

UNU-GCM  
Policy  
Report

02/03



UNITED NATIONS  
UNIVERSITY

Immigration  
detention and  
stateless persons

UNU-GCM  
Institute on Globalization,  
Culture and Mobility

Tendayi Bloom

## *Immigration detention and stateless persons*

This is a report of the United Nations University Institute on Globalization, Culture and Mobility. It forms part of the series, *Statelessness and Transcontinental Migration*. It should be cited as:

Bloom, Tendayi. *Immigration detention and stateless persons*. Policy Report No. 02/03. Barcelona: United Nations University Institute on Globalization, Culture and Mobility (UNU-GCM), 2013.

The United Nations University (UNU) is the academic arm of the United Nations (UN). It bridges the academic world and the UN system. Its goal is to develop sustainable solutions for current and future problems of humankind in all aspects of life. Through a problem-oriented and interdisciplinary approach it aims at applied research and education on a global scale. UNU was founded in 1973 and is an autonomous organ of the UN General Assembly. The University comprises a headquarters in Tokyo, Japan, and more than a dozen Institutes and Programmes worldwide.

The UNU Institute on Globalization, Culture and Mobility (GCM) focuses on globalization, culture and mobility through the lens of migration and media. It engages in rigorous research in these areas, sharing knowledge and good practice with a broad range of groups, collectives and actors within and beyond the academy. Its commitments are at local and global levels, whereby it seeks to bridge gaps in discourses and practices, so as to work towards the goals of the United Nations with regard to development, global partnership, sustainability and justice.

This research programme focuses on a range of issues related to the wellbeing and recognition of people who traverse continents devoid of citizenship. Issues related to refugees remain crucially unanswered in debates and policies surrounding migration. In the wake of acknowledgement within the academy that it is not always possible to isolate refugees from migrants, this programme analyzes a range of contexts where dignity and human rights are compromised through the absence of legal and political recognition. By focusing on situations of extreme vulnerability and on lives lived on the borderline, this research programme seeks to articulate and address urgent needs with regard to the stateless migrants who have entered Europe.

# Immigration detention and stateless persons

---

|   |    |
|---|----|
| Summary   | 3  |
| 1. Administrative detention and migration   | 4  |
| 2. Stateless persons in immigration detention   | 5  |
| 3. The international legal situation  | 8  |
| 4. Alternatives to detention (A2D)  | 10 |
| Conclusions and recommendations   | 13 |
| References  | 14 |
| Abbreviations   | 17 |
| Appendix 1: OCHCR conditions for detention not to be considered arbitrary (CHR 1998 19, 20)                 | 18 |
| Appendix 2: OCHCR principles for the detention of asylum seekers and immigrants (CHR 1999 30,31)            | 20 |
| Appendix 3: References to migration in the annual reports of the OHCHR Working Group on Arbitrary Detention | 22 |

## Summary

Administrative detention occurs where a state arrests and detains an individual outside the criminal law context. A key example of this is immigration detention. Different groups are susceptible to immigration detention in different countries. For example, in some, asylum seekers are held while their claims are verified. In some, refused asylum seekers are held while deportation is arranged. Some states categorize irregular border crossing as itself a criminal offense, so that immigration detention becomes, at least in practice, a form of criminal detention. Others merely hold irregular border crossers while they arrange deportation. For stateless persons, this is particularly problematic. Without citizenship, stateless persons may be difficult to deport. As a result, they can find themselves in

immigration detention for long periods of time or even indefinitely while they wait for a deportation that will in all likelihood not take place. This situation runs counter to International Law.

### **1. Administrative detention and migration**

Administrative detention refers to 'arrest and detention of individuals by State authorities outside the criminal law context' (HRC 2010 21). Migration detention is one form of this. It is used in order to 'establish the identity of illegal immigrants and rejected asylum-seekers or to secure expulsion to their countries of origin' (HRC 2008 17). Other states also use such detention to deter future immigration (HRC 2008 17). Immigration detention centres are referred to by a number of names. The Office of the High Commissioner for Human Rights (OHCHR) refers to 'transit centres' and 'guest houses' (HRC 2008 18). Italy has 'welcome centres' and 'removal centres'. The UK has recently changed the appellation from 'detention centres' to 'removal centres'. Immigration detention also includes: 'house arrest'... 'and confinement on board a ship, aircraft, road vehicle or train (CHR 1998 18). Further, '[t]he places of deprivation of liberty concerned may be places of custody situated in border areas, police premises, premises under the authority of a prison administration, ad hoc centres, so-called "international" or "transit" areas (ports or international airports), gathering centres or certain hospital premises' (CHR 1998 19).

There are also a range of ways in which persons can find themselves in migration detention. For example, some states, such as Australia, 'routinely detain anyone found on or entering their territory illegally' (e.g. CHR 2003 21; CHR 2004 15). Other states move non-citizens who have committed a crime automatically from criminal detention into immigration detention, irrespective of the crime or the length of time that person has been resident (e.g. the situation in the UK is summarized in Detention Action 2013). There is also a phenomenon, described by the OHCHR, especially since 2003, of using the lack of judicial review in immigration and other administrative detention statuses in order to detain persons suspected of having involvement with terrorism (CHR 2003; CHR 2004 2, 24). Immigration detention is also sometimes ostensibly used in order to protect vulnerable persons, such as the victims of trafficking, from harm. This is something that was brought to the attention of OHCHR's Working Group on Arbitrary Detention in 2001 by the Special Rapporteur on violence against women, its causes and consequences and the Special Rapporteur on the human rights of migrants (CHR 2001 16). However, it is noted that this reasoning should

not remove the need for the principles detailed in the Appendices of this current report.

The use of immigration detention is increasing, including 'privitization, criminalization and extra-territorialisation of detention as a first resort' (IDC 2012 1, see also Bloom 2013). This includes the detention of children, which the Committee of the Rights of Children recommends should 'expeditiously and completely cease'... 'on the basis of their immigration status'. Indeed, the international organization, Immigration Detention Coalition (IDC) launched a campaign on March 21<sup>st</sup> 2012 for an end to holding children in immigration detention (IDC 2012 6).

## 2. Stateless persons in immigration detention

Despite much concern among human rights bodies about the detention of migrants, and particularly of asylum seekers, the specific problems of stateless persons are rarely mentioned. This is despite the fact that stateless persons are particularly susceptible to the situation of indefinite detention. As a result, while '[s]tateless persons benefit from the same rights to liberty and security of person as other human beings, yet they are often at greater risk of unlawful or arbitrary detention' (Edwards 2011 16). This section defines statelessness for the purposes of this report and shows how this leads in practice to indefinite detention of persons essentially on the basis of their involuntary status of statelessness.

In this report, the *de jure* definition of a stateless person as 'a person who is not considered as a national by any state under the operation of its law' (1954 Statelessness Convention Art.1(1)), will be understood broadly. That is, it will include also all those who cannot make use of their right of abode in their country of citizenship because of the obstruction of their state. This may include persons who have valid travel documents which their state of citizenship refuses to recognize. This emphasis is put into the interpretation of the definition, as it reflects a privation that is of particular relevance in the consideration of immigration detention.

Although the administrative detention of migrants is usually not considered criminal, this distinction can be lost in practice. Indeed, as Bloom (2013) notes, this detention is often seen as securitized, and in several countries, private

## Immigration detention and stateless persons

security companies are used to carry out this detention. Indeed, these are the same companies with the same staff as are contracted to run criminal detention facilities as well as carry out other security roles. However, the OHCHR Working Group on Arbitrary Detention ‘reiterates that immigrants in irregular situations should not be qualified or treated as criminals nor viewed only from the perspective of national security. Detention should be of the last resort, permissible only for the shortest period of time’ (HRC 2009 2).

Stateless persons are at particular risk of indefinite detention when outside their country of habitual residence since, while repatriation may be desired by the host state, it may not ever be possible (Edwards 2011 16). This possibility of indefinite detention is exacerbated by the lack of limits on immigration detention, as shown in Table 1, which gives information on limits on migration detention, where known. Note that where there is a limit, with an option for an extension, this table includes the total time period (maximum plus extension) as the maximum time period. Note that most of the data is taken from the Global Detention Project (GDP) data sets and those of the Jesuit Refugee Service (JRS). Other sources are used where indicated. Of those 40 countries for which information is available, almost half (48%) do not place time limits on migration detention.

Table 1: Time limits on migration detention pending removal<sup>1</sup>

| No Limit            |  | A year and over |                      | Under a year     |            |
|---------------------|--|-----------------|----------------------|------------------|------------|
| Countries           |  | Countries       | Time limit           | Countries        | Time limit |
| Bahamas             |  | Romania*        | 2 years <sup>3</sup> | Belgium          | 8 months   |
| Canada <sup>2</sup> |  |                 |                      |                  |            |
| Denmark             |  |                 |                      |                  |            |
| Egypt               |  |                 |                      |                  |            |
| Estonia*            |  | Latvia          | 20 months            | Hungary          | 6 months   |
| Finland             |  |                 |                      | Slovakia         | 180 days   |
| Hong Kong           |  |                 |                      | USA <sup>4</sup> | 6 months   |

<sup>1</sup> This information is obtained through reading the individual country profiles offered by the Global Detention Project, and through the reports of the Jesuit Refugee Service, as well as other literature.

<sup>2</sup> GDP suggest that there is no limit, but an average length of 25 days

<sup>3</sup> The limit is 6 months and then 2 years for ‘criminal aliens’

|                      |                      |           |                      |          |
|----------------------|----------------------|-----------|----------------------|----------|
| (China)              |                      |           |                      |          |
| Israel               | Bulgaria             | 18 months |                      |          |
| Japan <sup>5</sup>   | Italy <sup>6</sup>   | 18 months |                      |          |
| Lebanon              | Switzerland          | 18 months | South Africa         | 120 days |
| Lithuania            |                      |           |                      |          |
| Malaysia             |                      |           |                      |          |
| Malta <sup>7</sup>   | Luxembourg           | 1 year    | Portugal             | 60 days  |
| Mauritania           | Poland               | 1 year    | Spain <sup>8</sup>   | 60 days  |
| Mexico               | Slovenia             | 1 year    |                      |          |
| Netherlands*         | Ukraine <sup>9</sup> | 1 year    |                      |          |
| New Zealand          |                      |           | France <sup>10</sup> | 32 days  |
| Sweden <sup>11</sup> |                      |           |                      |          |
| South Korea          |                      |           |                      |          |
| Tanzania             |                      |           | Morocco              | 26 days  |
| Turkey               |                      |           |                      |          |
| UK*                  |                      |           |                      |          |

\*nb. The European Union Returns Directive imposes a six-month limit, with a possible extension to 12 months. As can be seen, this is not always implemented.

The OHCHR's Working Group on Arbitrary Detention varies in its coverage of migration detention. For example, while in 2005 it commends the Australian Government's improvement in conditions for detained minors, elsewhere it notes that the immigration detention of minors is wholly inappropriate. Chart 1 traces the references to migration, to asylum, and to stateless persons made in the reports of the OHCHR Working Group on Arbitrary Detention. Detailed data

<sup>4</sup> Source: (Edwards 2012 24)

<sup>5</sup> GDP suggest that while there is no official limit, in practice there is a maximum of 2 years.

<sup>6</sup> GDP suggests that while the limit is 18 months, the average is 150 days.

<sup>7</sup> GDP suggest no limit, while JRS suggest a limit of 18 months.

<sup>8</sup> GDP report an average of 18 days.

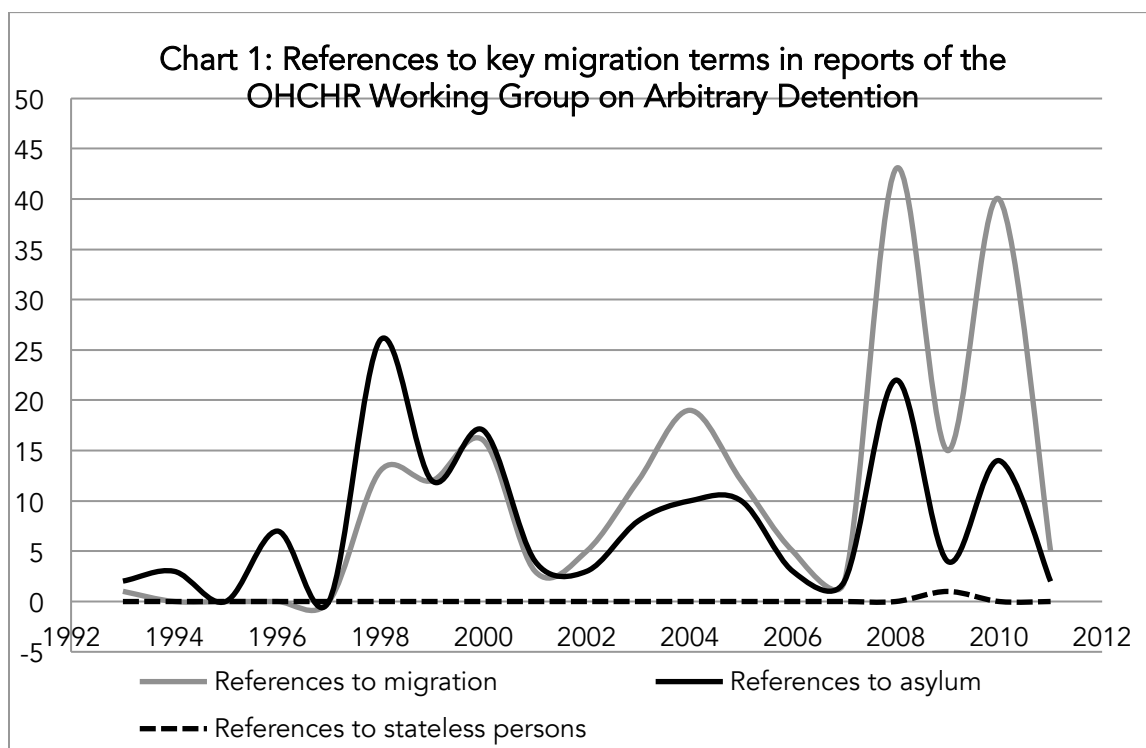
<sup>9</sup> GDP suggest that while the maximum is a year, in practice the period is longer.

<sup>10</sup> Corroborated by (Edwards 2012 24).

<sup>11</sup> Corroborated by JRS.

## Immigration detention and stateless persons

are available in Appendix 4 of this report, including explanations of the search parameters applied.



Indeed, migrants in general and asylum seekers are often grouped together by the Working Group, except where the specific conditions for asylum seekers is discussed. In the 2003 report, this changes and specific challenges relating to migrants generally are addressed separately from asylum-seekers, a special category of migrants. Stateless persons, as can be seen from Chart 1 and Appendix 4, are only mentioned in 2009, and then only once, although, as discussed in this report, they have a particular set of difficulties relating to arbitrary detention that need to be addressed.

### 3. The international legal situation

Arbitrary detention and arrest is outlawed, for example, by the Universal Declaration of Human Rights (UDHR) Art.3 and Art.9, by the International Covenant on Civil and Political Rights (ICCPR) Art.9 and Art.12, by the International Convention for the Rights of Migrant Workers and their Families (ICRMW) Art.16 and by the Convention on the Rights of the Child (CRC) Art.37. Arbitrariness, for the purposes of these provisions, requires a consideration of



the (insufficiency of) reasonableness, necessity, proportionality, and non-discrimination of the detention (Edwards 2011 20). This is detailed further in Appendices 1 and 2 of this report. With regard to the administrative detention of stateless persons, the key problem here relates to indefinite detention. Indefiniteness is considered to be a contributor to arbitrariness of detention, since it affects proportionality. The OHCHR Working Group on Arbitrary Detention 'emphasizes' ... 'that where obstacles to the removal of detained migrants do not lie within their sphere of responsibility, the principle of proportionality requires that they should be released (HRC 2010 2). This is 'to avoid potentially indefinite detention from occurring, which would be arbitrary' (HRC 2010 18).

Administrative detention of migrants per se is not illegal under international law. Indeed, OHCHR's Working Group on Arbitrary Detention notes:

The Working Group is fully aware of the sovereign right of States to regulate migration. However, it considers that immigration detention should be gradually abolished. Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows (HRC 2010 17).

That is, elements of the way in which immigration detention is carried out, especially with regard to irregular migrants, does contravene international law. Mandatory detention of those without papers is considered unlawful, since disproportional and arbitrary (Edwards 2011 22). In several countries, immigration detention occurs without end point, and without explanation to the person detained of the reason for their detention. This is also considered unlawful, even if entry was illegal (Edwards 2011 23). There may also be a lack of recourse to legal challenge of the detention. Indeed, while the treatment received in immigration detention can be akin to that in criminal detention, in some situations it is worse. This is because legal systems that have in place strict protections for those in criminal detention may not have the same procedures in place for those in administrative detention.

Article 26 of the 1954 Statelessness Convention states:

Each contracting state shall accord to stateless persons lawfully in its territory the right to choose their place of residence and to move

## *Immigration detention and stateless persons*

freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances [i.e. they should not be detained].

However, without access to the usual documents allowing movement across borders, stateless persons may often have crossed borders irregularly and so by definition will usually have an illegal status. Alice Edwards argues that:

Because of the unique situation of stateless persons (who have no other country in which they may regularize their situation), they must be considered 'lawfully in' the countries where they are habitually present (Edwards 2011 17).

This, she argues, is necessary to avoid a 'double penalty' being incurred by stateless persons. She argues that if a stateless person has registered their presence, they should be considered regularly present (Edwards 2011 43). One problem with this is that it may penalize those persons who have not registered their presence, from fear, for example.

While 'the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention' (HRC 1993 14), this is something that immigration detainees are still widely deprived of. Access to information in a language understood by the detainee and to legal representation is often unavailable (CHR 1997 12). Appendix 1 details the guarantees required in order for detention not to be considered arbitrary. Given the above discussion, it can be seen that a number of these are not adhered to in a number of those countries discussed. The OCHCR working group notes that '[w]here the absence of such guarantees or their violation, circumvention or non-implementation constitutes a matter of a high degree of gravity, the Working Group may conclude that the custody is arbitrary' (CHR 1998 20). There are obligations to seek alternatives to detention, or 'A2D' as it is referred to in the literature.

## **4. Alternatives to detention (A2D)**

UNHCR have established eight main alternatives to migration detention (e.g. discussed in Field 2006). These are:

1. No detention or release without conditions or on own recognizance;
2. Release on conditions;

3. Release on bail, bond, surety/guarantee;
4. Community-based supervised release or case management;
5. Designated residence at a particular accommodation centre;
6. Electronic tagging or reporting, or satellite tracking;
7. Home curfews; or
8. Complementary measures.

Some of these are already being implemented in some countries, with regard to some groups. This section details some examples of these, starting with the first, that of no detention, or release without conditions, or on own recognizance.<sup>12</sup> Some states have stopped the practice of detention of some groups of migrants who are not considered a threat. The Philippines and South Africa no longer detain asylum seekers (Edwards 2011 53). For stateless persons who do not represent a threat, perhaps release could be coupled with the granting of some papers as required by the 1961 Convention.

Many countries now release some migrants, particularly asylum seekers, on condition that they report regularly to an administrative office. In some cases, this represents real freedom, in others this is a difficult task, as reporting offices are difficultly located and there is a fear of being arrested and returned to detention when reporting. Some countries that now release some asylum seekers on conditions are France, Luxembourg, South Africa, Austria, Canada, Denmark, Greece, Australia, Hong Kong (China), Ireland, Japan, Norway, Sweden, and the US, as well as nearly all EU countries (Edwards 2011). As usual, information is not given with regard to stateless persons. Those who are not considered a threat could perhaps report in the same way. However, it would need some justification also to require a person regularly to report in this way for an indefinite period.

Another alternative to detention suggested is the release on bail, or with a bond or surety. While in some cases this may require the hand-over of an actual surety, in others the promise of payment is sufficient (Edwards 2011). Often a

---

<sup>12</sup> Please note that much of the evidence provided in this section comes from a report written for the United Nations High Commissioner for Refugees (UNHCR) in 2011 by legal expert Alice Edwards. The full reference to this important report is found in the reference list. Further examples of state practices are found, for example, in Field 2006 and the literature surrounding the Round Table on Alternatives to Detention organised by OHCHR with UNHCR in 2011 and on the UN's recommendation to seek alternatives to detention in 2012.

## *Immigration detention and stateless persons*

local guarantor will be needed. Following a new scheme in Toronto, the Canadian Border Services estimate that 90-95% of asylum applicants in the city are now released into the community following a scheme of this sort (Edwards 2011). This is also used for those pending deportation, for example, in the UK, Slovenia, Finland, Denmark, Canada, Japan and South Korea.

Within this category of community-based supervised release, there are three types of supervision used (Edwards 2011). First, there are NGO-run models, where NGOs assume full responsibility for the supervision of released detainees, including the responsibility to ensure that they do not abscond. Second, there are entirely government-run models. Finally, there are partnership models that involve a hybrid of government-NGO cooperation.

Another option is designated residence at a particular accommodation centre, with the implication that the person is free to come and go from their place of residence freely, so long as they continue to reside there (this should be distinguished from the case where a person is placed in a designated accommodation centre, but are not at liberty to come and go from that place of residence). In this situation, a person will in fact have varying degrees of liberty, but will be required to reside at a particular accommodation centre. One advantage of such a model is that it ensures persons have accommodation and perhaps also food provided. However, it includes a worrying restriction of liberty. This will be particularly problematic in the case of persons who have a family, for example, or where accommodation centres are located at a remove from local services, or from the community of which the person is a part.

All of these alternative measures to detention have drawbacks and several still represent significant restriction of liberty and, depending on how they are managed, may impose other privations, such as making it difficult to access cheap food shops or community services. Any measure adopted, whether detention, or one of these alternatives, needs to be assessed according to its reasonableness, necessity, proportionality, and non-discrimination. Such a measure should only be adopted if it is to serve some legitimate administrative requirement, and any loss of liberty or other right needs to be both justified and compensated through the provision of services at a remove, for example. Further, it should be recalled that if such a measure is to be employed 'pending deportation', then a stateless person could theoretically be subject to such a measure indefinitely as the deportation will not be possible and this, as has been argued above, is necessarily 'arbitrary'.

## Conclusions and recommendations

UNHCR's Guidelines on Detention, Guideline 9, states:

Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release (see Appendix 1 to this report)

Unfortunately, as this report has presented, stateless persons are vulnerable to administrative migration detention, and, more worryingly, their irregular status makes them vulnerable to indefinite and therefore arbitrary administrative detention. In countries where there is no legal limit on migration detention, this is a very real problem. Apart from the obvious rights violation, being detained without being told an end point has been shown to have significant long term psychological and physical health implications, even after the person is in fact released (e.g. see Silove et al. 2007; Bell et al. 2013).

This report recommends that the international community examine the question of the detention of stateless persons as a matter of urgency, including the formulation of an international instrument that will protect these most vulnerable persons from this significant violation of their rights under international law. With this in mind, this report makes the following specific recommendations:

1. There must be international agreement on some limit on administrative immigration detention, with some level of scrutiny regarding implementation.
2. There must be mechanisms for scrutiny more generally of state practice regarding the administrative detention of migrants and particularly stateless persons.
3. Administrative detention is not criminal detention. As a result, those detained should be held separately from criminal detainees, should be eligible for the healthcare, training and other welfare goods to which they would be eligible if they were not detained, and should not be subject to penal measures. These elements should be enshrined in international law and enforceable.

## *Immigration detention and stateless persons*

4. Although administrative detention is not criminal detention, this does not mean it should be outside the usual protections for those deprived of their liberty:
  - a. Detention decisions should be subject to review by a competent, independent and impartial body.
  - b. Persons detained should be told the reason for their detention in a language that they understand.
  - c. Persons detained should have access to legal redress in a language that they understand.
5. A reason needs to be given if a person is to be deprived of their liberty. If the sole reason is that they are 'pending deportation' then the detention of stateless persons is, by definition, not justified. Alternatives to detention must be sought and, in turn, these measures should themselves be justified.

It is crucial that the particular problems of immigration detention for stateless persons are acknowledged and addressed. This must be a priority, and it is hoped that efforts in this direction will be redoubled in preparation for the First Global Forum on Statelessness in 2014.

## References

- Bloom, Tendayi. *Extended Report: Statelessness and the delegation of migration functions to private agents*. Policy Report No. 02/04. Barcelona: United Nations University Institute on Globalization, Culture and Mobility (UNU-GCM), 2013.
- Bull, Melissa, Emily Schindeler, David Berkman and Janet Ransley. 'Sickness in the System of Long-term Immigration Detention'. *Journal of Refugee Studies* 26. 2013: 47-68.
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 2005 (E/CN.4/2006/7)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 2004 (E/CN.4/2005/6)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 2003

- (E/CN.4/2004/3)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 2002 (E/CN.4/2003/8)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 2001 (E/CN.4/2002/77)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 2000 (E/CN.4/2001/14)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 1999 (E/CN.4/2000/4)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 1998 (E/CN.4/1999/63)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 1997 (E/CN.4/1998/44)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 1996 (E/CN.4/1997/4)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 1995 (E/CN.4/1996/40)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 1994 (E/CN.4/1995/31)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNESC. 1993 (E/CN.4/1993/24)
- CHR. *Report of the Working Group on Arbitrary Detention*. UNGA. 1993b (E/CN.4/1994/27)
- Crépeau, François. *Report of the Special Rapporteur on the human rights of migrants*. New York, UNGA. 2012. (A/HRC/20/24).
- Detention Action. *Briefing: The Detained Fast Track*. Detention Action Briefing Paper. February 2013. <http://detentionaction.org.uk/wordpress/wp-content/uploads/2011/10/DFT-briefing-final-February-2013.pdf> Accessed 8th November 2013.
- Edwards, Alice. *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*. Legal and Protection Policy Research Series UNHCR. Geneva, Division of International Protection (PPLA/2011/01.Rev.1). April 2011.
- Field, Ophelia. *Alternatives to the Detention of Asylum Seekers and Refugees*. Legal and Protection Research Series. UNHCR. Geneva. 2006. (POLAS/2006/03).
- HRC. *Report of the Working Group on Arbitrary Detention*. UNGA. 2011 (A/HRC/16/47)

## *Immigration detention and stateless persons*

- HRC. *Report of the Working Group on Arbitrary Detention. Addendum. Mission to Armenia*. 2011b (A/HRC/16/47/Add.3).
- HRC. *Report of the Working Group on Arbitrary Detention. Addendum. Mission to Malaysia*. 2011 (A/HRC/16/47/Add.2)
- HRC. *Report of the Working Group on Arbitrary Detention*. UNGA. 2010 (A/HRC/13/30)
- HRC. *Report of the Working Group on Arbitrary Detention*. UNGA. 2009 (A/HRC/10/21)
- HRC. *Report of the Working Group on Arbitrary Detention*. UNGA. 2008 (A/HRC/13/30)
- HRC. *Report of the Working Group on Arbitrary Detention*. UNGA. 2007 (A/HRC/4/40)
- IDC. *2012 Annual Report. International Detention Coalition. Human rights for detained refugees, asylum seekers and migrants*. IDC, 2012.
- Silove, Derrick, Patricia Austin and Zachary Steel. 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees in Seeking Asylum in Australia', *Transcultural Psychology* 44/3. 2007: 359-393.



## Abbreviations

|        |  |
|--------|--|
| CHR    | Commission on Human Rights                                 |
| HRC    | Human Rights Council (CHR changed its name to HRC in 2006) |
| OHCHR  | Office of the High Commissioner for Human Rights           |
| UNESCO | United Nations Economic and Social Council                 |
| UNGA   | United Nations General Assembly                            |
| UNHCR  | United Nations High Commissioner for Refugees              |

## Appendix 1: OCHCR conditions for detention not to be considered arbitrary (CHR 1998 19, 20)

Guarantee 1: To be informed, at least orally, when held for questioning at the border, or in the territory concerned if he has entered illegally, in a language which he understands, of the nature of and grounds for the measure refusing admission at the border, or permission for temporary residence in the territory, that is being contemplated with respect to him.

Guarantee 2: Decision involving administrative custody taken by a duly authorized official with a sufficient level of responsibility in accordance with the criteria laid down by law and subject to guarantees 3 and 4.

Guarantee 3: Determination of the lawfulness of the administrative custody pursuant to legislation providing to this end for:

- (a) The person concerned to be brought automatically and promptly before a judge or a body affording equivalent guarantees of competence, independence and impartiality;
- (b) Alternatively, the possibility of appealing to a judge or to such a body.

Guarantee 4: To be entitled to have the decision reviewed by a higher court or an equivalent competent, independent and impartial body.

Guarantee 5: Written and reasoned notification of the measure of custody in a language understood by the applicant.

Guarantee 6: Possibility of communicating by an effective medium such as the telephone, fax or electronic mail, from the place of custody, in particular with a lawyer, a consular representative and relatives.

Guarantee 7: To be assisted by counsel of his own choosing (or, alternatively, by officially appointed counsel) both through visits in the place of custody and at any hearing.

Guarantee 8: Custody effected in public premises intended for this purpose; otherwise, the individual in custody shall be separated from persons imprisoned under criminal law.

Guarantee 9: Keeping up to date a register of persons entering and leaving custody, and specifying the reasons for the measure.

Guarantee 10: Not to be held in custody for an excessive or unlimited period, with a maximum period being set, as appropriate, by the regulations.

Guarantee 11: To be informed of the guarantees provided for in the disciplinary rules, if any.

Guarantee 12: Existence of a procedure for holding a person incommunicado and the nature of such a procedure, where applicable.

Guarantee 13: Possibility for the alien to benefit from alternatives to administrative custody.

Guarantee 14: Possibility for the Office of the United Nations Higher Commissioner for Refugees, the International Committee of the Red Cross and specialized non-governmental organizations to have access to places of custody.

Note that these are then further codified in (CHR 1999), into the set of 10 principles laid out in Appendix 2.

## Appendix 2: OCHCR principles for the detention of asylum seekers and immigrants (CHR 1999 30,31)

Principle 1: Any asylum-seeker or immigrant, when held for questioning at the border, or inside national territory in the case of illegal entry, must be informed at least orally, and in a language which he or she understands, of the nature of and grounds for the decision refusing entry at the border, or permission for temporary residence in the territory, that is being contemplated with respect to the person concerned.

Principle 2: Any asylum-seeker or immigrant must have the possibility, while in custody, of communicating with the outside world, including by telephone, fax or electronic mail, and of contacting a lawyer, a consular representative and relatives.

Principle 3: Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.

Principle 4: Any asylum-seeker or immigrant, when placed in custody, must enter his or her signature in a register which is numbered and bound, or affords equivalent guarantees, indicating the person's identity, the grounds for the custody and the competent authority which decided on the measure, as well as the time and date of admission into and release from custody.

Principle 5: Any asylum-seeker or immigrant, upon admission to a centre for custody, must be informed of the internal regulations and, where appropriate, of the applicable disciplinary rules and any possibility of his or her being held incommunicado, as well as of the guarantees accompanying such a measure.

Principle 6: The decision must be taken by a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law.

Principle 7: A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.

Principle 8: Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned.

Principle 9: Custody must be effected in a public establishment specifically intended for this purpose; when, for practical reasons, this is not the case, the asylum-seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law.

Principle 10: The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody.

## Appendix 3: References to migration in the annual reports of the OHCHR Working Group on Arbitrary Detention<sup>13</sup>

| Year/Ref           | Refs to 'migration' and 'migrant' (including immigration and immigrant) | Refs to 'asylum' | Refs to 'stateless' | # of pages |
|--------------------|---|------------------|---------------------|------------|
| 1992 <sup>14</sup> | nd  | nd               | nd                  | nd         |
| 1993 (CHR 1993)    | 1   | 2                | 0                   | 104        |
| 1994 (CHR 1993b)   | 0   | 3                | 0                   | 150        |
| 1995 (CHR 1994)    | 0   | 0                | 0                   | 25         |
| 1996 (CHR 1995)    | 1 <sup>15</sup>   | 7                | 0                   | 36         |
| 1997 (CHR 1996)    | 0   | 0                | 0                   | 39         |
| 1998 (CHR 1997)    | 13  | 26               | 0                   | 37         |
| 1999 (CHR 1998)    | 12  | 12               | 0                   | 24         |
| 2000 (CHR 1999)    | 16  | 17               | 0                   | 30         |
| 2001 (CHR 2000)    | 3   | 4                | 0                   | 35         |
| 2002 (CHR 2001)    | 5   | 3                | 0                   | 20         |
| 2003 (CHR 2002)    | 12  | 8                | 0                   | 25         |
| 2004 (CHR 2003)    | 19  | 10               | 0                   | 25         |
| 2005 (CHR 2004)    | 12  | 10               | 0                   | 25         |
| 2006 (CHR 2005)    | 5   | 3                | 0                   | 25         |
| 2007 (HRC 2007)    | 2   | 2                | 0                   | 28         |
| 2008 (HRC 2008)    | 43  | 22               | 0                   | 28         |
| 2009 (HRC 2009)    | 15  | 4                | 1                   | 26         |
| 2010 (HRC 2010)    | 40  | 14               | 0                   | 25         |
| 2011 (HRC 2011)    | 5   | 2                | 0                   | 28         |

<sup>13</sup> Information is included in the table about all reports available online at time of writing. Links to all of the available reports and accompanying documents can be found here: <http://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx> (accessed 06/08/2013)

<sup>14</sup> The first report, from 1992, was not available at the time of writing.

<sup>15</sup> Both of these references are to Cubans detained in Guantanamo Bay by the United States.



© UNU-GCM, 2013

*Texts, tables and figures included in this report  
are copyright of the United Nations University  
Institute on Globalization, Culture and Mobility  
(UNU-GCM).*

Sant Manuel Pavilion,  
Sant Pau Art Nouveau Site  
C/ Sant Antoni Maria Claret, 167  
08025 Barcelona, Spain  
info.gcm@unu.edu  
<http://www.gcm.unu.edu>