

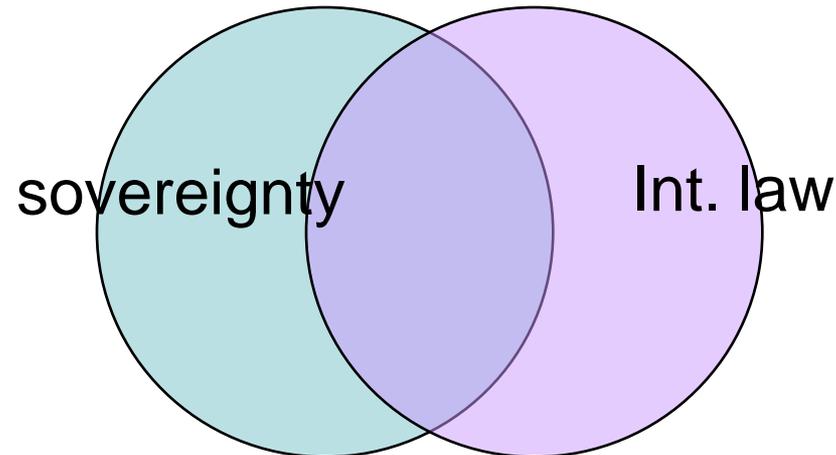


IOM • OIM

Right to Liberty and Security



Fundamental principle:



Power to manage migration must be exercised in full respect of international commitments



Freedom of movement

- If lawfully in State, right to liberty of movement and freedom to choose residence
- Once a person is 'lawfully within' a state any restrictions on freedom of movement or choice of residence must be judged according to the 'aliens generally' standard. Any restrictions imposed on 'aliens generally' would need to conform with international law. Article 12(1) of the ICCPR provides



- The right to liberty and security of person is a fundamental human right and an essential component of legal systems enjoying the rule of law.
- Like all human rights, it applies on principle to all human beings, regardless of immigration or other status.
- The right is found in two provisions of the Universal Declaration of Human Rights 1948 (UDHR): ‘Everyone has the right to life, liberty and security of person’ (Article 3) and ‘No one shall be subjected to arbitrary arrest, detention or exile’ (Article 9). These were subsequently transferred into Article 9 of the ICCPR, which guarantees liberty and security of person and prohibits arbitrary deprivation of such liberty.



- Although **states are not prohibited** from detaining irregular migrants to prevent unauthorised entry, or with a view to deportation or removal, **a state's power to detain is limited**, and it must protect the rights of those detained in full compliance notably with Articles 3 and 5 of the European Convention on Human Rights and the European Court of Human Rights' pertinent case law.



Detention

- ***Criminal Detention***
 - Imprisonment under criminal laws

- ***Administrative Detention***
 - often under the immigration laws
 - in practice fewer guarantees and safeguards against violations



- Article 9 ICCPR expresses the general principle of liberty and security of person. Article 9 applies to all deprivations of liberty, including detention for the purposes of immigration control.
- Any deprivations of liberty must thus be in accordance with the terms set out in Article 9, as developed by relevant human rights jurisprudence.
- Article 9 does not prohibit immigration detention, nor is the right to liberty and security of person absolute; rather it is a substantive guarantee against *unlawful* as well as *arbitrary* detention.



- Each of the main regional human rights treaties contains a prohibition against arbitrary deprivation of liberty in similar terms to those set out in Article 9 of the ICCPR.



- The international bodies which verify the respect of the human rights treaties have established that **the right to liberty postulates that every restriction to this right be exceptional.**



- The International Court of Justice in its *dictum* in the *Hostages in Tehran* case that it is, “wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights”, article 3 of which guarantees “the right to life, liberty and security of person”



- The Human Rights Committee has held that article 9(1) of the Covenant “protects the right to security of person also outside the context of formal deprivation of liberty”, and that an interpretation of article 9 “which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant”.
- In the view of the Committee, “it cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained”; on the contrary, “States parties are under an obligation to take reasonable and appropriate measures to protect them”.



- For cases involving criminal proceedings, the Inter-American Commission has developed the criteria that must be met in order for preventive detention (or detention pending trial) to be compatible with the right to personal liberty. As the IACHR wrote:
- The precautionary measures are established only when they are necessary for the proposed objectives. The pre-trial detention is not an exception to this rule. In compliance with the principle of exceptionality, the pre-trial detention will be appropriate when it is **the only way to ensure the purposes of the process** and when it has been demonstrated that **less damaging measures would be unsuccessful** to such purposes. Therefore, if possible, the pre-trial detention has to be **replaced for a lower severity measure**



Restrictions on freedom of movement

- provided by law
- necessary to protect national security
- necessary to protect public order
- necessary to protect public health or morals or the rights and freedoms of others.
- consistent with other rights



- The detention of migrants either criminal or administrative has been defined as a **“confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory”**.
- Detention prior to expulsion has been considered a deprivation of liberty falling within the scope of Article 9 of the International Covenant on Civil and Political Rights (ICCPR)



Arbitrariness

- First, any detention or deprivation must be in accordance with and authorised by law. Any deprivation of liberty that is not in conformity with national law would be unlawful – as a matter of national as well as international law – and therefore in breach of Article 9(1). Moreover, domestic legislation which permits the use of detention but which is not in conformity with international human rights standards would also be in violation of Article 9(1).



- Detention which may be initially legal may become “arbitrary” if it is unduly prolonged or not subject to periodic review.
- In its General Comment No. 8 concerning Article 9, the Committee lays down the elements that must be tested in determining the legality of preventive detention:
 - “If so-called preventive detention is used, for reasons of public security, it must be **controlled by these same provisions**, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1),
 - **information** of the reasons must be given (para. 2)
 - and court **control** of the detention must be available (para. 4)
 - as well as **compensation** in the case of a breach (para. 5).
 - And if, in addition, criminal charges are brought in such cases, the full protection of Article 9(2) and (3), as well as Article 14, must be granted.”



- Restrictions to liberty based on an administrative act are admissible under international law but the measure must be based on a law that provides with sufficient clarity and regulate the procedures to be observed.
- **The legality of a detention must be verified also against international law and particularly against the provisions of the ICCPR.**
- The lack of legality from an international perspective often derives from the fact that some States in the absence of a legislation authorising deprivation of liberty for migrants “label migration detention centres as “transit centres” or “guest houses” and “detention” as “retention”



- **The reasons justifying the detention of migrants**, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, **“must be clearly defined and exhaustively enumerated in legislation.”**



- It is not enough for deprivation of liberty to be provided by law.
- **The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.**
- The notion of “**arbitrariness**” is not to be equated with “against the law”, but must be interpreted more broadly to **include elements of inappropriateness, injustice, and lack of predictability.**



- No prohibition under international law
- International law provides procedural safeguards
- Detention must be carried out fairly
- Widespread evidence that States breach their obligations



- States may establish mechanisms to control undocumented migrants' entry into and departure from their territory, which must always be applied with strict regard for the guarantees of due process and respect for human dignity
- Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC18/03



- In the returns context, for example, it has been held to be disproportionate to continue to detain someone where there is no ‘real and tangible’ or ‘reasonably foreseeable’ prospect of removal.



- Provisions should always be made **to render detention unlawful** if the obstacle for identifying immigrants in an irregular situation or carrying out removal from the territory **does not lie within their sphere**, for example, when the consular representation of the country of origin does not cooperate or legal considerations - such as the principle of *non-refoulement* barring removal if there is a risk of torture or arbitrary detention in the country of destination - or factual obstacles - such as the unavailability of means of transportation – **render expulsion impossible**.



Gebremedhin v. France, 2007 (on lawful detention to prevent an unauthorised entry into the country)

- Where, the authorities in the State Party concerned have no option but to end the deprivation of the person's liberty with a view to his “deportation”, and this involves granting him leave to enter the country, **keeping him in detention for the time strictly necessary for the authorities to check whether his entry into the country is lawful may amount to the “lawful detention of a person to prevent his effecting an unauthorised entry into the country” within the meaning of Article 5 § 1(f).**
- Nevertheless, detention of this kind, like any deprivation of liberty, must be “lawful” and “in accordance with a procedure prescribed by law” within the meaning of Article 5 § 1. Not only must it have a strictly defined statutory basis, in particular as regard its duration – which must not be unreasonable – but it must also be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see, for example, *Amuur v. France*, 25 June 1996, § 50, *Reports of Judgments and Decisions* 1996-III).



Mikolenko v. Estonia, 2009 (on duration of detention with view of deportation)

- Compliance with domestic law is not in itself sufficient to establish lack of arbitrariness and further elements, must be examined in this context. One of these elements is the length of the detention, which should not exceed that reasonably required for the purpose pursued.
- The Court observes that the applicant's detention with a view to expulsion was extraordinarily long. He was detained for more than three years and eleven months.



Views on communication No. 1069/2002, submitted by Mr Ali Acsar Bakhtiyari and Mrs Roquahia Bakhtiyari, UN

Doc. A/59/40

- “Concerning Mrs Bakhtiyari and her children, the Committee observes that Mrs Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State Party has not, in the Committee’s view, demonstrated that their detention was justified for such an extended period.”



Proportionality

- Proportionality applies in relation to both the initial order of detention as well as its extension. The length of detention can render an otherwise lawful decision to detain arbitrary.
- detention should not continue beyond the period for which the State can provide appropriate justification.
- As each individual case must be examined on its merits, and periodically reviewed, it is not possible to identify a standard acceptable period of detention. On the other hand, maximum periods in detention ought to be set to guard against arbitrariness.



- The Human Rights Committee has also held that (*A. v. Australia*, HRC, Communication No. 560/1993, CCPR/C/59/D/560/1993)
- “remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context (...).”



- Thus, the determination as to whether detention is an appropriate measure must be done on the basis of a case-by-case analysis; a State has to consider all the less invasive or intrusive ways of accomplishing its objective before detention can be admissible





Tibi vs Ecuador

- According to the facts stated in the application, Daniel Tibi was a gem merchant. He was arrested on September 27, 1995, while he was driving his car down a street in the city of Quito, Ecuador.
- According to the Commission, Mr. Tibi was detained by officers of the Quito police force without a court order. He was then taken by plane to the city of Guayaquil, approximately 600 kilometers from Quito, where he was placed in jail and was illegally detained for eighteen months.
- The Commission adds that Daniel Tibi asserted that he was innocent of the charges
- against him and that he was tortured several times, beaten, burned, and “asphyxiated” to force him to confess to his participation in a drug trafficking case.



- Arrest of an individual without an order requires legal and factual justification, which has not been submitted by the State.
- The process of capture and detention in the instant case is not in accordance with due process. Mr. Tibi's deprivation of liberty was arbitrary, under the terms of Article 7(3) of the American Convention



- Mr. Tibi asserted that at no time did the police inform him of the reason for his arrest, despite the fact that the court order stated that “he was detained because he was being investigated for drug trafficking in criminal proceeding N 361-95.” Not informing Mr. Tibi of the reasons for his detention and of the charges against him breached Article 7(4) of the Convention



- after the arrest, Mr. Tibi remained in preventive detention two years, three months and three weeks, **which is not a reasonable time to remain in prison without being sentenced.**
- that the State did not comply with its obligation to promptly bring Daniel Tibi before a competent judicial authority, as required by Article 7(5) of the Convention.



- Violation of Art 5 (Humane Treatment);
Fair trial (Art 8), Right to Property (Art 21)



- **Detention must be ordered and approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case.**
- Everyone shall also have the right to challenge the legality of his or her detention before a court and have access to a lawyer.
- The Human Rights Committee expressed the view that judicial review of the lawfulness of detention must include the possibility to order release if the detention is incompatible with the requirements of the Covenant



- Detention is only permissible when a case specific evaluation concludes that the measure is essential in order to serve a legitimate interest of the State and to ensure that the subject reports for the proceeding to determine his or her immigration status and possible removal.

(Inter-American Court on Human Rights *Rafael Ferrer-Mazorra et al. (United States)*)



Non-Discrimination

- If a particular measure applies disproportionately to a particular ethnic, racial or religious group, for example, without a reasonable and objective justification, the measure would be discriminatory under the ICERD



Proper purpose

- A decision to detain ‘actuated by bad faith or an improper purpose’ may also render the detention arbitrary.
- Using detention to deter irregular migration in general may amount to an improper purpose, as it is not tailored to an individual case. It may also amount to collective punishment



Conditions of Detention

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person

Art 10, ICCPR



- Treatment is be “inhuman” when it was “premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering”.
- Treatment is considered to be “degrading” when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others



Procedural safeguards

- Any immigrant in detention must be brought promptly before a judicial or other authority and there must be a possibility to challenge the legality of detention
- The ground for custody must be based on criteria of legality, *i.e.* established as law by a duly empowered authority;
- A maximum period should be set by law and the custody may in no case be unlimited or of excessive length;
- Any immigrant must be notified of the custodial measure in a language understood by him or her, including the conditions for applying for judicial review, which shall decide promptly on the lawfulness of the measure and be competent to order the release of the person concerned, if appropriate;
- States must place immigrants in premises separate from persons imprisoned under criminal law; and
- Periodical review



➤ **Art 16 ICRMW (extensive procedural rights)**

- arbitrary detention prohibited
 - detention only on grounds and in accordance with procedures established by law
- consular authorities of State or origin, if migrant so requests, to be informed without delay
- right to prompt communication with the authorities
- right to take proceedings before the court so that lawfulness of detention can be determined
- enforceable right to compensation if detention unlawful



M.S.S. v. Belgium and Greece, 2011

- The sector for asylum seekers was rarely unlocked and the detainees had no access to the water fountain outside and were obliged to drink water from the toilets. In the sector for arrested persons, there were 145 detainees in a 110 sq. m space. In a number of cells there was only one bed for fourteen to seventeen people. There were not enough mattresses and a number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot.
- Detainees' access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed in all sectors that there was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and the detainees were deprived of outdoor exercise.



Burden of Proof

- The burden of proof to establish the lawfulness of the detention rests on the government in question.
- the state must establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of proportionality and necessity, and that it has considered other, less intrusive means of achieving the same objectives and they were not applicable.



Detention (“soft” law)

- Standard Minimum Rules for the Treatment of Prisoners (1955)
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)
- UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (1999)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)



minimum standards

- Right to be informed and to communicate with the outside world
- Registration at detention facilities
- Maximum length of detention
 - A maximum period of detention must be established by law and this may in no case be unlimited or of excessive length. Upon expiry of this period, the **detainee must be automatically released.**



- Special care of vulnerable/at risk groups
 - *C v. Australia*, the Human Rights Committee concluded that Article 7 had been violated because a person seeking asylum had been detained for such a prolonged period as to cause him mental illness (Communication No. 900/1999, CCPR/C/76/DE/900/1999 (November 13, 2002))
- Alternatives



Groups at Risk

- the specific vulnerabilities of children call for additional safeguards against arbitrary deprivations of liberty. As the ECtHR noted in *Muskhadzhiyeva*, the extreme vulnerability of a child takes precedence over the status of an irregular migrant



- Research shows that immigration detention has widespread and seriously damaging effects on the mental (and sometimes physical health) of those incarcerated.
- For those with pre-existing mental illness or those who are suffering from trauma, serious consideration must be given to A2Ds, or other arrangements that meet their treatment needs and subject to the safeguards elaborated under Article 9 of the ICCPR.



Alternatives

- The widespread and growing use of immigration detention has come under considerable scrutiny in recent years on pragmatic (practical and functional) as well as human rights/legal grounds.
- Pragmatically, no empirical evidence is available to give credence to the assumption that the threat of being detained deters irregular migration, or more specifically, discourages persons from seeking asylum.



- International human rights laws and standards make clear that immigration detention should be used only as a last resort in exceptional cases after all other options have been shown to be inadequate in the individual case. Despite the clear direction to authorities to first consider less onerous options, there is little clarity over how this can be achieved in a systematic manner.



- A distinction must be drawn between a **deprivation of liberty**, coming into account with respect to **detention**, and a simple **restriction of movement**, characterising the **alternative measures** to detention. The European Court of Human Rights clearly affirmed that: “the difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.”



- International legal principles of reasonableness, proportionality and necessity require that states justify their use of detention in each case by showing that there were not less intrusive means of achieving the same objective.
- The principle of proportionality must also be read as requiring detention to be a measure of last resort.
- The failure of many governments to offer any alternatives to detention, or to fail to pilot them or to systematise them, puts their detention policies and practices into conflict with international law.



- Many states have legislated for A2D or require that the “availability, effectiveness and appropriateness of alternatives to detention must be considered.”
- Various human rights and other bodies have warned states that any alternatives developed must not function as alternative forms of detention.
- Many alternatives restrict movement or deprive liberty to greater or lesser degrees in practice and, as such they are regulated also by the prohibition on arbitrary deprivations of liberty, they must only be imposed where they are necessary and proportionate to the objectives in question.
- In order to satisfy these requirements, the least intrusive alternative must be taken in each individual case.



- The question of immigration detention and potential alternatives is also now firmly on the international human rights agenda.
- The United Nations Human Rights Council (UN-HRC) (then Commission) extended the mandate of its Working Group on Arbitrary Detention (WGAD) to include immigration detention in 1997.
- The Working Group has since produced various reports on the issue. In 2007, it recommended that the UN-HRC conduct 'an in-depth and urgent deliberation to seek effective alternatives to prevent violations of rights of the large numbers of asylum-seekers and irregular migrants in detention around the world



Examples of A2Ds

- No detention or release without conditions or on own recognizance
- Release on conditions
- Release on bail, bond, surety/guarantee
- Community-based supervised release or case management
 - NGO-run models
 - Hybrid government-NGO cooperation or partnership models
 - Government-run models
- Designated residence at a particular accommodation centre
- Electronic tagging or reporting, or satellite tracking
- Home curfews
- Complementary measures



Thank you!