IDC Briefing Paper

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Immigration Detention as an Exceptional Measure of Last Resort

International Detention Coalition
Rights and dignity for all who migrate

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Presentation

This briefing paper was written to provide an overview of the international standard that immigration detention should only be used as an "exceptional measure of last resort", in order to highlight promising practice and encourage further progress in this area. It aims to inspire and embolden governments, local authorities, international organisations, civil society and community actors and other stakeholders, with steps they can take to move away from the use of immigration detention.

About International Detention Coalition (IDC)

IDC is a powerful global network of organisations, groups, individuals, as well as representatives of communities impacted by immigration detention, based in over 75 countries. IDC members have a wide range of specialisations related to immigration detention and alternatives to detention, including academia, law, research, policy, direct service, advocacy, and community organising.

IDC staff work nationally and regionally in Africa, the Americas, Asia Pacific, Europe, the Middle East and North Africa, and at the global level. Staff coordinate with members and partners on advocacy, research, coalition and capacity building, as well as create opportunities for national, regional and global collaboration to reduce and end immigration detention, and further rights-based alternatives to detention (ATD).

Our Vision

A world where immigration detention no longer exists and people who migrate live with rights and dignity.

Our Mission

IDC advocates to secure the human rights of people impacted by and at risk of immigration detention. In partnership with civil society, UN agencies, and multiple levels of government, we strategically build movements, and influence law, policy and practices to reduce and end immigration detention, as well as implement rights-based ATD.

Our Values

- **Solutions-Focused** We strategically adapt our approaches to context, and develop pragmatic solutions that are grounded in everyday reality and experience
- **Innovation** We continually innovate our understanding and practices, through curiosity, learning, and exploring new possibilities
- **Collaboration** We engage in collective thinking and group-centred processes that facilitate an active exchange of ideas and contributions
- **Respect** We listen closely and with empathy to diverse perspectives, share and accept critique, and treat one another with dignity
- **Representation** We prioritise diversity, inclusion, and the leadership of people with lived experience of detention, in order to ensure accountability in our work

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The views expressed in this document are those of IDC. We also extend our appreciation to the United Nations High Commissioner for Refugees in Mexico for their financial contributions to the preparation of the briefing paper.

Contents

1. Introduction_

In many parts of the world, governments use immigration detention as a generalised approach to migration management. The arbitrary detention of migrants is part of a wider trend of States criminalising migration. Numerous human rights bodies have called on States to abolish the practice of immigration detention. Where immigration detention is still used, international and regional standards provide that it must only ever be an "exceptional measure of last resort."

The principle of "last resort" is a legal standard which civil society actors can leverage in advocacy towards reducing and potentially ending immigration detention in certain contexts. But while it is a well-established standard of international law, there is sometimes a lack of clarity as to what it means in practice. What are relevant considerations for civil society actors who use this standard in advocacy? How does it relate to efforts to end immigration detention all together, including for certain groups?

This paper is aimed to support civil society actors considering using the "last resort" principle in advocacy, to assess options, opportunities and risks, and decide on the most effective courses of action in their specific contexts. The first section considers the content of the "last resort" principle, as set out by international and regional human rights bodies. The second section looks at the application of the "last resort" principle in practice, including national law examples and what impact it might have on immigration detention practices. The final section provides a mapping of different civil society approaches, possible opportunities and risks, as well as contextual considerations for civil society actors aiming to use the "last resort" principle in advocacy.

The paper is based on desk research and the experiences of IDC members, partners and team members in different regions of the world, gathered through interviews in September and October 2022.

2. International and regional human rights framework

a) Right to liberty and prohibition on arbitrary detention

The right to liberty is recognised by all major international and regional human rights instruments.[1] This right applies to all people without discrimination and irrespective of their migration situation.[2] The prohibition on arbitrary detention forms part of customary international law and constitutes a *jus cogens* norm from which derogation or exemption is never possible. The UN Committee on Migrant Workers (CMW) has specifically stated that the prohibition of arbitrary deprivation of liberty also protects migrants, in accordance with article 16 (4) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[3] Under the current international human rights law framework, immigration detention is not arbitrary per se. However, the following factors are of key relevance when considering the use of immigration detention and the protection of migrants from arbitrary detention:

1. The principle of non-discrimination and rights irrespective of nationality or immigration status in the Universal Declaration of Human Rights, and major international and regional human rights treaties.[4]

2. The fact that migration is a non-violent act and should never be treated or punished as a crime; irregular migration constitutes at most an administrative irregularity.[5]

3. Migration irregularity is not a choice of individuals, but a consequence of State policies and actions.[6]

4. The devastating impact of immigration detention on individuals and communities, which has been well-documented.[7]

5. The reality that immigration detention is often arbitrary and not in conformity with human rights standards, but part of a trend of criminalising migrants and migrant communities.[8]

6. The fact that the current international law framework which applies to protect migrants from arbitrary detention was largely developed in relation to criminal detention.[9]

b) States should ultimately abolish immigration detention

Although the right to liberty is not unlimited under international and regional human rights law, numerous international and regional human rights mechanisms have recognised the inherent undesirability of immigration detention, given its severe impact on human rights and the reality that immigration detention is often arbitrary and part of a wider trend of criminalisting migration. Indeed, human rights bodies are increasingly calling on States to **phase out and end the use of immigration detention** altogether.

The Committee on Migrant Workers has stated: "The Committee considers that States should take measures to abolish immigration detention. It emphasises that, through the Global Compact for Safe, Orderly and Regular Migration, States have committed to prioritise non-custodial alternatives in accordance with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only."[10]

The UN Working Group on Arbitrary Detention has stated**:** "The Working Group is fully aware of the sovereign right of States to regulate migration. However, it considers that immigration detention should gradually be abolished. Migrants in an irregular situation have not committed any crime. The criminalisation of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows."[11]

The **UN Office of the High Commissioner for Human Rights** "agrees with the position of the United Nations Working Group on Arbitrary Detention (WGAD) that immigration detention is largely arbitrary and should gradually be abolished."[12]

In the context of the COVID-19 pandemic, the **UN Network on Migration Working Group on Alternatives To Detention**, which IDC co-leads alongside UNICEF and UNHCR, has stated that momentum towards alternatives to detention "presents a unique opportunity to look beyond the current crisis and showcase concretely how migration can be governed without resorting to detention, as envisioned by the framework for action provided by the Global Compact for Migration, including in its Objective 13. States, United Nations entities, civil society organisations and other actors are encouraged to redouble their collaborative efforts to phase out the use of immigration detention – building on steps forward taken during the pandemic, documenting the positive impact of alternatives, reflecting on lessons learned, and ending as a matter of priority the detention of children, families and other migrants in vulnerable situations."[13]

The **Inter-American Commission on Human Rights** has reaffirmed that

"States shall take measures to eradicate the detention of migrants in law, public policy and practice. Until then, States shall ensure that detention is used only in accordance with and as authorised by law and only when determined to be necessary, reasonable in all the circumstances, and proportionate to a legitimate purpose."[14]

c) Principle of non-detention of certain groups

Under international law, immigration detention is also prohibited in certain circumstances or in relation to certain groups including:

- Immigration detention of children, which is never in a child's best interests.[15]
- When detention results from exercising the right to seek asylum or would constitute a punishment for irregular entry of stay or persons seeking asylum.[16]
- Immigration detention of persons in vulnerable situations,[17] such as pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, or survivors of trafficking, torture and/or other serious violent crimes.[18]

Non-detention as best practice - There are countries that do not allow for immigration detention at all in their legal systems, including a number of South American countries, which approach migration as an issue of human rights and protection and prioritise regularisation to address irregular migration. For example, migration laws in Ecuador, Uruguay, Bolivia and Peru do not include provisions that would authorise deprivation of liberty for migration-related reasons.[19] Additionally, Colombia has passed the Statute of Temporal Protection which regularises large numbers of Venezuelan people without resorting to immigration detention.[20] Other countries in the region prohibit the immigration detention of certain groups.

d) Immigration detention as an exceptional measure of last resort

In addition to the need to ultimately abolish immigration detention, and the prohibition on immigration detention of children and other people in specific situations of vulnerability, the prohibition on arbitrary detention requires that where States do still resort to immigration detention it must be strictly regulated.[21]

The **UN Committee on Migrant Workers** has stated: "Immigration policy should be based on a presumption of freedom and not of detention. Although the right to liberty is not unlimited, the Committee has reiterated that, since any deprivation of liberty is highly burdensome and restrictive of the human rights of individuals, it should be considered an **exceptional measure of last resort** and be used only once it is demonstrated

that it has a **legitimate objective** and is **necessary** and **proportionate."** Further, "Detention or any other form of deprivation of liberty on grounds relating to an individual's immigration status must be governed by the principle of exceptionality, that is, deprivation of liberty should serve as the **last possible measure only, once all the less harmful alternatives have been analysed and ruled out**. In any event, the decision to order the detention of migrant workers and members of their families should be taken for the shortest possible period and only if it is justified by a legitimate aim."[22]

According to the **UN Working Group on Arbitrary Detention**, "Any form of administrative detention or custody in the context of migration must be applied as **an exceptional measure of last resort,** for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt."[23]

The **Special Rapporteur on Migrants** has stated that "Detention for immigration purposes should never be mandatory or automatic. According to international human rights standards, it should be a measure of last resort, only permissible for the shortest period of time and when no less restrictive measure is available. Governments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure."[24]

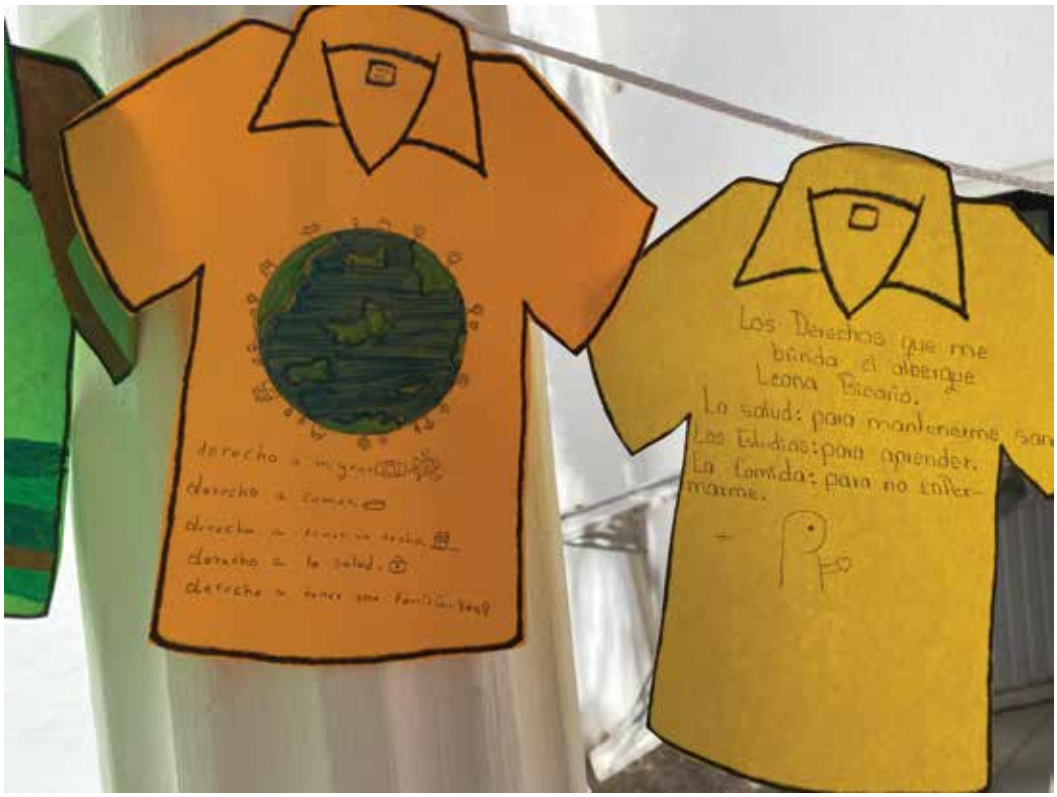
In terms of regional guidance**,** in the **Americas**, regional principles and standards adopted by the **Inter-American Commission on Human Rights (IACHR)** are unequivocal in stating that immigration detention must be used as a last resort and non-custodial community-based ATD should be used in the first instance.[25] Principle 69 of the Inter-American Principles on Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking states that "Detention must be **a measure of last resort**. All alternatives to detention must be explored. If detention of migrants is used, it must be lawful and used exclusively as a precautionary and temporary measure to ensure compliance with repatriation, deportation, expulsion, or extradition procedures." The regional position on ATD was clearly developed in two consecutive IACHR thematic reports on the United States and on Mexico, the two countries that rely most on immigration detention.[26]

In Europe various bodies of the **Council of Europe** and the **EU** "have highlighted that immigration detention must always be an exceptional measure of last resort. This entails that detention can only be justified if, after a thorough and individual assessment of the particular circumstances in each case, it has been established that less coercive measures are insufficient."[27]

e) What have States committed to doing politically?

The principle that immigration detention must only be a measure of last resort features clearly in the title of Objective 13 of the **Global Compact for Migration.**[28] Within this objective, states committed to "ensure that any detention in the context of international migration follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments, is carried out by authorised officials, and for the shortest possible period of time," and to further "prioritise noncustodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a **measure of last resort only.**" Furthermore, to realise this commitment, States unequivocally committed to "working to **end the practice of child detention** in the context of international migration…[29]"

A number of other political agreements do not specifically mention the "last resort" principle, but recognise the need to develop non-custodial community-based ATD, sometimes with a focus on children (see below).



3. Applying the "last resort" principle in practice

a) Elements of "immigration detention as a measure of last resort" and national law examples

According to guidance from international human rights bodies, the principle that immigration detention may only be used as an **exceptional measure** of last resort entails a number of cumulative and interrelated requirements, namely that:

- It is only used to pursue a **legitimate State objective**
- It must be **lawful**
- It must be **necessary** and **proportionate** to achieve the legitimate objective
- All the less harmful **alternatives** have been analysed and ruled out
- It is only used for the **shortest possible period** of time

Starting with the overriding principle of "exceptionality," the following section examines these elements in more detail and provides some national law examples, to help illustrate in practice what the different elements might look like in legislation (not as positive practice as such). It also provides reflections for civil society actors in terms of practical implementation.

Exceptionality of immigration detention

The principle of exceptionality of immigration detention requires that there should always be a presumption against detention in favour of freedom.[30] The principle means that deprivation of liberty should serve as the last possible measure, based on an individual and context specific assessment, and once all less harmful alternatives have been analysed and ruled out.[31]

It flows from the principle of exceptionality that any compulsory, automatic, systematic or widespread use of immigration detention is arbitrary.[32] Furthermore, the prohibition on arbitrary detention "extends to the use of detention as a deterrent or as a general migration management tool." The use of detention as a "routine measure of law enforcement may be arbitrary per se," to the extent that it is not an exceptional measure of last resort.

National Law Examples - Exceptionality of Immigration Detention

The exceptionality of immigration detention results from cumulatively applying elements of the "last resort" principle, as set out in this section below. In addition, some countries specifically provide that immigration detention, or its use in specific circumstances, is an "exceptional measure" (e.g. Argentina and Türkiye). In other countries, legislation effectively precludes immigration detention except in certain limited circumstances, contributing to its exceptionality (e.g. South Africa and Tajikistan).

Argentina - Article 70 of the National Migration Law specifies that (in addition to other grounds - see below), detention can be used **exceptionally** and only by judicial order in proceedings where expulsion orders are not yet firm and consented to (e.g. with outstanding appeals).[33]

Türkiye - the Law on Foreigners and International Protection provides that "Applicants shall not be subject to administrative detention solely for lodging an international protection claim" (Article 68(1)) and that the detention of international protection applicants shall be "**an exceptional action**" and only permissible on specific grounds (Article 68 (2)).

South Africa - The Constitution enshrines the right to dignity and to freedom from arbitrary detention, as well as key protections for people in detention which apply equally to immigration detention. **In general, the Refugees Act protects people seeking asylum from immigration detention by providing that no proceedings for unlawful entry or stay in the country may be instituted against persons who have applied for or been granted asylum.** The Act allows for the detention of people seeking asylum under certain limited circumstances when their asylum permit has been withdrawn. Under an amendment to the Act adopted in 2017,[34] refugees and people seeking asylum may also be detained pending removal on grounds of national security, national interest or public order.[35]

Tajikistan - The detention of people seeking asylum is reportedly very rare in Tajikistan.[36] **People who enter Tajikistan without valid documents but declare that they are seeking asylum are exempt from the punishments stipulated for illegal entry/ stay in the State**, as per article 6(4) of the 2014 Refugee Law.[37] However, the 2014 Law of the Republic of Tajikistan on Refugees states that persons who enter Tajikistan without a permit but claim asylum can be detained at the border entry points.

Legitimate objective

Under international human rights law, immigration detention is only permitted when it is based on a legitimate objective of the State.[38] International human rights treaties do not list legitimate purposes that make immigration detention permissible. However, the UN Committee on Migrant Workers notes that both the Special Rapporteur on Migrants and the UNHCR[39] have indicated that "immigration detention can be justified only **if a person poses a danger to himself or herself or to society, or if there is a risk that he or she will avoid administrative or other proceedings."**

The UN Special Rapporteur on the human rights of migrants has specified that: "Legitimate objectives for detention are the same for migrants as they are for anyone else: 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**."[40] Reasons that would legitimise the detention include "the necessity of identification of the person in an irregular situation or risk of absconding when their presence is necessary for further proceedings."[41]

UNHCR's Detention Guidelines state that "Detention that is not pursued for a legitimate purpose would be arbitrary." In terms of detention that is not pursued for a legitimate objective, the Guidelines provide the examples of: detention as a penalty for illegal entry and/or as a deterrent to seeking asylum, detention of people seeking asylum on grounds of expulsion.[42]

In terms of regional human rights law, Article 5 of the **European Convention on Human Rights** provides two legitimate grounds for detention of migrants:

- to prevent his effecting an unauthorised entry into the country;
- against whom action is being taken with a view to deportation or extradition.

The **Inter-American Principles** on the Human Rights of all Migrants state that "If detention of migrants is used, it must be lawful and used exclusively as a precautionary and temporary measure to ensure compliance with **repatriation, deportation, expulsion, or extradition procedures"** (Principle 69).

Non-criminalisation

The criminalisation of irregular entry, stay or exit is not a legitimate objective on which to deprive migrants of their liberty.[43] The principle of non-criminalisation of migration means that States are not permitted to regulate migration with criminal law.[44] The UN Special Rapporteur on the human rights of migrants has stressed that "irregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property or national security."[45] The CMW has reaffirmed: "under no circumstances can infringements relating to irregular entry or stay have consequences similar to those arising from criminal activity."[46]

Irregularly crossing borders may at most constitute administrative offences, and they are not offences that violate the law to an extent that warrants criminalisation.[47] Furthermore, seeking

asylum is not an unlawful act and people should never be penalised, including through the use of detention or other restrictive measures, on the basis of entering a country irregularly to seek asylum.[48] The Protocol against The Smuggling of Migrants by Land, Sea and Air states that while the smuggling of migrants may be a criminal offence, migrants themselves shall not be criminalised for the fact of having been the object of smuggling.[49]

Furthermore, the immigration detention of migrants on national security grounds is problematic. While human rights bodies recognise that immigration detention may be justified where an individual poses a threat to himself or society, irregular entry or stay is not per se a crime or threat to national security. However, there is a tendency for governments to define migration as an issue of national sovereignty and thus national security, overemphasising security-based procedures and viewing migrants as a general threat to national security. The UN Special Rapporteur on the human rights of migrants has noted that "security detention poses particular risks to migrants, who may end up in prolonged or even indefinite detention justified by vague criteria."[50]

Immigration detention must be lawful

Even where there is a legitimate State objective for using immigration detention, it must be authorised by law and in line with the procedures established by law.[51] This means that deprivation of liberty must be clearly and exhaustively provided for by law.[52] The CMW has specified that "the law must not leave ample discretion to the authorities in the decision and enforcement of immigration detention."[53]

The **Inter-American Principles** state that immigration detention must be "Lawful, that is, established by law and in accordance with regional and international treaties on human rights" (principle 69 (a)). The IACHR has specified that to ensure the lawfulness of immigration detention, "the grounds for and conditions for such detention must be clearly and exhaustively prescribed in existing laws."[54] The IACHR further clarified that: "Any ambiguity in the laws establishing the grounds and conditions under which immigration detention is permissible may lead to an arbitrary exercise of authority and would be particularly undesirable given the effects that the deprivation of liberty has on such rights as, inter alia, personal liberty, life, personal integrity, family life and so on." [55]

National Law Examples - Grounds for Immigration Detention Specified in Law

Argentina: Under the National Migration Law (NML) and the Regulation of the National Migration Law,[56] there are **three grounds on which immigration detention can be used:**

1. "Where there are reasonable grounds to suspect a person's intention to enter the territory differs from that manifested at the time of obtaining a visa or presenting before immigration control;

2. to enforce an order of expulsion;

3. to prevent absconding during adjudication procedures in cases where an expulsion order is not firm (i.e. expulsion orders with outstanding appeals)."[57]

The law states that the following factors will be considered to determine whether there is a risk that the person will not comply with the expulsion order:

- "Integration; determined by a person's domicile, habitual residence, location of their family and business or work.

- The circumstances and nature of the fact for which the foreigner's expulsion is being ordered.

- The foreigner's behaviour during the administrative proceedings preceding the expulsion order, to the extent that it indicates their willingness to accept the final decision, and in particular, if they have hidden information about their identity or residence or have presented false information."[58]

Türkiye: According to Article 68 of the Law on Foreigners and International Protection, detention of international protection applicants shall be "an exceptional action" and applicants may only be subject to administrative detention for the following reasons:

- for the purpose of determination of the identity or nationality in case there is serious doubt as to the accuracy of the information provided;

- for the purpose of being withheld from entering into the Türkiye in breach of terms [and conditions] of entry at the border gates;

- when it would not be possible to identify the elements of the grounds for their application unless subjected to administrative detention;

- when [the person] poses a serious public order or public security threat.

In EU member States - research found that the following six categories of grounds for immigration detention were included in national law in EU member states:[59]

- Detention to prevent unauthorised entry

- Detention to effect removal
- Detention to establish identity and nationality
- Detention to prevent absconding
- Disrespect of alternatives and non-departure after voluntary period is expired
- Detention for irregular entry, exit or stay

Considerations:

States that include grounds for detention in national law take different approaches:[60]

Some include specific and detailed lists of situations which can justify detention. While this provides concrete guidance, there is a risk that it could be too prescriptive, as the grounds for detention should always be assessed in the individual case.

- Some States include grounds for detention in general terms, which can encourage weighing but leaves room for interpretation
- Others include a general description in the law, and provide further clarifications and examples in regulations and guidelines: such guidance can help implementation while leaving room for individual assessment.
- In some countries, the law authorises the use of immigration detention on the ground(s) of irregular entry, stay or exit. This appears to be problematic, as it allows for the detention of an individual based solely on their migration situation or status, rather than to achieve a legitimate objective recognised under international human rights law.[61]

Principle of non-arbitrariness

Under international human rights law, the principle of non-arbitrariness means that it is not enough for immigration detention to be pursued as a legitimate objective provided for by law.[62] The law itself, as well as its application, must not be arbitrary. The UN Human Rights Committee has stated "the notion of 'arbitrariness' must not be equated with 'against the law' but must be interpreted more broadly to include such elements as inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity and proportionality."[63] According to the CMW, arbitrary detention is any detention that exceeds the limits of reasonableness. This means that it "must meet the criteria of necessity and proportionality and be based on an individualised assessment."[64]

Necessity

The criteria of necessity means that immigration detention can only be used where it is strictly essential to achieve the established legitimate end.[65] The UN Human Rights Committee has stated, "Detention in the course of proceedings

for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time."[66] As the CMW has pointed out, the authorities must start from the fact that deprivation of liberty is the most harmful measure for the person concerned. Therefore, it must evaluate all available alternatives to detention that are less harmful to the individual.[67]

The **Inter-American Principles** on the Human Rights of all Migrants state that immigration detention must be: "Necessary, in the sense that detention must be absolutely essential to achieve the intended purpose" (Principle 69 (b)).

The **European Court of Human Rights** does not apply a criteria of necessity, but instead requires that immigration detention must be carried out in good faith and must be closely connected to the ground of detention relied on by the Government.[68]

National Law Examples - Necessity

Uruguay - recognises the right to migrate; there is no detention for immigration administrative violations,[69] except for what is **considered necessary** to complete an expulsion procedure. These are rarely carried out, and when they are detention tends to last from a few hours to up to a day. Uruguay does not have immigration detention centres.[70] **Ecuador** also recognises the right to migrate, which is enshrined in its Constitution and operationalised by its Law on Human Mobility - it closed all immigration detention centres in 2017.[71]

EU legislation - Article 15.5 of the EU's Return Directive says detention shall only be maintained "for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is **necessary to ensure successful removal**." One of the conditions of paragraph 1 is that "Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence." Article 15.5 also says the maximum detention period for returns is 6 months. The Directive requires criteria for the existence of a risk of absconding to be defined by law (Article 3.7). In implementing the directive, some EU countries have an exhaustive list of situations that objectively meet grounds for detention.[72]

Malawi - The main provisions regulating immigration detention in Malawi are found in the Immigration Act 1964 and the Immigration Regulations 1968. The Act provides for immigration detention as an administrative measure pending removal. There is no maximum time limit for this type of detention, but **regulations specify it must be "necessary" for arranging the removal, which must be done at the first reasonable opportunity**. In addition, people may be detained for up to 14 days for identity checks.[73]

Considerations:

- Providing factors and examples of situations that can indicate grounds for detention are met, for example a risk of absconding, could help decision-makers.
- But it is important not to be prescriptive, as indicators should be assessed considering the individual case.[74]

Due diligence

The principle of due diligence means that where detention is justified on a particular ground, there is a duty for authorities to carry out proceedings towards that end with due diligence and there must be a real and tangible possibility of achieving that end. Most law examples in this category imply effectuating removals, which IDC does not favour. However, it is important to be aware of the laws involving all of these principles related to "last resort" in order to effectively assess risk and potential for advocacy using these standards in a given context.

For example, the European Court of Human Rights has found that immigration detention can only be justified so long as such deportation or extradition proceedings are in progress and if such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.[75]

National Law Examples - Due Diligence

Argentina - The National Migration Law (Article 70) clarifies that in relation to detention to prevent absconding during procedures relating to expulsion orders which are not yet firm (i.e. expulsion orders with outstanding appeals), the detention request must contain a "precise description of the factors giving rise to the situation, provide documentary evidence corroborating these, and indicate the duration required."[76] The law further stipulates that where the "retention" request is accepted, "the migration authority must **present a report to the intervening judicial body every 10 days detailing the progress of the administrative procedure as well as the reasons that justify maintaining the retention measure."**[77]

European Union - as mentioned above, the EU's Return Directive provides that detention may only be "maintained as long as removal arrangements are in progress and executed with **due diligence**" (Article 15 (1)).

In **South Africa**, "A person can be detained on reasonable grounds that they are an illegal foreigner for a period not exceeding 48 hours, while their status is being verified in terms of section 41 (of the Immigration Act). The purpose of this provision is to avoid unlawful and arbitrary arrests and detentions that last longer than the prescribed 48-hour limit. The 2014 Regulations to the Immigration Act[78] clearly outline **how immigration officers must carry out this duty:**

- 'access relevant documents that may be readily available in this regard;'
- 'contact relatives or other persons who could prove such identity and status;'
- 'access Departmental records in this regard'; or
- 'provide the necessary means for the person to obtain the documents that may confirm his or her identity and status.'[79]

Proportionality

The criteria of proportionality requires that the authorities carry out an assessment contrasting the gravity of the measure taken - the deprivation of liberty - with the importance of the legitimate purpose pursued.[80] This balancing includes taking into consideration the potential impacts of detention on the physical and mental health of the individual, the particular needs of individuals and members of their families, and the situation concerned.[81]

National Law Example - Proportionality

In Germany, the courts apply the **general principle of proportionality in the German Constitution to limit the use of immigration detention for the purposes of removal**.[82] This has been permanent jurisprudence of the Federal Constitutional Court.[83] For example, the High Court of Düsseldorf decided that the detention of an individual was unlawful under the general rule of proportionality, because the individual was willing to return to Belgium voluntarily, which could have been facilitated as an option with less impact on the individual and cost for the authorities. The Court stated: "This corresponds to the general principle that a detention order may not be issued solely on the basis of the fulfilment of the formal requirements of Section 62 (2), but also that the constitutional requirement of proportionality must always be observed."[84] A number of other cases applying the proportionality principle concern limiting the period of detention to the shortest possible time, often related to the lack of possibility or necessary action on the part of the authorities towards preparing for the removal.[85]

All alternatives must be reviewed and ruled out

Central to the requirement that immigration detention only ever be used as an exceptional measure of last resort, is the legal obligation for States to first analyse and rule out all alternatives to detention (ATD) before resorting to immigration detention.[86] This has been reaffirmed by several international and regional human rights bodies.

The WGAD has stated "Alternatives to detention must be sought to ensure that detention is resorted to as an exceptional measure."[87] The Special Rapporteur on human rights of migrants has stated that "the right to liberty and security of persons...obliges States to consider

in the first instance less intrusive alternatives to detention of migrants.[88] The Committee against Torture has found that States cannot resort to detention simply because they do not perceive alternative measures to be available, but must instead "duly examine" and "exhaust" all alternatives before resorting to detention.[89]

The **CMW** has reaffirmed that States have the "obligation to review and implement all available alternative measures before resorting to detention, in accordance with the principles of necessity and proportionality."[90] The Committee provides that States should adopt or amend domestic legislation that provides for "human rights compliant alternatives." It understands as ATD: "all community-based care measures or non-custodial accommodation solutions" which must be considered in the context of detention procedures with the aim of respecting the human rights of migrants.[91] ATD should respect the right to personal freedom and not create related restrictions or conditions, but rather "generate other legitimate mechanisms and measures in line with human rights standards."[92]

In the **Global Compact for Migration (GCM)**, States reiterated existing human rights obligations and provided guidance to operationalise them by committing to "Use immigration detention only as a measure of last resort and work towards alternatives."[93] The 164 governments that adopted the GCM agreed in Objective 13 to "prioritise noncustodial alternatives to detention that are in line with international law" and to "promote, implement and expand alternatives to detention, favouring non-custodial measures and community-based care arrangements, especially in the case of families and children."[94] Similarly, the **Global Compact on Refugees** states that "the development of non-custodial and community-based alternatives to detention, particularly for children, will also be supported."[95]

Following the adoption of the GCM, the **United Nations Network on Migration Working Group on ATD** was established, tasked with promoting and supporting States to develop and implement non-custodial, human rights-based ATD in the migration context, in line with Objective 13 of the GCM.[96] IDC co-leads this Working Group, alongside UNICEF and UNHCR, and its members include representatives of civil society organisations, migrant communities, young people, local governments, and UN agencies working on immigration detention and ATD across the world. In addition to producing policy guidance on ATD - including in response to the COVID-19 pandemic[97] and on promising practice examples of ATD,[98] a key activity undertaken by the Working Group on ATD has been the convening of periodic global peer learning exchanges sponsored by governments champi-

oning Objective 13.[99] These peer learning exchanges bring governments, UN agencies and civil society actors from all global regions together and provide a space to discuss experiences with regard to the implementation of Objective 13 of the GCM, share challenges and concerns, identify promising practices, and explore opportunities for continued multi-stakeholder cooperation and whole-of-society approaches.

At the regional level, the **Inter-American Principles** state: "Detention must be a measure of last resort. All alternatives to detention must be explored."[100] The **Inter-American Court** has stated in the case of Velez Loor v. Panama that "those migratory policies whose central focus is the mandatory detention of irregular migrants, without ordering the competent authorities to verify in each particular case and by means of an individualised evaluation, the possibility of using less restrictive measures of achieving the same ends, are arbitrary."[101]

In the **Brazil Plan of Action,** governments of Latin America and the Caribbean "Recognize that the deprivation of liberty of migrant children in an irregular situation, ordered solely for this reason, is arbitrary and that consequently we must make progress in adopting alternatives to detention, aimed at its prohibition, that promote their care and welfare with a view to their full protection in light of their particular vulnerabilities, taking into account Advisory Opinion 21/14 of the InterAmerican Court of Human Rights, as appropriate."[102] The Plan of Action also includes action to "Design norms and operating procedures to introduce alternatives to administrative migratory detention of asylum-seekers, in particular for accompanied and unaccompanied children."[103]

In the 2016 **Migration Dialogue for Southern Africa (MIDSA)** dialogue,[104] fifteen Southern African countries made a significant commitment to "develop and implement" alternatives to detention, as well as to implement MIDSA Regional and National Action Plans to oversee progress. The States are Members of the Southern African Development Community (SADC), the first sub regional mechanism in Africa to focus explicitly on alternatives as a way to reduce immigration detention.[105]

The **European Court of Human Rights**' case law on the obligation to consider alternatives to detention has been developed in relation to cases of vulnerable persons, with a particular emphasis on children and people seeking asylum.[106] Numerous other bodies of the Council of Europe have reiterated the obligation for States to consider and rule out alternatives to immigration detention in each individual case.[107] The Council of Europe's foremost inter-governmental human rights body, the Steering Committee on Human Rights, has adopted an "Analysis of the legal and practical aspects of effective alternatives to detention in the context of migration,"[108] and a practical guide on "Alternatives to Immigration Detention: Fostering Effective Results."[109]

In Asia, through the **Association of Southeast Asian Nations** (**ASEAN**) Declaration on the Rights of the Child in the Context of Migration[110] and its accompanying Regional Plan of Action,[111] States have agreed that in order to promote the best interests of the child,

they will work to develop "effective procedures and alternatives to child immigration detention....and to ensure, where possible, children are kept together with their families in a non-custodial, and clean and safe environment."

National Law Examples - Obligation to Review Alternatives to Detention

A number of States have provisions in law which require the authorities to review ATD when considering immigration detention.[112] Some only allow for detention when ATD has been ruled out. In other countries, the use of ATD is discretionary or provided as a mechanism for release. Some countries set out specific ATD in law.

Türkiye - in 2019, amendments to the Law on Foreigners and International Protection (LFIP) for the first time introduced specific ATD in Turkish law. In relation to applicants for international protection: Article 68 (3) of the LFIP requires an individualised assessment of the necessity to detain. It states that "The **governorates may determine alternatives for administrative detention**. Where such measures are not sufficient, administrative detention shall be applied." In terms of pre-removal detention, Article 57(A) of the **LFIP lists seven specific ATD**: residence at a specific address, working on a voluntary basis for public good, reporting duties, family-based return, return counselling, financial guarantees, and electronic monitoring.[113] Note that IDC considers intrusive forms of electronic monitoring to be de facto detention, and not rights-based ATD.

EU legislation - only allows immigration detention when other sufficient but **less coercive measures cannot be applied effectively in a specific case.**[114] EU member States are obliged to implement this in national law, and all member States now have the concept of ATD in law.[115] The **Court of Justice of the European Union** (CJEU) has been clear that immigration detention may only be used (whether for the purposes of removal or during the asylum procedure) where on the basis of an individual assessment it proves necessary and if other less coercive alternative measures cannot be applied effectively.[116] The Court has further stated that domestic law must provide for the rules concerning alternatives to detention and national courts must be able to order alternatives to detention.[117]

In **Portugal**, a non-national cannot be detained purely based on their application for international protection. Moreover, a decision to detain must be based on an individual assessment and **may only be taken if other, non-coercive alternatives are unavailable**. The non-coercive alternatives outlined in law include a financial bond and reporting to the authorities. Electronic surveillance and house arrest are also established as "alternative measures."[118]

Hong Kong - Section 36 of the **Immigration Ordinance stipulates that 'recognisance' is an ATD**. When determining whether to detain someone or release them on recognisance, policy and immigration officials consider a range of factors including whether 1) releasing that person would create a public safety risk, 2) they are likely to abscond, 3) they have a close connection to or fixed place of residence in Hong Kong, and 4) their identity has been satisfactorily established.[119]

Considerations:

- An obligation to rule out alternatives before applying detention is stronger than a requirement to simply consider them, which would not meet international standards on the "last resort" principle.
- Where ATD are listed in law, they tend to be "enforcement-based" rather than based on engagement and rights.[120] These ATD are commonly drawn from the criminal justice field (e.g. periodic reporting with the authorities and electronic surveillance) and are used as an extension of coercive migration policies that criminalise migrants.[121] The CMW states that such ATD "are often excessively restrictive and are not appropriate in the context of migration."[122]
- Where alternatives are not listed in law, it can be difficult for judges to check that authorities have met the obligation to consider them.
- Despite an obligation in law, alternatives are often not considered by authorities in practice (see below).

Shortest possible time

Immigration detention is only justified for the shortest possible time, and not longer than absolutely necessary to achieve the legitimate State objective. The maximum permissible period for immigration detention must be set out in law and indefinite detention of individuals is arbitrary.[123] There must be prompt and regular review by a court or other independent and impartial tribunal to ensure the detention continues to be a necessary measure.[124]

The WGAD has affirmed that where there are obstacles to identifying or removing a person which are not attributable to the person, the person must be released in order to avoid potentially indefinite detention which would be arbitrary.[125] The principle of proportionality requires that detention has a legitimate aim, which would not exist if there were no longer a real and tangible prospect of removal.[126] UNHCR'S Detention Guidelines reaffirm that "Indefinite detention is arbitrary and maximum limits on detention should be established in law (Guideline 6).

National Law Example - Shortest Possible Time

Argentina - Article 70 of the National Migration Law states that in all cases, **the duration of detention "may not exceed what is strictly necessary** to effectuate the expulsion of the foreigner."[127]

European Union - the EU's Return Directive provides that "Any detention shall be for as **short a period as possible** and only maintained as long as removal arrangements are in progress and executed with due diligence" (Article 15 (1)).

b) What impact has the "last resort" principle had on detention practices?

Despite international standards and guidance that 1) States should phase out immigration detention, 2) that detention is prohibited in relation to certain groups/circumstances and 3) where it is used, detention should only be an exceptional measure of last resort, there continues to be a trend towards States using immigration detention as a generalised method of migration management and to punish and criminalise migration.

At the same time, there are significant differences across regions and countries, in terms of applying the "last resort" principle in law and practice. In South America, most countries either do not provide for immigration detention in law and in practice, or it is specifically prohibited or limited to an exceptional measure[128] and immigration detention is rarely used in practice, or not at all.[129] In Europe several countries have incorporated the "last resort" standard into law, particularly members of the European Union which are required to transpose EU legislation. Nevertheless, immigration detention continues to be widespread in Europe and particularly in the EU.[130]

In numerous countries in other parts of the world, legislation does not apply the "last resort" standard and authorities have discretion to apply immigration detention, which in some cases may also be a criminal measure. In practice, in Asia Pacific, there is widespread use of arbitrary detention with many countries using it as a de facto measure, in some cases mandatorily and/or indefinitely, such as in Australia.[131] In the Middle East and North Africa, the criminalisation and arbitrary detention of migrants, particularly people in an irregular situation - is a key concern.[132] In Africa, while most states do not detain non-nationals in the first instance, criminalisation and securitisation of migration, as well the disregard for laws regulating immigration, mean people are detained arbitrarily.[133] In a number of African countries, immigration detention is commonly applied as a criminal law penalty rather than an administrative measure. In North America, immigration detention has retained its mandatory character and continues to be used in the first instance.[134]

Where States have incorporated elements of the "last resort" principle into national legislation, this appears to be related to positive practice in limiting immigration detention in some cases. However, it is clear that having this obligation in national law does not automatically reduce the use of immigration detention or mean that authorities only use it exceptionally (as seen in the EU) - and certainly does not eliminate immigration detention entirely. There are many factors and gaps which influence how and to what extent the standard of "last resort" is implemented in practice.

Positive impacts

There are countries which have incorporated elements of the principle that immigration should only be an "exceptional measure of last resort" in legislation and rarely use immigration detention. For example, in Argentina, legislation provides that in cases of ir-

regularity, liberty is the rule and detention for deportation is an exceptional measure, which can only be ordered by a judge once all administrative and judicial remedies against deportation are exhausted and in order to enforce such a decision.[135] Despite the adoption of some regressive measures in 2016 and 2017, immigration detention is still rarely applied "reflecting a trend common to most countries in South America, where detention and deportation have historically not been given major importance.[136]"

The last resort principle has sometimes contributed to detention reduction in contexts where courts have been able to exercise effective judicial oversight of decisions to deprive migrants of their liberty. In Europe, the decisions of the European Court of Human Rights have led States to change immigration detention laws, policies and practices to restrict the use of detention.[137] At the national level, in countries including Germany (see above), Brazil and Chile, courts have contributed to limiting the use of immigration detention.[138] For example, it has been noted that in Chile, "the Courts of Justice have contributed to restricting the use of detention in cases of expulsion. In a critical decision, it was affirmed that detention is an exceptional measure aimed at enforcing a deportation order after exhausting remedies and with a maximum duration of 24 hours."[139] Judicial independence, culture and capacity to apply standards in individual cases involving immigration detention thus appear to be important factors in terms of the implementation of the "last resort" principle.

In addition, civil society actors in different countries reiterate that the last resort principle is useful as one basis for advocacy (see below) and legal work on individual cases, as it can be used to protect people from arbitrary detention and secure their release.

Gaps in implementation

At the same time, enshrining the "last resort" principle in legislation does not guarantee its implementation in practice nor does it necessarily lead to ending immigration detention. Sources consulted for this research indicated that the drivers of detention are often political, and government policies tend to have more impact on officer's decision-making than legal standards, especially where standards are not enforced by courts. Overall, advocacy is needed to address drivers for immigration detention and generate the political will for governments to phase it out systematically.

Even when elements of "last resort" principle are enshrined in law, implementing authorities often interpret grounds for detention broadly - for example, considering that not having

valid documents constitutes a risk of "absconding," or that undocumented people generally pose a security risk warranting detention – rendering the last resort principle ineffective. Technical legislative/policy tweaks are sometimes used by governments to broaden grounds for immigration detention, while the "last resort" principle appears to be observed.

Corruption and vested interests also hinder proper administrative processes and perpetuate immigration detention practices. Some governments use euphemisms and unofficial places for immigration detention to avoid legal limitations and oversight (e.g. hotspots, residency, shelter, hotels, barracks). In addition, governments are increasingly using digital technologies in migration management, which can involve considerable risks, restrictions on liberty and free movement in practice.[140] In some cases, the use of technologies leads to *de facto* detention - for example in the case of electronic tagging.[141]

In terms of capacity and gaps in technical implementation, many countries do not have screening and assessment processes, and front-line officers lack capacity to make individualised decisions on placement. A lack of communication among government institutions with different responsibilities and information about individuals can hamper informed decision-making. As mentioned above, a lack of effective judicial oversight, capacity and independence can mean judges do not apply standards or provide reasoning in individual decisions, rubber-stamping government decisions.

Even where there is an obligation to pursue ATD in law, there is often a lack of understanding, investment in and availability of community-based ATD that really work to respect people's rights, keep people engaged, move cases forward and lead to case resolution.[142] Pilots can test new approaches, but they are often small scale and not extended or scaled up. In this sense, governments can say they are considering ATD, but this consideration does not take place in the majority of cases and does not necessarily lead to the reduction of immigration detention in practice. Where ATD are not listed in legislation, it may be difficult for judges to check whether the authorities have met their obligation to consider and rule them out.

c) Factors that support the "last resort" principle in practice

IDC members and partners have highlighted the following key factors which can support the implementation of the "last resort" principle in practice.[143] The table also provides examples of civil society action taken to strengthen these elements as a way to work toward reducing and ending immigration detention in those contexts.

Factors supporting last resort principle in practice	Example of civil society action
Political will There is political will to move away from or reduce the use of immigration detention. Governments find other ways to address irregularity (regularisation, ATD) and/or accept irregular populations. This could be linked to approaches to migration management that prioritise rights and protection more broadly. In **South America**, a number of governments have demonstrated political will to prioritise rights in their responses to migration, rather than enforcement and immigration detention, e.g. in Colombia, Ecuador and Uruguay.[144] For IDC, countries that do not use immigration detention at all demonstrate best practice and are the ultimate source of inspiration in working to reduce and end immigration detention.	**Civil society mobilisation to build political will** In the **UK,** sustained **civil society mobilisation and collaboration** to delegitimise the use of detention over 10 years led the government to move away from its use of immigration detention and explore ATD. "Campaigners, charities, faith groups, lawyers, individuals, institutions and (crucially) migrants with experience of detention collaborated strategically over many years to transform the political debate." They "told a consistent and compelling story about the injustice of indefinite detention and the need for a time limit" and "succeeded in both **making detention a political problem**, and in **setting the narrative** for other actors to follow."[145]
Effective judicial oversight Judges involved in decisions understand the standards and are willing to apply them independently of the authorities. Often, judges are not experts in immigration or asylum law and have little understanding about what the "last resort" principle or its elements involve in practice. Sometimes, judges rubber stamp authorities' decisions to detain people, making the "last resort" principle ineffective.	**Strategic litigation** In the **Republic of Korea** lawyers have brought forward a case regarding the need for a time limit and judicial oversight of immigration detention decisions. This case is currently being heard by the constitutional court (see box below). **Training and sensitising judges** In **Bulgaria**, NGOs want to take judges to visit so-called "camps" so the judges can see the reality and understand that they involve deprivation of liberty. In **Poland**, The Association for Legal Intervention (SIP) sees a direct impact through training judges on the legal standards on immigration detention including the principle of "last resort:" judges who have been trained are being stricter regarding immigration detention decisions.

Factors supporting last resort principle in practice	Example of civil society action
Legal representation Ensuring people at risk of immigration detention have access to legal representation can improve court decisions and application of the "last resort" principle, particularly where judges lack expertise in this area of law.	**Calling for free legal representation** In **Germany**, there is currently very limited access to free legal aid for people in judicial proceedings relating to immigration detention. To address this gap, NGOs have presented policy proposals to ensure, in every case, legal representation in such proceedings, as a way to reduce arbitrary detention and better ensure that immigration detention is only used as an exceptional measure of last resort.[146]
Screening and assessment mechanisms These mechanisms are in place for proper individualised decision-making as early as possible and prior to detention. Often, a lack of individualised screening and assessment means blanket or generalised decisions about the need to detain, contrary to the principle of "last resort."	**Technical support to improve screening** In **Cyprus**, Cyprus Refugee Council (CyRC) developed and used a vulnerability screening tool within its case management ATD pilot project.[147] An adapted version of the tool was adopted by Cyprus's Asylum Service and is currently being used for joint screening on vulnerability in the First Reception Centre by the authorities (CODECA), UNHCR and CyRC under the supervision of the European Union Agency for Asylum.
Front-line officers have the capacity to make appropriate decisions on placement and management for individuals.	**Capacity building for front-line officers** In **Bulgaria**, the Centre for Legal Aid - Voice in Bulgaria has been working for a number of years with front-line officers, building their capacity and sensitivity regarding individual decision-making. Front-line officers tend to have more longevity, while politicians and higher level officers change. CLA is seeing progress in terms of the capacity of front-line officers to make individualised decisions about the need to detain, and is developing a protocol (handbook) for officers to support in decision-making.

Factors supporting last resort principle in practice	Example of civil society action
Alternatives to detention are available and provide officials with a viable option to ensure people stay engaged and to move cases forward. IDC believes that **adherence to the following principles** will ensure that ATD contributes to reducing and ending immigration detention. • ATD Must Respect **Human Rights** • ATD Must Use an **Intersectional Approach** • ATD Must Create **No New Harms** • ATD Must **Reduce Immigration Detention** • ATD Must Be Based on **Engagement Not Enforcement** • ATD Must Involve **Holistic Support** Often, there is a **lack of availability or understanding** regarding community-based ATD among authorities and judges - which is one reason why decision-makers resort to detention.	**ATD advocacy and pilots** The **European Alternatives to Detention Network (EATDN)** brings together civil society organisations implementing case management-based ATD in eight European countries (**Belgium, Bulgaria, Cyprus, Greece, Italy, Poland, Spain and the UK**), in partnership with regional-level and international organisations. The network aims to create a shift at a systemic level from enforcement-based migration management systems that rely on detention, to promoting community-based ATD. Ultimately, the goal of the EATDN is to reduce and eventually end the use of immigration detention (see box). For more on using ATD as a systems change strategy, see IDC's position paper.[148]

Factors supporting last resort principle in practice	Example of civil society action
Whole-of-government whole-of-society approach Proper communication and coordination among institutions and actors involved in an individual's case, can ensure that decisions are made with all the relevant information. Often, institutions do not share information meaning that decision-making authorities lack the complete picture about the individual's situation.	**Supporting whole-of-government whole-of-society approach** In **Thailand**, civil society supported the government to develop a policy on ATD for children and families. Under an MoU signed by seven government agencies in 2019, Thailand has started to release children and mothers from immigration detention. Implementing SOPs adopted in 2020 provide for inter-institutional communication through the establishment of a **Multi-Disciplinary Working Group** (MWG), composed of Immigration officials, competent officers under the Child Protection Act of 2003, and representatives from UNHCR, UNICEF and IOM. The MWG is required to consider ATD and develop an **individual care plan** for each child, and coordinate with relevant service providers to implement the care plan.[149] In Mexico, IDC together with close partners Institute for Women in Migration (IMUMI), Asylum Access Mexico and Kids in Need of Defense (KIND) work together as a consortium to support development, implementation and roll-out of the National Protocol for the Comprehensive Protection of Migrant Children. The consortium has prioritised training for local child protection authorities in the southern border states of Veracruz, Chiapas and Tabasco, as well as technical expertise for establishing multi-stakeholder committees, together with state and local protocols for implementation. The consortium has also facilitated peer learning events that support coordination among stakeholders and more informed decision-making.[150]

Factors supporting last resort principle in practice	Example of civil society action
Last resort in law and concrete implementation legislation Specific standards are set out in law. Implementing regulations can also provide concrete guidance to the authorities on how to apply this. For example, this could include factors to consider in terms of whether detention is necessary to meet a given objective; or which ATD are available and should be ruled out before detention. In some contexts, the administrative culture means authorities will only apply what is written in law. It can also help judges provide oversight as to whether the authorities met requirements.	**Advocacy for strengthening legal standards** In **Mexico**, a civil society advocacy task force is advocating for the inclusion of specific legal standards regarding detention in legislation that regulates immigration and asylum.

4. Using the "last resort" principle in civil society advocacy:

a) Mapping different civil society approaches related to using the "last resort" principle in advocacy

To ensure a healthy and vibrant ecosystem of change, diverse approaches from a range of actors are absolutely necessary in the movement to end immigration detention. As a diverse sector, civil society often undertakes a range of strategies, implementing multiple approaches simultaneously.

This includes advocacy approaches which may or may not use the "immigration detention as an exceptional measure of last resort" principle explicitly or implicitly and at different times, as mapped in this section. These approaches are not exclusive of one another, often exist on a spectrum, and they can and do complement each other in many contexts.

Given that advocacy environments are constantly changing, civil society strategies also need to be adapted to respond to newly arising risks and opportunities. While it might be useful to use the "last resort" principle at a certain time, it may be effective to move on to other approaches as we progress along our theory of change towards an end to immigration detention entirely (see also 'contextual considerations for civil society actors' below).

Focusing on ending immigration detention, including for certain groups

Such advocacy campaigns focus on ending immigration detention without using the "last resort" argument. These efforts and campaigns might be national or local and include those that seek to build pressure or otherwise persuade governments to introduce prohibitions on immigration detention in law or policy, close immigration detention centres and/or stop detaining specific groups of people in practice.

> Successful joint civil society efforts in **Mexico**, together with government engagement by UN agencies, resulted in the outlawing of child immigration detention by the Mexican Congress in 2020. With the goal of ending the immigration detention of children and envisioning an alternative framework and practice, IDC and its members and partners played an instrumental role through a range of diverse advocacy strategies, including national and global campaign work, regional and global advocacy, technical assistance in piloting ATD and developing a national protocol, as well as training and engagement with legislators.

In **Belgium** a platform of child rights organisations coordinated a national campaign to end immigration detention of children:[151] *"We wanted the campaign to have a simple message which could appeal to people's core values. This is how we chose our campaign slogan "You don't lock up a child. Period."*[152]

> In the **UK**, a local campaign focused on closing the campsfield immigration detention centre near Oxford.[153]

Using the "last resort principle" in advocacy

This involves utilising the protection standard of "immigration detention as a measure of last resort" explicitly or implicitly to support incremental change towards reducing immigration detention, which has potential to support ongoing efforts to end immigration detention entirely.

This includes a range of approaches: from those where applying the "last resort" principle is a central demand, to those where it is used as part of (not necessarily the main or most visible component of) a broader strategy, e.g. within a narrative or as a premise for systems change - these approaches may also be combined.

As an explicit **advocacy demand** (to introduce/implement), for example:

- Advocating for legislation enshrining the "last resort principle" in national law
- Calling on government to ensure detention is only used as a measure of last resort

As an existing legal **standard to leverage** or support, for example:

- Legal action to prevent arbitrary detention in individual cases

- Strategic litigation to influence policy and reduce government use of detention
- Capacity building and technical advice to ensure "last resort" principle is better implemented in practice

As **a premise** for broader systems change advocacy to reduce and ultimately end immigration detention.

The European ATD Network uses the "last resort" principle in its advocacy for ATD as a systems change strategy towards ending immigration detention (see also box on EATDN below)**.** One EATDN member explains: *"It's a key standard, a must have - even if it is not implemented properly in practice, it's something to step on. We use it mainly in our legal work but also as a premise and argument in our advocacy and papers. It's not only a political concept, but a legal concept, which is important because it has a definition and strict criteria to be applied."* Diana Radoslavova, Centre for Legal Aid - Voice in Bulgaria.

In Thailand, IDC engages in ongoing efforts with the Coalition for the Rights of Refugees and Stateless Persons (CRSP) to develop and implement the ATD MOU towards ending child immigration detention. This has involved direct advocacy with the Thai government and the creation of a community of practice in Thailand. These efforts have resulted in more than 300 children and mothers released from immigration detention. *"Without the "last resort" principle, we wouldn't have been able to get government buy-in for civil society organisations' proposal on the MOU-ATD for the release of children."* Mic Chawaratt, Southeast Asia Programme Manager, IDC. (see also the example of Thailand above and box below).

Similarly, Mexico's recently established Grupo de Acción por la No Detención de Personas Refugiadas is currently advocating to end the detention of people seeking asylum, balancing a principled and solutions-based strategy aimed at legislative and policy reform. The task force, co-lead by IDC and Asylum Access Mexico, is considering a variety of strategies in their engagement with legislators and policy makers, including the principles of "last resort" and "exceptionality." These are complemented by other initiatives, such as social media campaigning and multi-site visits to key detention facilities in border regions.

Working to reduce immigration detention (without using the standard of "last resort")

Working practically to reduce immigration detention, leaving governments room to use immigration detention without referencing the "last resort" argument in restrictive contexts where other methods have little chance of success.

IDC is working in Malaysia with the End Child Detention Network (ECDN) and a community of practice has been established to advocate for ATD for children. Efforts have resulted in the Malaysian Cabinet approving an ATD pilot project for unaccompanied minors that is yet to be implemented. *"The coali-*

tion aims to end child immigration detention, but in our discussions with the government we focus on ATD to reduce detention of children as an achievable step. Our key message is - let's start the ATD pilot, and learn and adapt along the way!" Hannah Jambunathan, Community & Engagement Organiser - Malaysia, IDC.

Using "last resort" as part of a longer-term strategy to end immigration detention

Depending on the context, working on ending detention and the principle of "last resort" is not necessarily mutually exclusive. Civil society campaigns sometimes choose to link the two: ending immigration detention, including of certain groups, might be an end goal, while working to reduce detention to an exceptional measure - including by leveraging the "last resort" principle - could be an advocacy message or interim step, as part of an incremental process of change.

Similarly, within the international human rights system, human rights mechanisms recommend that States work towards gradually ending immigration detention, while setting out the legal obligation that when States still do detain individuals for migration-related reasons, this is only as an exceptional measure of last resort.

Italy - "Last resort" to catalyse a process towards ending immigration detention

In their 2020 article "It is time to stand up against migrant detention" two seasoned activists working to end immigration detention in Italy called on the Italian government to: 1) suspend opening of new CPRs (immigration detention centres) and expansion of Italian detention industry and 2) re- interpret Italian and EU legislation and consider immigration detention as a measure of last resort. The authors wrote: *"We believe that, in making detention a measure of last resort a process that would eventually see the end of detention in Italy could be initiated. This would eliminate unnecessary and cruel confinement in what we can describe as 'ethnic prisons.'*[154]

In practice, civil society often uses multi-pronged approaches and actors must decide, with their communities and in accordance with local realities, what will work best and be achievable in their context and what the bottom lines are. Further, migrant and refugee-led groups, particularly leaders with lived experience of detention, must be supported and centred in these strategic decisions, as they are the ones driving change on the ground, and best understand the challenges facing their communities, the realities and impacts of immigration detention, as well as the potential solutions. In the experience of some IDC members, advocacy can be more effective when civil society actors using diverse approaches coordinate with each other towards shared goals.

Legal action and advocacy in the Republic of Korea

Immigration detention is a relatively recent issue in the Republic of Korea and two key concerns are the lack of judicial review and the fact that people can be detained indefinitely. A group of lawyers have brought a case on these two issues, which is currently being heard in the Constitutional Court. As lawyers, they try to work with the law and court procedures to achieve change on immigration detention. Although it doesn't feature explicitly in the case, there is a consensus among lawyers working on the case that immigration detention should only ever be used as an exceptional measure of last resort.

In terms of advocacy on immigration detention, civil society actors in the Republic of Korea have tended to focus on what's possible and pressing issues where decision-makers are more likely to listen. For example, in the past NGOs made proposals for law reform to end child immigration detention, introduce a time limit for detention, ensure due process and the principle of "last resort." During the period of the 20th National Assembly (2016-2020), the "last resort" proposal had less impact in terms of advocacy, as it was not taken up by Assembly Members as some of the other issues were.

To date, the civil society discourse has tended to focus on ensuring the principle of "last resort" to limit detention, but recently there are voices calling for ending immigration detention completely - actors with different approaches respect each other and work together. Migrant rights NGOs have also highlighted the need to work on other issues that impact the everyday lives of migrant communities, including the situation of people who are released or those who are not detained and can't work, or people who can't be deported for various reasons. It is critical to advocate to ensure that all migrants are able to lead healthy and stable lives.[155]

b) Opportunities and challenges in using the "last resort" principle in advocacy

Contexts differ greatly in terms of migration patterns and systems, use of immigration detention, experiences of people impacted by detention, as well as the openness of governments to engage with civil society. IDC members and partners in different contexts shared some **key opportunities and challenges** for this paper that they have experienced in terms of using the "last resort" principle in advocacy. They are presented here as factors to consider when developing strategies in different contexts.

Strengths/Opportunities of advocacy based on "last resort" principle

Allows us to leverage existing **legal standards** (international, and in some cases regional or national law as well). We are calling on States to implement what they have already committed to.

Opens the door for **government engagement** by indicating acceptance of the government's role in managing migration, and can make our proposals more acceptable for certain government departments, and thus more achievable.

Use as a basis for possible interim steps and **incremental change** in a given context. For example, in contexts with routine or mandatory detention, introducing release mechanisms or community placement based on the "last resort" principle could be an important step forward.

Use to encourage the idea that **much more can be achieved** to reduce detention and ensure rights if the "last resort" principle is better implemented in practice, even within the current legal framework.

A potential premise for **broader systems change advocacy**, to catalyse processes towards reducing and ending detention and working towards fairer, more humane migration governance. For example using ATD as a systems change strategy.[156]

A **flexible concept** with room for interpretation, which can form the basis of constructive advocacy and use of common language. For governments: it's a legal standard which (they claim they are already implementing). For civil society it's a means for "reducing detention further" and eventually ending it.

Risks/Challenges of advocacy based on "last resort" principle

The last resort principle in law **does not mean it is implemented in practice**. It can be useful in individual legal cases, but can be lacking in terms of the overall detention system. Political will plays a huge role. Certain supportive elements might need to be in place to contribute to its application in practice (see above).

Some governments may not be open to **arguments about legal standards** on immigration detention (it might be too sensitive or they are not motivated by legal obligations).

The existence of national standards and rules related to the "last resort" principle might make it seem that immigration detention is well-regulated, which could be used by the authorities to **legitimise the use of detention**, while in reality the standard is rarely met.

It might be **regressive** to introduce legal provisions that allow for immigration detention even as a "last resort" e.g. if immigration detention is not permitted by higher standards.

Impact depends on **judicial independence, capacity and culture** - where there is little will and ability to apply detailed legal standards and reasoning in individual cases, the "last resort" principle may have little impact.

Proactively asking for implementation of the "last resort" standard means **accepting the use of detention, at least for now.**

Using the "last resort" principle may involve working within the **current migration governance approach** - which in many contexts is control-based and re-

Use to enhance advocacy and narratives to end immigration detention - depending on the context, the two approaches do not have to be mutually exclusive

strictive, and linked to criminalising migrant communities. In some contexts, we might need to work explicitly towards a paradigm shift as well or instead.

Using ATD as a systems change strategy is also possible with a narrative that focuses on ending detention - for example in some campaigns to end child detention.

The meaning of "last resort" is **vague and may leave too much open to interpretation** by the governments and courts. For some actors, it might also be **too legalistic**. Governments tend to interpret it to broaden the use of detention, while courts often rubber stamp the authorities decisions.

There may be **strategic differences among civil society actors** about the "last resort" approach, and these potential divisions may impact its overall influence in a given context.

The European Alternatives to Detention Network (EATDN)

The EATDN is a group of NGOs that aims to end immigration detention in Europe.[157] Established in 2017, it brings together civil society organisations implementing case management-based ATD in eight European countries (Belgium, Bulgaria, Cyprus, Greece, Italy, Poland, Spain and the UK) in partnership with regional-level and international organisations.

The network aims to create a shift at a systemic level from enforcement-based migration management systems that rely on detention, to promoting community-based alternatives. Ultimately, the goal of the EATDN is to reduce and eventually end the use of immigration detention in Europe. The core of the EATDN's strategy is to build evidence and momentum on rights-based approaches which are based on the principles of case management in the community, in order to demonstrate how migration management without immigration detention can be effective.

In its advocacy, the EATDN references the fact that "EU law states that immigration detention should only ever be used as a last resort and in specific circumstances." It highlights that European governments rarely conduct individual assessment and frequently apply immigration detention as a first option before considering ATD. When governments use ATD, they tend to be focused on "traditional" or "enforcement" approaches, whereas ATD based on case management are more effective in supporting people to work towards resolving their case.

The EATDN's members implement and test case management-based approaches aimed at supporting individuals in an irregular situation to work towards a durable solution while living in the community. They also provide non-coercive, non-enforcement based ATD to support people who would or could otherwise be detained, and promote the further expansion of this model over enforcement-based ATD. The pilots are all carried out in line with the principles of IDC's Community Assessment and Placement (CAP) model, employing case managers to work with individuals at risk of immigration detention in order to ensure that their holistic needs are being met.[158]

c) Contextual considerations for civil society actors

In IDC's experience, change is always context specific and advocacy approaches used will depend on specific regional and national political, historical, and migratory contexts, including contexts of mandatory detention, transit, as well as destination countries, all of which can also change over time. Whether and how civil society actors use concepts such as "last resort" in advocacy will depend on a broader strategy and theory of change for ending immigration detention - actors may find it useful to consider:

- What is our vision - what do we want to achieve in the end?
- What are the interim steps we need to achieve to get there (are our goals SMART)?
- Who has the power to make this change (power map)?
- Who can effectively influence these decision-makers ?
- Who do we need on board? How can we build power?
- What are the current and future opportunities and entry points?

Political environments are changing and civil society actors will need to regularly reassess their contexts to determine the best strategy at the time. Here are some contextual considerations, highlighted by IDC team members, IDC members and partners, which can support civil society actors considering using the "last resort" principle in advocacy to think through possible courses of action.

What does the government care about?

In assessing the context, civil society actors can ask: what are the drivers for the government to use immigration detention and what does the government care about? Often, governments prioritise security and border control, but are there other factors we could leverage in our advocacy? Are there vested/financial interests in detaining? Are there common interests relating to migration governance we could use to influence decision-makers? Do we need to build pressure for change?

Which processes and actors can influence decision-makers?

- For example, could legal action/ the courts impact the government's use of immigration detention? What about other government departments/local authorities? Or international organisations and mechanisms, participation in international and regional processes or influence from other governments?
- Could the "last resort" principle or calls to reduce or end immigration detention support the above? What are the opportunities and risks?

How is migration framed by the government?

Does the government frame migration (at least partly) in terms of legal standards and human rights? If yes, could the "last resort" principle be a useful

standard to leverage (for example, in the European Union)? Or is it framed primarily as a security or humanitarian issue? In which case, might legal and human rights arguments not have such traction (for example in some MENA countries)? Or could there be an opportunity to influence the government to start using human rights principles by inserting concepts such as "last resort" in advocacy?

who requires appropriate safeguarding in their advocacy?

Critically, what different roles and approaches complement each other and move things forward? How can we ensure that our approaches are complementary so that we can build power together, rather than reduce our collective influence by failing to coordinate strategically?

Is it possible to build a multi-diverse coalition?

Considerations for civil society coalitions: who do we have on board and what are our strengths that we can draw on? For example: do we have capacity in legal and policy advocacy? Or in service provision? Or in community organising? Who can speak openly and

Coalitions can also consider how much collective influence they currently have and who else is needed to have influence? Could using principles like "last resort" support collective action or are other concepts and approaches more useful?

How is it being ensured that people with lived experience and impacted communities are centred in strategic decisions?

Coalitions will need to consider how they can centre people with lived experience and impacted communities in strategic decisions to ensure more powerful, principled and ethical advocacy. Advocating for immigration detention as a measure of "last resort" can involve questions of principle and the need to decide on bottom lines that have real impact on communities, including what people are willing to accept or not in the short-term to potentially benefit the long-term. These are critical questions and discussions, and coalitions must ensure that they are not acting as gatekeepers to knowledge and information that can support informed decision-making by those most impacted. In short, a key consideration for coalition is - how can we meaningfully partner with leaders with lived experience of immigration detention in advocacy?

What are the compelling demands in your context?

Selecting key compelling demands can help grow support and make it more likely that decision-makers will listen. For example, groups in different contexts have called on governments to close detention centres, introduce time limits on detention, stop detaining children or other people in vulnerable situations, start piloting community-based ATD, strengthen due process, and introduce "last resort" principle into legislation. The powerful demand can help bring others on board.

Does national law already include the principle of "last resort"?

In contexts which already have the "**last resort" principle in law**, it could be a key standard to rely on: for legal action in individual cases, for technical and capacity building towards better implementation and advocacy and government engagement for incremental change to reduce and potentially end immigration detention. For example, civil society groups in the EU often rely on this principle in their advocacy.

At the same time, there might be risks to consider in accepting the government's use of immigration detention or the current migration governance approach. Also, there could be risks in terms of coalition building and divisions among civil society regarding this approach which are worth understanding and/or addressing first.

Civil society actors considering **law reform** to introduce or strengthen the "last resort" principle in law can consider, together with impacted communities:

- What potential impact might this have? Both positive and negative, especially on impacted communities.
- What are the opportunities and risks (see table above)?
- What is the legal and administrative culture in our context?
- Does the judiciary have the necessary capacity and culture to apply the "last resort" principle in a way that would restrict the use of de-

tention? How else could it be useful?

- Are there more effective legal changes that could better manage risks?

How politically sensitive is immigration detention as an issue?

Is it safe for civil society to criticise immigration detention? If direct criticism is not viable, could using the "last resort" principle open the door for constructive dialogue with the authorities? Or would other demands be more effective, such as ensuring a time limit for immigration detention or focusing on children in immigration detention?

For more resources and workshop templates on building strategy, power mapping, issue analysis, and campaign planning, please see IDC's Community Leadership Curriculum.

Advocacy towards ending child detention in Thailand

In Thailand, seven government agencies signed a Memorandum of Understanding on the Determination of Measures and Approaches Alternatives to Detention of Children in Immigration Detention Centres (the MOU-ATD) in 2019, with SOPs to implement the MOU following in July 2020.[159]

The MOU-ATD states that children should not be detained, unless there is an "absolute necessity," and that detention be used as a measure of last resort only and for the shortest time possible. The best interests of the child must inform decision-making, and the child's opinion must be taken into consideration. It also prioritises family-based care, with shelters as a measure of last resort and for the shortest time possible. Children released under the MOU-ATD are supported by two NGOs, Step Ahead and Host International Thailand, who assist in reporting requirements and providing case management support in the community.[160]

"With other civil society organisations, IDC worked to support the government to develop a policy on ATD for children and families. The MOU-ATD uses the 'last resort' language for children and this was an important compromise to get the policy in place. If there had been no flexibility for the government to use detention, it would not have been possible to get certain government departments to buy-in. In Thailand, refugee and migration policy relies mainly on security and humanitarian concepts, but over the last ten years we're seeing a shift with the government starting to use human rights concepts. There are a number of key gaps in the MOU-ATD and its related SOPs, but they mark important steps towards ending the immigration detention of children in Thailand". Mic Chawaratt, Southeast Asia Programme Manager, IDC.

"We did a lot of work to get the MOU-ATD off the ground. It is significant because women and children are now being released. But it's not perfect, there are many issues in implementation and it's not a silver bullet - we see it as a stepping stone. Our position now is that everyone should be released and there should be no immigration detention at all. There are international law arguments, but also many other reasons: detention is destroying families and peoples' mental and physical health; detention is costing the government huge amounts of money; and there are so many other ways: alternatives to detention from across the world that allow governments to keep track of people and for them to lead a normal life. It's difficult to talk about "last resort" when abuse is so egregious and has gotten to such a level, with extortion and corruption in detention and the broader system." Patrick Phongsathorn, Human Rights Advocacy Specialist, Fortify Rights

Endnotes

1 "The right to liberty is recognised in article 3 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, article 16 of the Convention on the Rights of Migrant Workers, article 37 (b)–(d), of the Convention on the Rights of the Child, article 14 of the Convention on the Rights of Persons with Disabilities, article 6 of the African Charter on Human and Peoples' Rights, article 7 of the American Convention on Human Rights, article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), article 14 of the Arab Charter on Human Rights, and article 12 of the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration," UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 5 (2021) on migrants' rights to liberty and freedom from arbitrary detention,* CMW/C/GC/5.

2 See e.g. Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 3.

3 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 5 (2021) on migrants' rights to liberty and freedom from arbitrary detention*, CMW/C/GC/5. para 17.

4 OHCHR, *Initial written submission to General Comment No. 5 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on the Right to Liberty and Protection from Arbitrary Detention*, April 2019.

5 As stated by numerous UN human rights bodies, see ""non-criminalisation" below.

6 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 5 (2021) on migrants' rights to liberty and freedom from arbitrary detention*, CMW/C/GC/5, para 37

7 See for example: WHO Regional Office for Europe, *Addressing the health challenges in immigration detention, and alternatives to detention: a country implementation guide*, 2022; Von Werthern M, Robjant K, Chui Z et al., 'The impact of immigration detention on mental health: a systematic review', *BMC Psychiatry, vol. 18,* 2018; Mares S, 'Mental health consequences of detaining children and families who seek asylum: a scoping review', *Eur Child Adolesc Psychiatry 30,* 2021, pp. 1615-1639; International Detention Coalition, *There are Alternatives: A handbook for preventing unnecessary immigration detention*, revised edition, 2015, page 5.

8 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, op. cit. Para. 1.

9 While the international human rights law framework as developed by the Human Rights Committee relates to all forms of deprivation of liberty, it was largely developed in relation to criminal forms of detention, interview with José Antonio Guevara Bermúdez, former member of the UN Working Group on Arbitrary Detention, in October 2022.

10 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, op. cit. para. 47.

11 UN Working Group on Arbitrary Detention, A/HRC/13/30, 15 January 2010, para 58

12 OHCHR, *Initial written submission to General Comment No. 5 of the CMW*, April 2019, para. 12

13 UN Network on Migration, *Policy Brief - COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?*, 2020; see also

14 Principle 68, Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, Resolution 04/19 approved by the Commission on December 7, 2019.

15 Over the last decade, there have been developments in international law with authoritative guidance now affirming that children should never be detained for reasons related to their migration status because it is never in their best interests. In their joint General Comment of 2017, the UN Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, stated that the detention of children because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. The joint General Comment clarified that the 'last resort' principle does not apply to immigration detention of children and called for States to cease the practice and allow children "to remain with family and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved." See *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/CG/3-CRC/C/GC/22. Also see Annual report of the Special Representative of the Secretary-General on Violence against Children (A/76/224), 2021, stating that immigration detention is a form of violence against children; and the *Joint Statement by the United Nations Network on Migration on Child Immigration Detention (16 September 2019)* in which it states: "Today, the United Nations Network on Migration strongly reiterates its position that child immigration detention must be ended in every region of the world." The Inter-American Court of Human Rights set out the principle of non-deprivation of liberty of children owing to their irregular migratory situation in its Advisory Opinion OC-21/14 on 'The Rights and Guarantees of Children in the Context of Migration and/or in need of international protection,' 2014. According to Pablo Ceriani Cernadas, "In the Advisory Opinion the Inter-American Court concludes that there is no sufficient ground for depriving a child of liberty for migration purposes, not even as a last resort measure. This prohibition of detention applies not only to unaccompanied and separated children but also to families", see Pablo Ceriani Cernadas, *Immigration Detention Through the Lens of International Human Rights: Lessons from South America, Global Detention Project Working Paper No. 23*, 2017.

16 Article 31, 1951 Convention Relating to the status of Refugees. UNHCR's Detention Guidelines, 2012, reaffirm that detention as a penalty for illegal entry and/or as a deterrent to seeking asylum would be arbitrary, see Guideline 4.1.4. The UN Working Group on Arbitrary Detention considers deprivation of liberty as arbitrary when it when it results from the exercise of rights under the UDHR, including article 14: the right to seek and to enjoy asylum, see *Report of the Working Group on Arbitrary Detention United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, 6 July 2015, para. 10(b). The Inter-American Principles on the Human Rights of All Migrants state that migrants with international protection needs should never be detained (Principle 69 (f)).

17 The Committee on Migrants Workers has affirmed a "principle of non-detention of persons in vulnerable situations" which means that states should "avoid detaining migrants who have specific needs or who are at particular risk of exploitation, abuse, gender-based violence, including sexual violence, and other human rights violations in the contexts of detention," UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, op. cit, para 52 and 53. The Inter-American Principles on the Human Rights of All Migrants (op.cit) state that "Migrants with international protection needs and migrants in vulnerable situations, including pregnant women, breastfeeding women and victims of trafficking must never be detained" (Principle 69(f)).

18 UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 41: "The detention of migrants in other situations of vulnerability or at risk…must not take place."

19 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 23; Pablo Ceriani Cernadas, *Immigration Detention Through the Lens of International Human Rights: Lessons from South America, Global Detention Project Working Paper No. 23*, 2017, page 16.

20 UN Network on Migration, *Temporary regularisation programmes - Snapshot*, May 2022.

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22 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, paras. 44 and 45

23 UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 12.

24 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2012, para. 68.

25 Inter-American Commission on Human Rights,*Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking*, Resolution 04/19; Inter-American Commission on Human Rights, Human Rights of Migrants, Refugees, Stateless Persons, *Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, OEA/Ser.L/V/ II.Doc. 4 6 /15; see also International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 12.

26 Inter-American Commission on Human Rights (2015) 'Refugees and Migrants in the United States: Families and Unaccompanied Children', OAS/Ser.L/V/II. 155, available at: http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf (last accessed 20 April 2022). Also see Inter-American Commission on Human Rights (2013) 'Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico', OEA/Ser.L/V/II, available at: http://www.oas.org/en/iachr/migrants/docs/pdf/Report-Migrants-Mexico-2013.pdf (last accessed 20 April 2022).

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31 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, paras 21 and 45.

32 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para 21; UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 19 "The detention must comply with the principle of proportionality and as such, automatic and/or mandatory detention in the context of migration is arbitrary".

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34 Refugees Amendment Act (11 of 2017).

35 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention, Annex: Country Profiles*, May 2022, page 72.

36 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention, Annex: Country Profiles*, May 2022, page 80.

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41 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2012,

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44 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 41.

45 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2012, para. 13.

46 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 41.

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48 Article 31, 1951 Convention Relating to the Status of Refugees

49 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2012, para 13.

50 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2012, para 10.

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52 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 25.

53 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 25

54 Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II, 2013.

55 Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II, 2013, para 437.

56 Article 70 of the NML as amended by the Decree of Necessity and urgency 70/2017, see Global Detention Project, *Country Report: Immigration Detention in Argentina: A Paradigm Shift?*, 2020, page 10.

57 Global Detention Project, *Country Report: Immigration Detention in Argentina: A Paradigm Shift?*, 2020, page 10.

58 Global Detention Project, *Country Report: Immigration Detention in Argentina: A Paradigm Shift?*, 2020, page 11.

59 European Union Agency for Fundamental Rights,*Detention of third-country nationals in return procedures*, 2010, pp. 16 - 19.

60 See European Union Agency for Fundamental Rights, *Detention of third-country nationals in return procedures*, 2010, page 16.

61 European Union Agency for Fundamental Rights, *Detention of third-country nationals in return procedures*, 2010, page 17.

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63 Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 12.

64 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, op. cit, para 22.

65 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, op. cit, para 28.

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70 International Detention Coalition, *Gaining Ground, Annex: Country Profiles*, 2022, page 94.

71 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 23.

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77 Global Detention Project, *Country Report: Immigration Detention in Argentina: A Paradigm Shift?*, 2020.

78 Immigration Regulations, 2014 in GNR.413 GG 37679 of 22 May 2014.

79 Lawyers for Human Rights, Monitoring Policy, Litigious and Legislative Shifts in Immigration Detention in South Africa, 2020, page 20.

80 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 29.

81 UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 24, UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 29.

82 Under paragraphs 57 and 62 of the Residency Law (Aufenthaltsgesetz)

83 See Collection of Decisions of the Federal Constitutional Court (BVerfGE) vol. 23, p. 127 (pp. 133 et seq.); vol. 48, p. 396 (p. 402); vol. 83, p. 1 (p. 19); vol. 107, p. 299; vol. 109, p. 279 (pp. 335 et seqq.)

84 High Court of Düsseldorf, Decision of 13 June 2006 I-3 Wx 140/06

85 See Supreme Court of Germany, Decision of 26 June 2017 V ZB 7/17

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88 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2012, para. 50.

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90 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 55.

91 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 48.

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93 UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, 2018, Objective 13.

94 UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, 2018, Objective 13.

95 United Nations, Global Compact on Refugees, 2018, para. 60.

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98 See for example, UN Network on Migration 'Snapshots' on: *Ending child immigration detention, 2022; Scaling-up community-based ATD*, 2022; *Temporary regularisation programmes*, 2022; and *Whole-of-Government Whole-of Society approaches*, 2022.

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100 Principle 69

101 Inter-American Court of Human Rights, Velez Loor v. Panama, judgment November 2010.

102 Regional Refugee Instruments & Related (2014), *Brazil Declaration and Plan of Action*, 3 December 2014, available at: https://www.refworld.org/docid/5487065b4.html [accessed 16 November 2022],

103 See Regional Refugee Instruments & Related (2014), *Brazil Declaration and Plan of Action*, 3 December 2014, available at: https://www.refworld.org/docid/5487065b4.html [accessed 16 November 2022], The "Borders of Solidarity and Safety" Programme (c).

104 See IOM, Migration Dialogue for Southern Africa (MIDSA), accessed 3 January 2023.

105 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 11.

106 Steering Committee for Human Rights (CDDH), *Legal and practical aspects of effective alternatives to detention in the context of migration*, 2018, see for example, ECtHR, Nikoghosyan and Others v. Poland, no. 14743/17 (2022); ECtHR, Thimothawes v. Belgium, no. 39061/11 (2017); ECtHR, S.K. v. Russia, no. 52722/15 (2017).

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108 Steering Committee for Human Rights (CDDH), *Legal and practical aspects of effective alternatives to detention in the context of migration*, 2018.

109 Council of Europe, Alternatives to Immigration Detention: Fostering Effective Results, Practical Guide, adopted at Adopted at the 91th CDDH meeting (18–21 June 2019).

110 ASEAN Declaration on the Rights of Children in the Context of Migration, 2019.

111 Regional Plan of Action on Implementing the ASEAN Declaration on the Rights of Children in the Context of Migration.

112 Legislation might use the term "alternatives to detention" or other terms such as "less coercive measures" or refer to specific ATD measures themselves.

113 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 32; UN Network on Migration, *Immigration Detention and Alternatives to Detention in the Asia-Pacific Region*, 2022, page 78

114 EU Return Directive 2008/115/EC Article 15(1), EU Reception Conditions Directive 2013/33/EU Article 8(2).

115 European Migration Network, *Detention and alternatives to detention in international protection and return procedures*, 2022, page 15; European Union Agency for Fundamental Rights, *Detention of third-country nationals in return procedures*, 2010.

116 See for example: Joined cases C924/19 PPU and C925/19 PPU Országos Idegenrendeszeti Föigazgatóság Dél-alföldi Regionális Igazgatóság, Judgment of 14 May 2020 (Grand Chamber); in Case C-61/11 PPU El Dridi, Judgment of 28 April 2011, the Court stated '(T)he Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him'. Within the return procedure, there is 'a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised

facility; the principle of proportionality must be observed throughout those stages.' (paras 39, 41); and Case C-528/15 Al Chodor and Others, Judgment of 15 March 2017 relating to the EU's Dublin III Regulation.

117 Joined cases C924/19 PPU and C925/19 PPU Országos Idegenrendeszeti Föigazgatóság Dél-alföldi Regionális Igazgatóság, Judgment of 14 May 2020 (Grand Chamber).

118 International Detention Coalition, *Gaining Ground, Annex: Country Profiles*, 2022, page 68.

119 UN Network on Migration, *Immigration Detention and Alternatives to Detention in the Asia-Pacific Region,* 2022, page 25.

120 "Engagement-based ATD builds trust, supports empowerment, and promotes agency and wellbeing so people can actively participate in processes that affect their rights and futures", see International Detention Coalition, *Using ATD as a Systems Change Strategy Towards Ending Immigration Detention*, 2022, p. 19.

121 International Detention Coalition, *Using ATD as a Systems Change Strategy Towards Ending Immigration Detention*, 2022, p. 19.

122 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 59.

123 UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, paras 25 and 26.

124 UN Committee Migrant Workers (CMW), *General Comment No. 5*, 2021, para. 52.

125 UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 27.

126 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2012, para. 24.

127 Unofficial translation

128 Pablo Ceriani Cernadas, *Immigration Detention Through the Lens of International Human Rights: Lessons from South America, Global Detention Project Working Paper No. 23*, 2017.

129 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention,* May 2022, page 23; Pablo Ceriani Cernadas, *Immigration Detention Through the Lens of International Human Rights: Lessons from South America, Global Detention Project Working Paper No. 23*, 2017.

130 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, p15.

131 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 14; UN Network on Migration, *Immigration Detention and Alternatives to Detention in the Asia-Pacific Region*, 2022

132 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 16.

133 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 11.

134 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 13.

135 Pablo Ceriani Cernadas, *Immigration Detention Through the Lens of International Human Rights: Lessons from South America, Global Detention Project Working Paper No. 23*, 2017. (The law in Argentina does not provide that alternatives to detention need to be considered and ruled out).

136 Global Detention Project, *Country Report: **Immigration Detention in Argentina: A Paradigm Shift?***, 2020, page 6.

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139 Pablo Ceriani Cernadas, *Immigration Detention Through the Lens of International Human Rights: Lessons from South America, Global Detention Project Working Paper No. 23*, 2017, page 6.

140 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 18.

141 International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 18; International Detention Coalition, *Using ATD as a Systems Change Strategy Towards Ending Immigration Detention*, 2022, page 20.

142 On ATD based on rights, engagement and holistic support, see International Detention Coalition, *Using ATD as a Systems Change Strategy Towards Ending Immigration Detention*, 2022, pages 18 - 20.

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144 See International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, page 18; UN Network on Migration, Temporary Regularisation Programmes, 2022; Pablo Ceriani Cernadas, *Immigration Detention Through the Lens of International Human Rights: Lessons from South America, Global Detention Project Working Paper No. 23*, 2017.

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