, migrant transit or removal centres; closed refugee camps; and assisted voluntary return programs where there is little or no access to judicial oversight, due process mechanisms, or opportunities for seeking protection or regularising one’s stay.
8. The severe detrimental physical and mental health impacts of immigration detention, even when used for very short periods of time, are well documented.<sup>8</sup> This is especially true for

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<sup>6</sup> Human Rights Committee, General Comment No. 8; Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 5, A/HRC/20/24.

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

<sup>8</sup> See, e.g. Silove D, Steel Z, Watters C., *Policies of deterrence and the mental health of asylum seekers*, JAMA (2000); Medecins Sans Frontieres, *The Impact of Detention on Migrants’ Health*, Briefing Paper (2010); Coffey G, et al, *The meaning and mental health consequences of long-term immigration detention for people seeking*

particularly vulnerable groups including women, children, refugees, asylum-seekers, survivors of torture or trauma, the elderly, those with existing mental or physical disabilities, and victims of trafficking.<sup>9</sup> It is important to note that when particularly vulnerable migrants are subject to immigration detention, the mere use of custodial measures may amount to a violation of the right to “security of person.” State parties therefore have an obligation to protect particularly vulnerable migrants against violations of their security of person by avoiding immigration detention altogether for such groups and seeking less-restrictive alternatives to detention in accordance with the principles of necessity and proportionality.

9. *No recommendation.*

10. Most often, public authorities are entrusted with the power to deprive refugees, asylum-seekers and migrants of their liberty. This includes police, prison officers, immigration authorities, border guards, military forces, security forces, and the coastguard. However, increasingly state parties are adopting the practice of outsourcing the migration management function to third parties, including private security, health and social-welfare contractors. It is therefore important to note that when state parties outsource these vital functions, they still retain the duty to protect the right to liberty and security of person against deprivations by such third parties.

## II. Arbitrary detention and unlawful detention

11. Due to the endemic nature of immigration detention and its frequent justification on a variety of grounds by state parties, it is important to note that the *only* legitimate objectives for the detention of refugees, asylum-seekers and migrants are the same as they are for anyone else, namely: when someone presents a risk of absconding from future legal proceedings or administrative processes, or when someone presents a danger to their own or public security.<sup>10</sup>

12. *No recommendation.*

13. Just as any decision to detain refugees, asylum-seekers and migrants in custodial detention must not be arbitrary, it is important to note that any restrictions on liberty in the form of alternatives to detention must also be reasonable and necessary in all the circumstances. When liberty restrictions proposed in the name of alternatives to detention are not reasonable and necessary—for example, in the case of mandatory, closed refugee camps—they will amount to alternative forms of detention and constitute arbitrary deprivations of liberty.

14. *No recommendation.*

15. It has already been stated that state parties should never criminalise the act of migration (see para. 4). However, refugees, asylum-seekers and migrants are frequently subject to unclear legal regimes which obscure or blur the differences between administrative and criminal detention. While the purpose of administrative detention is never supposed to be punitive, often the effect is indistinguishable. It is therefore important to note that refugees, asylum-seekers and migrants should never be subject to criminal, prison-like conditions or environments.<sup>11</sup> When conditions of immigration detention are punitive, either in purpose or effect, they will necessarily be arbitrary.

16. *No recommendation.*

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*asylum*, Social Science & Medicine 70 (2010).

<sup>9</sup> International Detention Coalition, *Captured Childhood*, (2012) available at <http://idcoalition.org/ccap/>.

<sup>10</sup> Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 9, A/HRC/20/24.

<sup>11</sup> Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 31, A/HRC/20/24.

17. A frequent state party rationale for immigration detention occurs when refugees, asylum-seekers and migrants attempt to exercise fundamental article 12 rights to liberty of movement and freedom to choose one's residence. It is therefore critically important in the immigration detention context to articulate that arrest or detention imposed as a punishment for attempted freedom of movement will also be arbitrary when the restrictions on movement are not tied to a reasonable and necessary rationale in all the circumstances.
18. It is important to clarify, in light of the recent statement by the Committee on the Rights of the Child,<sup>12</sup> that children should never be criminalized or subject to punitive measures because of they or their parents' migration status. According to the CRC, "[t]he detention of a child because of they or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child."
19. *No recommendation.*
20. Despite clear guidance that states should never criminalise the act of migration (see para. 4), state parties are increasingly passing laws that criminalise irregular entry and stay. Additionally, when such criminal regimes are instituted, migrants are rarely afforded the due process protections due to criminal detainees and/or convicted criminals under article 9. This General Comment should first clarify that state parties should never criminalise the act of migration. Further, it should state unequivocally that administrative detention cannot be used as a means of avoiding due process obligations due to the criminally accused or detained.
21. *No recommendation.*
22. Refugees, asylum-seekers and migrants are frequently subject to immigration detention due to overly broad substantive grounds for arrest and detention. Therefore it is important to clarify that, in the context of immigration detention, "sufficient precision" will require states to distinguish between different legal categories of migrants as well as to account for the individual strengths and vulnerabilities of migrants via effective screening and assessment mechanisms, which provide recourse to applicable protection procedures.
23. *No recommendation.*

### III. Notice of reasons for arrest and any criminal charges

24. *No recommendation.*
25. Refugees, asylum-seekers and migrants are infrequently told the reasons for their arrest or detention, let alone provided a legal basis and the necessary factual specifics to successfully challenge what may be unlawful or arbitrary detention. In the case of immigration detention on the basis of irregular entry, for example, the factual specifics may be nothing more than a discriminatory assumption on the part of the arresting official. There is also an increasing trend among state parties to invoke overly broad substantive grounds for arrest and detention (see para. 22), which leave migrants guessing at the legal basis of the arrest. "National security" grounds have been especially troubling, as state parties are often not legally obligated in their domestic legislation to provide the factual specifics of the arrest at all, leaving legal counsel unable to challenge the factual basis of their clients' detention. It is therefore important to highlight that notice of arrest takes on an additional level of importance within the context of immigration detention and that this requirement specifically applies to administrative detention.
26. When reasons for arrest are provided to refugees, asylum-seekers and migrants, they are

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<sup>12</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, 78, available at [http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC\\_DGDChildrens\\_Rights\\_InternationalMigration.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGDChildrens_Rights_InternationalMigration.pdf).

infrequently provided in the native language of the arrested individual. Often, refugees, asylum-seekers and migrants are forced to rely on interpretation provided by other detained individuals. In cases of exploitative migrant smuggling, this may mean that migrants are dependent upon smugglers to provide interpretation. In cases of human trafficking, there is a serious concern that the lack of interpretation leaves trafficking victims further exploited and at the liberty of their traffickers. Furthermore, research shows that most refugees, asylum-seekers and migrants are unaware of the specific immigration policies of the countries where they are arrested or detained,<sup>15</sup> so it is unfair to assume that reasons for immigration detention will be “evident from the circumstances of the arrest” or that explicit, interpreted notification will be “superfluous” in the case of immigration detention. This point should be clarified with regard to immigration detention as compared to the detention of nationals or criminal detention more broadly.

27. While a delay of up to “several hours” may be appropriate in limited circumstances, it should be noted that where state parties are actively engaging in the arrest and detention of refugees, asylum-seekers and migrants—for example at borders, during immigration enforcement sweeps, or during roadside checkpoints—the need for interpreters will be known ahead of time and should be anticipated, making any delays in notification an unacceptable violation of article 9.
28. All refugees, asylum-seekers and migrants are vulnerable within the context of immigration, and especially with regards to arbitrary arrest and detention. Compared to national populations, migrants may lack a degree of linguistic or cultural competency, strong family ties or social networks in the host country, and knowledge of the domestic criminal or immigration laws. This heightened vulnerability will require additional safeguards to prevent violations of the right to notice. For example, immediate access to legal counsel, family or embassy contacts, and interpretation services should be provided. In addition, there are a number of particularly vulnerable categories of migrants who will require further safeguards. Children and the mentally ill have already been mentioned. Refugees, asylum-seekers and stateless persons may also require immediate access to UNHCR or other protection agencies. Torture and trauma survivors may require the provision of emotional or psychological counseling. Trafficking victims may require holistic shelter and case management services. Without such additional safeguards, the right to notice is likely to be ineffectual.
29. It is again important to note that—while migration should never be considered a criminal act (see para. 4)—states should not use administrative detention, on the basis of a criminalizing irregular entry for example, without also providing the additional due process requirements of article 9 in connection with criminal charges.
30. *No recommendation.*
31. *No recommendation.*

#### IV. Judicial control of detention in connection with criminal charges

32. One of the critical challenges facing refugees, asylum-seekers and migrants at risk of immigration detention is that they are increasingly being charged under criminal law for administrative immigration violations without being afforded the accompanying due process provisions of criminal arrest and detention. While it remains the position of the IDC—as well as a number of international experts including the UN Special Rapporteur on the Human Rights of Migrants and the Working Group on Arbitrary Detention—that the act of migration should never be criminalised—clarity is needed as to whether the specific provisions of paragraph 3 of article 9 apply to migration-related criminal charges, such as illegal entry or stay, possession of false travel documents, or failure to apply for asylum within a certain statutory period.

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<sup>15</sup> International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention*, 11, available at <http://idcoalition.org/cap/handbook/>.

33. Because the basis for most immigration detention is administrative, there is often little or no judicial oversight, even when the initial basis of the arrest may have been based on a criminal violation related to irregular entry, for example. This general comment should clarify the rights of administrative detainees to judicial review and control.
34. Judicial process relating to expedited deportations is a particular problem as there is often no opportunity to assert protection claims, no access to legal aid, and limited access to UNHCR or protection mechanisms. Strict standards appropriate for children are also appropriate in the context of other particularly vulnerable migrants, for example women, families, the elderly, the physically and mentally ill, torture and trauma, survivors, and victims of human trafficking.
35. Mistreatment and poor conditions of detention are endemic to immigration detention, in part because there is little to no access to judicial oversight.
36. Many places of immigration detention are purposely located in places where there is little access to judicial mechanisms, independent oversight, interpreters, lawyers, civil society presence, psychosocial support, and protection mechanisms for children or trafficking victims. While this is not incommunicado detention per se, its effect is nearly indistinguishable as migrants are further isolated and left increasingly vulnerable to exploitation and article 9 violations. There is also very little forthcoming information globally about the names, identities, numbers or reasons for detention for many of the world's immigration detainees. State parties are, in many cases, simply unable to produce such information.
37. We note that in the context of immigration detention there should be a presumption against custodial detention, and that alternatives to detention, including release options, must first be pursued. Any liberty restrictions must be necessary and proportionate in all the circumstances.
38. *No recommendation.*
39. Detention must be used as a last resort only, however the opposite is most often true in cases of immigration detention. A common justification for this is "flight risk", despite a lack of individualized assessment of risk. States particularly use this justification when referencing irregular migration, and xenophobic assumptions of non-compliance are pervasive despite growing evidence that compliance, even in cases of return, is quite high among migrant populations when they are afforded a dignified, humane process and are able to exhaust all possible protection remedies. Mandatory detention of refugees, asylum-seekers and refugees may require its own paragraph. Security exceptions in the context of immigration detention may also require its own paragraph.
40. This should include tracking the number and specific information (length of time held in detention, etc.) of detainees held in immigration detention on criminal charges related to migration status.

## V. The right to take proceedings for release from unlawful or arbitrary detention

41. We note that the right to take proceedings for release is frequently bypassed in the immigration detention context, leading to *refoulement* and violations of the rights of torture victims. The right to have legal representation in such proceedings is especially crucial for migrants because they are most often unfamiliar with the legal proceedings in the host country and may not speak the language of the host country.
42. *No recommendation.*
43. *No recommendation.*
44. "Circumstances justifying the detention have changed" should be understood to include, for example, when refugees, asylum-seekers and migrants take steps to seek international protection or otherwise to regularize their status.

45. *No recommendation.*

46. Immigration detention tribunals managed entirely within the government department responsible for enforcing immigration regulations and/or immigration detention facilities will necessarily not be impartial as state security concerns and increasing “border control” targets will conflict with due process and migrant protection functions.

47. Summary expulsions or deportations while obstructing access to judicial review are a particularly serious concern. Applications for review should have a suspensive effect, but many migrants are unable to file applications for review as they are limited from doing so while in immigration detention facilities. Similarly, many migrants are discouraged from filing applications for review by policies which force them to remain in detention during the filing process, which can take months or even years in some cases. So even those individuals with valid protection claims or opportunities to regularize their status may be forced to choose deportation or *refoulement* simply in order to exit immigration detention. In cases where the national law provides automatic judicial review of immigration detention, it is important that the procedural guarantees of judicial review are respected, particularly the right to have an individual assessment conducted by the court. We note that, in cases of immigration detention, group determinations of refugees, asylum-seekers and migrants are frequently conducted and identical decisions may be issued in violation of the right to an individualized detention assessment.

48. *No recommendation.*

49. *No recommendation.*

50. *No recommendation.*

## VI. The right to compensation for unlawful or arbitrary arrest or detention

51. This general comment should clarify that the right extends to irregular as well as regular migrants, to citizens as well as non-citizens.

52. There are serious problems with compensation in the immigration detention context as migrants are frequently removed from the state before being able to successfully challenge their detention or seek compensation. In cases of forced encampment, access to legal assistance is extremely limited, therefore few cases are brought against offending states.

53. *No recommendation.*

54. This para. should specifically include mention of the freedom of movement. When discriminatory restrictions, non-necessary forced encampment, or group or class based detention decisions are used, compensation and reparation will take on a heightened importance.

55. *No recommendation.*

## VII. Relationship of article 9 with other articles of the covenant

56. *No recommendation.*

57. *No recommendation.*

58. There is extensive research on the mental and physical health impacts of immigration detention, including prolonged detention, isolation, and the particularly serious impacts of immigration detention on particularly vulnerable groups of migrants. In such cases, even very limited detention may be said to be a violation of the right to security of person.

59. A number of immigration detention practices bear specific mentioning here, including

practices of physical isolation, and indefinite detention, especially indefinite detention based on “security” grounds, or when used in conjunction with non-returnable migrants such as failed asylum seekers, torture victims or stateless persons.

60. Places of immigration detention are frequently not found to have these basic protections, which are reserved or understood to apply only to places of criminal detention. This General Comment should clarify that these protections are specifically applicable to the administrative detention context, particularly with regard to the millions of detained migrants each year.

61. *No recommendation.*

62. All persons deprived of their liberty—including migrants in places of immigration detention—must be treated with humanity and with respect for the inherent dignity of the human person.<sup>14</sup> This includes minimum standards with relation to accommodation, personal hygiene, clothing, bedding, food, exercise, access to newspapers, books and religious advisers, communication with the outside world and medical services.<sup>15</sup> Conditions of immigration detention should not be prison-like, including but not limited to: prison uniforms; highly restricted movement a lack of outdoor recreation; monitored or restricted physical contact with family and friends; or lack of contact with the outside world.<sup>16</sup>

63. Liberty of movement is critically important in the immigration detention context and overlaps with rights of non-discrimination and freedom of movement found in the Refugee and Migrant Worker conventions. This is especially important given the intersection of immigration detention policies and attempts to control migration movements. While states retain the right to expel unlawfully present migrants, any expulsion must be carefully circumscribed in accordance with international human rights protections, most notably those of article 9.

64. *No recommendation.*

65. Offshoring policies are particularly troubling in this regard because they are frequently accompanied by a lack of access to judicial mechanisms, and claims by states that they are not responsible for liberty restrictions under their control but falling outside of their territorial jurisdiction.

66. *No recommendation.*

67. We note that this para. applies not simply to armed conflict, but also in the context of large refugee, asylum-seeker and migrant influxes. This may require an additional para. to clarify. We note that there is complementarity not only with humanitarian law, but with refugee law, statelessness law, and indeed the migrant convention itself—that is, IHR law generally. Humanitarian law and IHR law are not mutually exclusive but reinforce one another and while the ICCPR presents a customary normative baseline, additional conventions raise the standards applicable to specific groups.

68. Derogation happens frequently, if not officially, in the context of large refugee, asylum-seeker and migrant influxes. However, it bears mentioning that this must happen “on the record” so that affected peoples are put on notice and so that the international community can monitor such derogation when it is invoked. Also, we note that ongoing and prolonged derogation will violate article 9. For example, the current average time of a refugee or asylum-seeker being held in refugee encampments is 13 years. This fact highlights that derogation is often not “strictly required by the exigencies of the actual situation” but is used as a way of enforcing freedom of movement restrictions in violation of article 9.

69. We note that general “influxes” of migrants should not normally constitute a “public

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<sup>14</sup> International Covenant on Civil and Political Rights, article 10, paragraph 1; Human Rights Committee, general comment No. 21 (1992) on humane treatment of persons deprived of their liberty; The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 17, para. 1.

<sup>15</sup> See The Standard Minimum Rules for the Treatment of Prisoners.

<sup>16</sup> Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, A/HRC/20/24

emergency.” While large-scale migratory movements may, in limited cases, be considered a humanitarian crisis, they do not destabilize the state in the same way that prolonged war or terror attacks might, and therefore should not be used to derogate from the arbitrary detention principle.

70. *No recommendation.*

71. *No recommendation.*

## 4. CONCLUSION

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The IDC warmly welcomes the HRC's General Comment No. 35 as an opportunity to clarify that article 9 squarely applies to immigration detention and to clarify both the rights of refugees, asylum-seekers and migrants in the context of administrative detention as well as the limitations on states who are increasingly seeking to control and limit migration through the use of criminalisation and detention policies.

The IDC calls on the Human Rights Committee to make a clear and unequivocal statement that state parties should cease using immigration detention as a first resort, and more specifically that state parties must adhere to article 9 standards prohibiting arbitrary and illegal deprivations of liberty. To better protect the rights of all people to liberty and security of person, state parties must make a presumption against the use of immigration detention, and urgent priority should be given to exploring, developing and implementing alternatives to immigration detention at the national level.

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

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

International Detention Coalition  
14 October 2013

## 5. APPENDIX

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### Appendix 1: IDC Core Position

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

*Available at* [http://idcoalition.org/wp-content/uploads/2008/12/idc\\_posterfinal.pdf](http://idcoalition.org/wp-content/uploads/2008/12/idc_posterfinal.pdf)

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

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

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

### Appendix 3: IDC Handbook: *There are Alternatives*

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

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

### Appendix 4: IDC Handbook: *Captured Childhood*

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

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

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

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