
Working Group on Arbitrary Detention

Revised Deliberation No. 5 on deprivation of liberty of migrants

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the Working Group's mandate, and requested that it devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy.
2. In the light of the experience gained from its country visits carried out in that framework, in 1999 the Working Group took the initiative to develop criteria for determining whether the deprivation of liberty of asylum seekers and immigrants might be arbitrary, and to that end adopted its deliberation No. 5.¹
3. In 2017, twenty years after it was requested to consider the deprivation of liberty of immigrants and asylum seekers, the Working Group, concerned by the rising prevalence of deprivation of liberty of immigrants and asylum seekers in recent years, recognizing the need to consolidate the developments in its own jurisprudence, taking into account the important developments in international law in this area and having received contributions, inter alia, from relevant United Nations agencies and special procedure mandate holders, has decided to revise and replace its deliberation No. 5 with the present version.
4. The Working Group wishes to emphasize in particular that 2018 marks the seventieth anniversary of the Universal Declaration of Human Rights, an instrument that recognizes that every human being is born free and equal in dignity and rights and that every person has the same rights and liberties without distinction based on race, colour, sex, language, religion, political opinion or other, national or social origin, economic position, birth, nationality or any other status. Furthermore, it proclaims that no one shall be subjected to arbitrary arrest, detention or exile and that it is the right of every person to leave any country, including his own, and to return to his country. The instrument also recognizes the right of every person to seek and enjoy in other countries asylum.
5. The present deliberation aims to consolidate the Working Group's existing practice regarding the deprivation of liberty of migrants and, as such, is representative of its existing jurisprudence.

Revised deliberation No. 5

6. For the purposes of the present deliberation, a "migrant" shall be taken to mean any person who is moving or has moved across an international border away from his or her habitual place of residence, regardless of: (a) the person's legal status; (b) whether the

¹ E/CN.4/2000/4, annex II.

movement is voluntary or involuntary; (c) the cause of the movement; or (d) the duration of stay. The term shall also be taken to include asylum seekers, refugees and stateless persons.

I. The right to personal liberty and the right of migrants not to be detained arbitrarily

7. The right to personal liberty is fundamental and extends to all persons at all times and circumstances, including migrants and asylum seekers, irrespective of their citizenship, nationality or migratory status.² Furthermore, as stated in article 13 of the Universal Declaration of Human Rights, everyone has the right to leave any country, including his own, and return to his own country.

8. The prohibition of arbitrary detention is absolute, meaning that it is a non-derogable norm of customary international law, or *jus cogens*.³ Arbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers. This extends both to the territorial jurisdiction and effective control of a State.

II. The right to seek and enjoy asylum and the non-criminalization of migration

9. Seeking asylum is a universal human right, the exercise of which must not be criminalized.⁴

10. The irregular entry and stay in a country by migrants should not be treated as a criminal offence, and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows.⁵ Migrants must not be qualified or treated as criminals, or viewed only from the perspective of national or public security and/or health.⁶

11. The deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited.⁷

III. Exceptionality of detention in the course of migration proceedings

12. 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.⁸

13. Any form of detention, including detention in the course of migration proceedings, must be ordered and approved by a judge or other judicial authority.⁹ Anyone detained in the course of migration proceedings must be brought promptly before a judicial authority, before which they should have access to automatic, regular periodic reviews of their detention to

² See Human Rights Committee general comment No. 35 (2014) on liberty and security of person, para. 3.

³ See general comment No. 35, para. 66.

⁴ See Universal Declaration of Human Rights, art. 14; the Convention relating to the Status of Refugees; and the Protocol relating to the Status of Refugees.

⁵ See A/HRC/13/30, para. 58; and A/HRC/7/4, para. 53.

⁶ See A/HRC/10/21, para. 68.

⁷ See A/HRC/30/37, para. 46. See also E/CN.4/1999/63/Add.3, para. 37; A/HRC/27/48/Add.2, para. 130 and A/HRC/36/37/Add.2, paras 41-42.

⁸ See the Convention relating to the Status of Refugees, art. 31.

⁹ See A/HRC/13/30, para. 61; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 4; E/CN.4/1999/63/Add.4, para. 51; and E/CN.4/2003/8/Add.2, para. 64 (a). See also A/HRC/13/30/Add.2, para. 79 (e).

ensure that it remains necessary, proportional, lawful and non-arbitrary.¹⁰ This does not exclude their right to bring proceedings before a court to challenge the lawfulness or arbitrariness of their detention.¹¹

14. Detention in the course of migration proceedings must be justified as reasonable, necessary and proportionate in the light of the circumstances specific to the individual case. Such detention is permissible only for the shortest period of time, it must not be punitive in nature and must be periodically reviewed as it extends in time.¹²

15. Non-nationals, including immigrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty, shall be guaranteed access to a court of law empowered to order immediate release or able to vary the conditions of release.

16. Alternatives to detention must be sought to ensure that the detention is resorted to as an exceptional measure.¹³

17. Alternatives to detention should be realistic and must not depend upon the ability of the individual to pay for these.¹⁴ Alternatives to detention may take various forms, including reporting at regular intervals to the authorities, community-based solutions, release on bail or other securities, or stay in open centres or at a designated place.¹⁵ The conditions in any such open centres and other facilities must be humane and respectful of the inherent dignity of all persons.¹⁶

18. The application of measures alternative to detention must be reviewed by a judicial authority and alternatives to detention must not be considered as alternatives to release.¹⁷

19. The need to detain should be assessed on an individual basis and not based on a formal assessment of the migrant's current migration status.¹⁸ The detention must comply with the principle of proportionality¹⁹ and as such, automatic and/or mandatory detention in the context of migration is arbitrary.²⁰

20. Detention in the course of migration proceedings must be prescribed by law, justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. These cumulative elements must be complied with in each individual case.²¹

¹⁰ See A/HRC/30/37, para. 43; A/HRC/13/30, para. 61; and Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11, para. 3. See also E/CN.4/2003/8/Add.2, para. 64 (a); A/HRC/13/30/Add.2, para. 79 (g); and A/HRC/16/47/Add.2, para. 120.

¹¹ See A/HRC/30/37, para. 43; A/HRC/13/30, para. 61; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11, para. 3; and E/CN.4/2006/7, para. 85. See also E/CN.4/2005/6/Add.2, para. 86; E/CN.4/2005/6/Add.3, para. 86 (d); E/CN.4/2006/7/Add.3, para. 89.

¹² See A/HRC/30/37, para. 45; E/CN.4/2006/7, para. 85; and A/HRC/10/21, para. 75. See also opinions No. 42/2017 and No. 28/2017; A/HRC/27/48/Add.4, para. 130 (h); A/HRC/30/36/Add.3, para. 73; A/HRC/30/36/Add.1, para. 81; A/HRC/36/37/Add.1, para. 99 (a); and general comment No. 35, para. 18.

¹³ See A/HRC/13/30, para. 59. See also E/CN.4/1999/63/Add.3, para. 33; A/HRC/19/57/Add.3, para. 68 (e); A/HRC/27/48/Add.2, para. 124; and A/HRC/30/36/Add.1, para. 81.

¹⁴ See, for example, A/HRC/36/37/Add.2, paras. 28 and 30.

¹⁵ See A/HRC/13/30, para. 65. See also A/HRC/30/36/Add.3, para. 48; E/CN.4/2003/8/Add.2, para. 64 (a) (ii); and A/HRC/36/37/Add.2, para. 92 (a) (ii).

¹⁶ See, for example, A/HRC/33/50/Add.1, para. 72.

¹⁷ See A/HRC/13/30, para. 65. See also A/HRC/36/37/Add.2, paras. 28 and 30.

¹⁸ See A/HRC/30/37, para. 115.

¹⁹ See, for example, A/HRC/19/57/Add.3, para. 68 (f) and (g); A/HRC/30/36/Add.1, para. 88; and A/HRC/36/37/Add.1, para. 99 (a).

²⁰ See, for example, A/HRC/36/37/Add.2, para. 92 (a); and opinion No. 42/2017.

²¹ See general comment No. 35, para. 18; and A/HRC/10/21, para. 67. See also opinions No. 42/2017 and No. 28/2017.

21. Migration detention policies and procedures must not be discriminatory or make distinctions based on the legal conditions of the person.²² Detaining someone solely on the basis of a distinction such as race, colour, sex, language, religion, political or other opinion, national or social origin, economic position, birth, nationality or any other status will always be arbitrary.

22. The element of reasonableness requires that the detention be imposed in pursuance of a legitimate aim in each individual case. This must be prescribed by legislation that clearly defines and exhaustively lists the reasons that are legitimate aims justifying detention.²³ Such reasons that would legitimize 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.²⁴

23. The element of necessity requires that the detention be absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists in the individual circumstances of the person who is in an irregular migration situation.²⁵

24. The element of proportionality requires that a balance be struck between the gravity of the measure taken, which is the deprivation of liberty of a person in an irregular situation, including the effect of the detention on the physical and mental health of the individual, and the situation concerned.²⁶ To ensure that the principle of proportionality is satisfied, alternatives to detention must always be considered.²⁷

IV. Length of detention in the course of migration proceedings

25. A maximum detention period in the course of migration proceedings must be set by legislation, and such detention shall be permissible only for the shortest period of time. Excessive detention in the course of migration proceedings is arbitrary.²⁸ Upon the expiry of the detention period set by law, the detained person must automatically be released.²⁹

26. Indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.³⁰

27. There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them — including non-cooperation of the consular representation of the country of origin, the principle of non-refoulement³¹ or the unavailability of means of transportation — thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.³²

²² See Universal Declaration of Human Rights, arts. 2, 9, 10 and 11; and International Covenant on Civil and Political Rights, art. 9 (1).

²³ See A/HRC/13/30, para. 59; and A/HRC/10/21, paras. 67 and 82.

²⁴ See A/HRC/13/30, para. 59; and general comment No. 35, para. 18.

²⁵ See A/HRC/7/4, para. 46. See also E/CN.4/1999/63/Add.3, para. 34; and E/CN.4/1999/63/Add.3, paras. 29 and 34.

²⁶ See A/HRC/30/37, para. 111.

²⁷ *Ibid.*, para. 108.

²⁸ See, for example, opinion No. 5/2009, 42/2017; E/CN.4/1999/63/Add.3, para. 35; and A/HRC/33/50/Add.1, paras. 49-50.

²⁹ See A/HRC/13/30, para. 61.

³⁰ See A/HRC/13/30, para. 63. See also opinions No. 42/2017 and No. 28/2017.

³¹ See the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; and the Convention relating to the Status of Refugees, art. 33.

³² See A/HRC/13/30, para. 63; A/HRC/7/4, para. 48; and A/HRC/10/21, para. 82. See also opinion No. 45/2006.

V. The right to challenge the legality of detention

28. The Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court³³ applies to all non-nationals, including immigrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty.³⁴

29. The right of anyone deprived of his or her liberty to bring proceedings before a court in order that it may decide without delay on the lawfulness of his or her detention and obtain appropriate remedies upon a successful challenge, is a self-standing human right, the absence of which constitutes a human rights violation.³⁵ This right applies to everyone, including immigrants regardless of their migration status, refugees and asylum seekers and stateless persons.³⁶

30. Any detention in the course of migration proceedings that makes it impossible to mount an effective challenge to the continued detention is arbitrary.³⁷

VI. Respect for rights during detention in the course of migration proceedings

31. Those detained in the course of migration proceedings enjoy the same rights as those detained in the criminal justice or other administrative context, including the rights enshrined in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

32. Those detained in the course of migration proceedings must be treated without discrimination based on race, colour, sex, property, birth, age, national, ethnic or social origin, language, religion, economic condition, political or other opinion, sexual orientation or gender identity, disability, nationality or any other status, or on any ground that aims at or may result in undermining the enjoyment of human rights on the basis of equality.

33. Those detained in the course of migration proceedings have the right to be informed, in writing and in a language which they understand, of the nature of and grounds for the decision to detain, the duration of detention, as well as of the possibility to challenge the legality and arbitrariness of such decision.³⁸

34. All those detained in the course of migration proceedings must be properly informed of their right to seek asylum and be able to file an asylum application.³⁹

35. All detained migrants must have access to legal representation and advice and interpreters, including with the view to challenging the detention order, appealing deportation decisions or preventing cases of refoulement. If necessary, access to free and effective legal aid should be ensured.⁴⁰

³³ A/HRC/30/37.

³⁴ Ibid., para. 8.

³⁵ Ibid., para. 2.

³⁶ Ibid., para. 8.

³⁷ See, for example, opinions No. 42/2017 and No. 28/2017. See also *C. v. Australia* (CCPR/C/76/D/900/1999); *Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D. and E. and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

³⁸ See A/HRC/30/37, para. 42. See also E/CN.4/1999/63/Add.3, paras. 27-28; E/CN.4/1999/63/Add.4, paras. 49-50; A/HRC/27/48/Add.2, para. 118 (d) (i) and 119 (b); and A/HRC/10/21/Add.5, para. 76.

³⁹ See, for example, A/HRC/27/48/Add.2, para. 133; A/HRC/30/36/Add.3, para. 80; and A/HRC/10/21/Add.5, para. 76.

⁴⁰ See, for example, A/HRC/27/48/Add.2, para. 129; A/HRC/30/36/Add.1, para. 90; and A/HRC/33/50/Add.1, paras. 51-54.

36. All detained migrants from the moment of their detention and during the course of detention must be informed of the right to contact their consular representatives. If the migrant wishes to exercise that right, it is the duty of the authorities holding the migrant to facilitate such contact.⁴¹

37. All detained migrants must be able to communicate with the outside world and relatives, including by telephone or email.⁴²

38. All detained migrants must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings.⁴³ Detention conditions and treatment must not be such as to impede the ability to challenge the lawfulness of detention, and detention should not be used as a tool to discourage asylum applications.

39. All detained migrants must have free access to appropriate medical care, including mental health care.⁴⁴

VII. Migrants in situations of vulnerability and/or at risk

40. Detaining children because of their parents' migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child.⁴⁵ Children must not be separated from their parents and/or legal guardians.⁴⁶ The detention of children whose parents are detained should not be justified on the basis of maintaining the family unit, and alternatives to detention must be applied to the entire family instead.

41. Detention of migrants in other situations of vulnerability or at risk, 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, must not take place.⁴⁷

42. Men and women in detention should be always separated unless they are a part of an immediate family unit.

VIII. The prohibition of non-refoulement

43. The principle of non-refoulement must always be respected, and the expulsion of non-nationals in need of international protection, including migrants regardless of their status, asylum seekers, refugees and stateless persons, is prohibited by international law.⁴⁸

IX. Detention facilities

44. The detention of asylum seekers or other irregular migrants must not take place in facilities such as police stations, remand institutions, prisons and other such facilities since these are designed for those within the realm of the criminal justice system.⁴⁹ The mixing of migrants and other detainees who are held under the remit of the criminal justice system must not take place.

⁴¹ See, for example, A/HRC/7/4/Add.3, para. 100 (l); and A/HRC/27/48/Add.2, para. 95.

⁴² See, for example, A/HRC/27/48/Add.2, para. 118 (d) (ii); and A/HRC/30/36/Add.3, para. 77.

⁴³ See A/HRC/7/4, paras. 49-50. See also E/CN.4/1999/63/Add.3, para. 30; A/HRC/27/48/Add.2, para. 121; A/HRC/30/36/Add.3, para. 75; and A/HRC/36/37/Add.1, para. 99 (c).

⁴⁴ See, for example, A/HRC/27/48/Add.2, para. 118 (d) (iii); and A/HRC/30/36/Add.3, para. 75.

⁴⁵ See A/HRC/30/37, para. 46; and A/HRC/10/21, para. 60.

⁴⁶ See, for example, A/HRC/36/37/Add.2, paras. 43 and 92 (j).

⁴⁷ See, for example, A/HRC/13/30/Add.2, para. 79 (f); and A/HRC/16/47/Add.2, para. 119.

⁴⁸ See Convention against Torture, art. 3; and Convention relating to the Status of Refugees, art. 33. See also opinion No. 5/2009; A/HRC/27/48/Add.2, para. 129; and A/HRC/27/48/Add.4, para. 130 (c).

⁴⁹ See, for example, E/CN.4/1999/63/Add.3, para. 30.

45. Whether a place where those held in the course of migration proceedings is a place of detention depends on whether the individuals held there are free to leave it at will or not. If not, irrespective of whether the facilities are labelled “shelters”, “guest houses”, “transit centres” “migrant stations” or anything else, these constitute places of deprivation of liberty and all the safeguards applicable to those held in detention must be fully respected.⁵⁰

46. If a State outsources the running of migration detention facilities to private companies or other entities, it remains responsible for the way such contractors carry out that delegation. The State in question cannot absolve itself of the responsibility for the way the private companies or other entities run such detention facilities, as a duty of care is owed by that State to those held in such detention.⁵¹

X. Access to those held in detention in the course of migration proceedings

47. The Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and other relevant organizations, including national human rights institutions, national preventive mechanisms and international and national non-governmental organizations, must be allowed free access to the places of detention where those detained in the course of migration proceedings are held.⁵²

XI. Scope of application of the present deliberation

48. The standards restated in the present deliberation apply to all States in all situations, and factors such as the influx of large numbers of immigrants regardless of their status, asylum seekers, refugees and stateless persons cannot be used to justify the departure from these standards. The standards in the present deliberation also apply to migration detention facilities maintained by a State in the territory of another State, with both States jointly responsible for the detention.⁵³

[Adopted on 23 November 2017].

⁵⁰ See A/HRC/7/4, para. 43; and A/HRC/36/37, paras. 50-56. See also A/HRC/33/50/Add.1, para. 36.

⁵¹ See, for example, A/HRC/36/37/Add.2, paras. 33-36.

⁵² See, for example, E/CN.4/1999/63/Add.3, para. 38; E/CN.4/1999/63/Add.4, para. 52; A/HRC/16/47/Add.2, paras. 126-128; A/HRC/19/57/Add.3, para. 68 (h); A/HRC/27/48/Add.2, para. 127; and A/HRC/30/36/Add.3, para. 80.

⁵³ See, for example, opinion No. 52/2014.