

REPORTS AND DOCUMENTS

ICRC policy paper on immigration detention

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Introduction

The International Committee of the Red Cross (ICRC) has worked on behalf of detained irregular migrants for many years as part of its activities for detainee populations in general, but has only recently started implementing specific programmes for detained migrants in countries of transit and destination. The ICRC visits detained migrants in both criminal and dedicated immigration detention facilities. During these visits, as with all detainees, the ICRC assesses whether detained migrants are treated humanely, held in conditions that preserve their dignity and afforded due process of law. The ICRC also evaluates whether they are able to maintain contact with the outside world, such as with their families and consular authorities, if they wish to do so. As part of its dialogue with the authorities, the ICRC also raises protection issues related to return to ensure that the authorities fulfil their obligations under relevant international law – in particular with respect to the principle of *non-refoulement*.¹

The ICRC works in immigration detention² on its own or in collaboration with National Red Cross and Red Crescent Societies in several countries along migration routes. National Societies also work independently in immigration detention, mainly but not exclusively providing Restoring Family Links services and direct assistance where these services are needed. The ICRC will continue at global, regional and bilateral levels to support the work of National Societies by providing expertise, knowledge-sharing platforms and resources.

The ICRC vulnerability approach

The ICRC's engagement is prompted by migrants' vulnerability, and its activities are defined by their needs. The ICRC — like the rest of the International Red

Cross and Red Crescent Movement — uses a broad description of “migrants”³ which includes refugees, asylum-seekers and irregular migrants. It does so in order to capture the full extent of humanitarian concerns related to migration and to provide sufficient flexibility to address their often complex situations and the fact that migrants may become vulnerable on their way to or in their country of destination. This being said, it is important to recall that the legal status of individuals is crucial in determining the applicable regime(s), and to stress that ICRC action aims to ensure that migrants receive the protection to which they are entitled under international and domestic law, including the special protection afforded to certain categories of people such as refugees and asylum-seekers.

Main issues of concern

Migration is a growing global phenomenon, and many States endeavour to control and contain irregular migration by adopting restrictive migration policies. This may result in the use of coercive measures, including a systematic resort to detention, either administrative or criminal. Systematically resorting to the detention of irregular migrants, regardless of their individual personal circumstances, is in contradiction with the right to liberty and security of persons – which is one of the most fundamental human rights – and with the key considerations that *detention should be a measure of last resort* and non-custodial measures should always be considered first.

Administrative detention for the purposes of immigration control is sometimes used as a deterrent or as punishment. This should not be the case, as *detention for administrative reasons should, by definition, be non-punitive in nature*.

The ICRC encourages States to treat irregular migration as an administrative infraction rather than as a crime. Criminalization of irregular entry or stay may hinder detained migrants’ access to specialized services, further stigmatize irregular migrants as a group, and prevent them from finding the specialized support many of them may need following previous exposure to violence and abuse. Such detention also has a negative impact on the judicial

- 1 The principle of *non-refoulement* prohibits the transfer of persons from one authority to another when there are substantial grounds to believe that the person would be in danger of being subjected to violations of certain fundamental rights. This is in particular recognized for torture and other forms of ill-treatment, arbitrary deprivation of life and persecution. The principle of *non-refoulement* is found expressly in international humanitarian law, international human rights law and refugee law, although with different scopes in each of these bodies of law. The gist of the principle of *non-refoulement* has also become customary international law.
- 2 In this paper, the term “immigration detention” refers to detention for reasons of irregular entry or stay in a country’s territory.
- 3 The ICRC describes migrants as persons who leave or flee their habitual residence to go to new places – usually abroad – to seek opportunities or safer and better prospects. This definition includes all types of migrants regardless of their legal status, while recognizing the special protection of refugees and asylum-seekers. See International Federation of Red Cross and Red Crescent Societies, *Policy on Migration*, 2009, available at: www.ifrc.org/PageFiles/89395/Migration%20Policy_EN.pdf.

system, which often has a very heavy caseload, and on the penitentiary system, which is often already overcrowded.

This paper intends to briefly highlight – and focuses exclusively on – key considerations for States when considering the administrative detention of irregular migrants, i.e. detention initiated/ordered by an administrative authority for reasons of irregular entry or stay in a country’s territory, without criminal charges being brought against the person. Administrative detention may take place in dedicated immigration detention facilities or in those used by the criminal justice system.

Key considerations for States

The ICRC urges States, when considering the administrative detention of irregular migrants, to respect the following fundamental points (most of which reflect existing international law and are compatible with international standards and/or safeguards, as elaborated in human rights jurisprudence, in soft-law instruments and by United Nations human rights bodies and mechanisms):

1. Detention should be an exceptional measure; liberty and alternatives to detention should always be considered first – i.e., detention should be a measure of last resort.

A large body of research⁴ has shown the negative impact of administrative detention on the mental health of migrants, which is linked to the uncertainty of the administrative process and fears for the future, compounding previous traumas related to the migrants’ personal history. The ICRC is a daily witness to this negative impact on migrants in its visits to detention centres.

2. Detention can only be ordered on the basis of a decision taken in each individual case, without discrimination of any kind. A decision to detain must not be based on a mandatory rule for a broad category of persons.

The element of individual assessment is crucial to enabling a review of the particular circumstances of each person, avoiding unnecessary detention decisions and ensuring that detention is justified and only used as a measure of last resort.

3. Any detention must be determined to be necessary, reasonable and proportionate to a legitimate purpose. Administrative detention may not serve as a deterrent or as punishment.

4 See Mary Bosworth, “The Impact of Immigration Detention on Mental Health: A Literature Review”, Appendix 5 in Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw*, January 2016; Janet Cleveland, Cécile Rousseau and Rachel Kronick, *The Harmful Effects of Detention and Family Separation on Asylum Seekers’ Mental Health in the Context of Bill C-31*, Brief Submitted to the House of Commons Standing Committee on Citizenship and Immigration concerning Bill C-31, the Protecting Canada’s Immigration System Act, April 2012; Colin Neave, *Suicide and Self-Harm in the Immigration Detention Network*, Report by the Commonwealth and Immigration Ombudsman, May 2013.

Administrative immigration detention can only be used in cases where an individual assessment confirms in the case of a particular migrant the existence of an acceptable basis for which immigration detention may be justified, in particular if a specific migrant is believed to present a risk to public security or a risk of absconding. It follows that administrative detention should not be used as a means of deterrence or punishment for irregular entry and/or stay, as this in itself is not one of the limited acceptable grounds that may justify the detention of migrants. An individual assessment of the existence of such risks will determine whether administrative detention is considered necessary, reasonable and proportionate, *after non-custodial measures have been considered*.

4. Detention should be limited in time.

Administrative detention must not last beyond the period for which the State can provide appropriate justification – it should be limited in time.

5. Conditions and treatment in administrative detention should be non-punitive.

If migrants are held in administrative detention, it is critical that their liberty not be constrained beyond what is strictly necessary. For example, migrants should be able to move around freely within their place of detention, family members should be accommodated together, and migrants must be able to maintain meaningful contacts with the outside world. To facilitate this, it is important that irregular migrants be segregated from persons suspected of, charged with or sentenced for criminal offences. All places where migrants are deprived of their liberty must provide decent living conditions. The detaining authorities must ensure their personal safety and provide for their needs, both physical and psychological, including access to adequate medical care. They must be protected against all forms of abuse and exploitation, including sexual violence.

6. Migrants must be allowed to have contact with members of their family.

States must allow detained migrants to contact their families, but they should also ensure that migrants have the means, both technical and financial, to do so. Many migrants lose all their belongings during their journey or at the time of their arrest and do not have the means to make an international phone call. The authorities should provide detained migrants, free of charge, at least an initial phone call to their family, in the country or abroad, to inform family members of their whereabouts. Moreover, if migrants have family or friends able to visit, these individuals should be able to have contact visits with the detained migrants.

7. Respect for key procedural safeguards is essential.

The ICRC considers that a number of key procedural safeguards must be observed, as required by existing law or as a matter of policy and good practice:

- i. Migrants must be informed promptly, in a language they understand, of the reasons why they are being detained as well as of their other rights, including the possibilities of appeal.
- ii. The decision to detain must be made by a duly authorized official in accordance with the criteria laid down by law.

- iii. Migrants have the right to be registered and held in a recognized place of detention.
- iv. If so requested by the migrant, the relevant diplomatic or consular authorities must be informed, without delay, of a migrant's detention. Migrants must be informed of their right to inform and to communicate with their consular or diplomatic authorities.
- v. The decision to place in detention must be reviewed with the least possible delay by a judicial or other independent authority. This procedure should include the right to appeal. The necessity to maintain in detention must be reviewed periodically. All migrants have the right to challenge the lawfulness of their detention before a judicial body having the authority to order their release if their detention is unlawful.
- vi. Migrants should be allowed to have legal assistance in challenging their detention.
- vii. Migrants should be able to attend the proceedings in person and/or to be represented by their legal representative.

8. Migrants have the right to seek and enjoy asylum from persecution.

The detention of refugees and asylum-seekers should generally be avoided. As all persons have the right to seek and enjoy asylum from persecution, any detention of persons exercising this right must be carefully circumscribed. The irregular status of migrants or the fact that they are detained should not prevent them from being able to apply for asylum or to pursue their asylum claim. Thus, migrants should be given the necessary information about this right and allowed to exercise it, including by being given access to asylum procedures.

9. The special circumstances of certain categories of especially vulnerable migrants, such as children, victims of torture or trafficking, persons with mental disabilities and/or health conditions, and elderly people, should be considered. Detention of these vulnerable groups should be avoided.

The serious negative effects of detention on the mental health of migrants are magnified when it comes to children, as their developmental needs cannot be met in such a setting. This also applies to victims of prior trauma, who cannot be properly treated in detention. Children shall only be detained as a measure of last resort and for the shortest appropriate duration. Their best interests must be the primary consideration in every decision to initiate or continue detention. In addition, States should not detain victims of torture or trafficking or persons with mental disabilities and/or health conditions solely on the basis of their immigration status. Detention of migrants with physical disabilities should only take place when the authorities provide reasonable accommodation that preserves their dignity. The specific needs of other groups that may present special vulnerabilities in certain circumstances – such as women, stateless persons or victims of sexual abuse – should also be taken into account, and the need for their detention should be carefully considered.

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