

Immigration Detention: Some Issues of Inequality

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Immigration detention is not new, but the scale of its use by states to control borders and “manage” migration is unprecedented. Whether as an administrative practice or as a consequence of the criminalisation of migration, detention of migrants is now a global phenomenon which affects an increasing number of vulnerable migrants, for increasingly long periods of time, often in conditions which fall far below the standards set by international human rights law.

The principle of equality has a dual relevance to immigration detention. First, the decision to detain should not be discriminatory; second, non-nationals should enjoy substantive equality with nationals in the rights they enjoy in detention. This article reviews some issues of inequality which arise within immigration detention. It first examines the use and dimensions of this form of detention, the limits which human rights law places on states’ recourse to detention and the bars to detention which is arbitrary, or discriminatory. It then contrasts the rights of those in administrative detention with the greater protection often provided by criminal justice systems, and considers the special needs of non-nationals to legal access and health care. It argues that special steps are required to ensure the substantive equality of immigration detainees.

1. The Use of Detention

The detention of refugees, migrants and stateless persons has become a frequent – and frequently arbitrary and disproportion-

ate – response to violations of immigration law. Detention is most commonly used where migrants enter a state illegally, or overstay their leave. Although asylum-seekers, children, victims of trafficking and stateless persons are recognised as vulnerable groups under international law, and entitled to special protection, many are detained.

Immigration detention as a term refers to the deprivation of liberty of non-citizens under aliens’ legislation because of their status. Deprivation of liberty on these grounds typically takes the form of administrative detention. But there is a growing trend among states to make irregular entry or presence in a country a criminal offence, with the result that more irregular migrants are subject to detention within the criminal justice system.

The conventional object of administrative detention is to ensure that another measure such as deportation or expulsion can be implemented, but in the immigration context it is also used – and abused – for punitive and deterrent purposes. “Immigration detention” which is administrative in character is to be distinguished from “criminal detention” and “security detention” which refer respectively to detention on the grounds of having committed a criminal offence, or detention for national security or terrorism-related reasons. In some instances, non-citizens who are prosecuted for criminal offences, including immigration and documentation violations, are held in mandatory detention after their sentences have been served, pending their removal.

Under international law, states have a sovereign right to determine who may enter and stay in their territory. Many states see the removal of irregular immigrants as an integral part of border control, and in “the best interests” of the destination country.¹ This is especially the case for states faced with high numbers of irregular migrants, with detention playing an important role in securing irregular migrants prior to removal, on the assumption that “absconding is a significant risk and detention is one solution”.² As the number of migrants arriving irregularly has risen, so the use of detention by countries of destination has expanded.³ Some countries routinely detain anyone found on or entering their territory illegally.⁴ In the case of asylum-seekers, detention is typically used when an individual’s identity is being established or where a claim is being processed, and continues where a claim has been refused, pending expulsion from the country.⁵

Detention is today a common practice in Europe, in use in almost all of the Council of Europe’s 47 member states⁶ and in the last ten years, its use in expulsion proceedings has “blossomed”.⁷ In these years, states on the external frontiers of the European Union (EU) have responded to rising numbers of asylum-seekers and irregular migrants by imposing tighter border controls, in which detention plays a key role. After 2004, the governments of 10 new EU member states made the use of detention to control and deter illegal immigration to and through their territories a national priority.⁸ This trend has not only affected EU member states, but has been encouraged in states which irregular migrants transit on their way to the EU.⁹

However, set in a wider human rights context, and viewed from the standpoint of vulnerable migrants, the position can be seen in different terms:

“Migrants arrive (...) in shaky and dangerous boats (...) or via land hidden in the back of smugglers’ trucks, travelling thousands of miles in cramped and dangerous conditions. They find ways to cross land borders in secret, or elude border controls with false documents. Some overstay their visas. (...) Seeking to protect their borders, [European countries] (...) criminalise these migrants, lock them up in prison-like conditions, and expel them as quickly as possible – even to countries where they risk persecution and torture. These foreigners are not criminals; they are guilty only of having aspired to a better life, a job or, in the saddest and most distressing cases, protection from persecution (...)”¹⁰

2. The Dimensions of Detention

Another, and more radical, view is that the European detention camps “form a border between nation states (...) which is expanding into a huge borderless system (...) a corridor of exile.”¹¹

A growing body of information on detention is published by intergovernmental organisations, and by human rights and migrant rights non-governmental organisations (NGOs); it is most extensive in its reporting on Europe.¹² Only the roughest estimates exist for the numbers of those in immigration detention; nonetheless, all the evidence shows they are high, and have increased sharply in the last decade. Thus, although it is known that between 2005 and 2007, around 1.4 million people were apprehended for being illegally present in EU countries, and almost 760,000 removals were undertaken,¹³ it is not known how many were detained before removal. Some examples suggest the wider picture. In certain countries “the number of non-citizens in administrative detention exceeds the number of sentenced prisoners or detain-

ees, who have or are suspected of having committed a crime.”¹⁴ It is estimated that one million children are affected worldwide by immigration detention policies.¹⁵ Between 2001 and 2009, the annual number of immigration-related detentions in the US rose from some 95,000 to 380,000; and the average daily population of detained immigrants grew from about 19,000, to over 30,000.¹⁶ In the UK, by 2012 there will be a 60% increase in the immigration “estate” – the holding capacity of detention centres.¹⁷

Immigration detainees are held in a range of different, and sometimes grossly unsuitable, places. In the course of its country visits, the European Committee for the Prevention of Torture (ECPT) has reported meetings with detainees in a variety of custodial settings, ranging from holding facilities at points of entry to police stations, prisons and specialised detention centres, transit and “international zones” at airports, where persons were held for days under makeshift conditions in airport lounges.¹⁸ In practice, some states “misleadingly label” immigration detention centres as “transit centres” or “guest houses” and detention as “retention” in the absence of legislation authorising deprivation of liberty.¹⁹ Greece, on the EU’s southern border, has been under particular pressure from migrants and refugees arriving irregularly; a policy of systematic detention has meant that many police stations have been transformed into facilities for the detention of aliens awaiting deportation.²⁰

3. Legal Principles: International, Regional and National²¹

There is often a considerable gap between the principles of international human rights law and national practice. The UN’s monitoring body on detention describes a global patchwork of national law and practice:

“Some states are entirely lacking a legal regime governing immigration and asylum procedures. Others have enacted immigration laws, but have omitted to provide for a legal framework of detention. (...) If there is a legal framework for detention its design differs. States allow for the detention of a-s and immigrants outside the criminal or national security context in order to establish the legal identity of illegal immigrants and rejected a-s or to secure expulsion to their countries of origin. In other states, detention is mandatory and is sometimes even used as a means of deterring future refugee or migration flows. In some countries there is legislation which provides for a maximum period of detention, whereas others are lacking such a time limit. Some national laws require that detention be ordered by a judge but most states resort to administrative detention.”²²

Immigration detention is thus an area in which there are particular tensions between international and regional human rights law and state practice. Although the state has general authority to decide who enters and who should be removed from its territory, at the same time it must comply with fundamental human rights principles, including the right to liberty.

Although human rights law generally guarantees a universal right to liberty, the right is not absolute, and narrow exceptions are allowed. Under international human rights law, the International Covenant on Civil and Political Rights (ICCPR) guarantees everyone the right to liberty and security, and that no one shall be deprived of his liberty “except on such grounds and in accordance with such procedure as are established by law”.²³

Two exceptions are set out in European regional human rights law. The European Convention on Human Rights (ECHR) permits detention of non-nationals to prevent unau-

thorised entry into a country, and to effect deportation or extradition.²⁴ To be lawful, detention must be in accordance with national and – where the two are inconsistent – international law; it must not be arbitrary, it must pass tests of reasonableness, necessity and proportionality, its length must not be disproportionate, it must not be imposed with discrimination, and the decision to detain must be taken in good faith and with proper purpose. The principles of reasonableness, necessity and proportionality require also that states consider alternatives to detention which would be a lesser interference with the right to liberty and security of the person.²⁵

Through Directive 2008/115/EC (the Returns Directive),²⁶ European Union law sets a “limit” on the length of immigration detention prior to deportation, and has codified legal principles: detention must only serve the purpose of facilitating removal; it must be for the shortest possible period while removal arrangements are in process; and it must be “executed with due diligence”. Where there is no reasonable expectation that someone will be removed, detention ceases to be justified and the detainee must be released immediately.²⁷ But the Returns Directive sets an excessive outer time limit of 18 months.²⁸

Although not bound by the Returns Directive, UK courts have derived broadly similar tests from English common law: there must be an intention to deport; detention “pending removal” may only be for a “reasonable” period of time; and where it is evident that removal cannot be effected within a reasonable period, the detention becomes unlawful.²⁹

Thus, while the detention of irregular migrants is not prohibited, it should be used only as a last resort³⁰ and its use should be subject to rigorous tests. The issue in each case is whether the state’s action in detain-

ing an individual is in accordance with international law, as interpreted in the case law of national and international courts, and applied in the decisions of international oversight bodies such as the Human Rights Committee and the UN Working Group on Arbitrary Detention.

In the case of three of the most vulnerable groups – asylum-seekers, children and (to some degree) stateless persons – detention should not generally be used, and they are entitled to special protection under international law.³¹

There is a growing jurisprudence in this area, especially by the European Court of Human Rights (ECtHR). But although the ECHR imposes clear limits on states’ use of detention generally, the ECtHR has interpreted these limits restrictively in cases involving non-nationals. Galina Cornelisse argues that the ECtHR’s review of the lawfulness of immigration detention is “fundamentally different” from the way it examines the lawfulness of other forms of detention.³²

When called upon to resolve conflicts between human rights and competing public interests, judges have to reconcile the special status of these rights with the legitimate power of the state to set limits to their exercise.³³ *Saadi*³⁴ is one example of the priority given by the ECtHR to national sovereignty over the right to liberty in immigration cases.

Saadi was a refugee from Northern Iraq who applied for asylum upon his arrival in the United Kingdom. Although he was detained by the British authorities for reasons of mere administrative expediency, this was not held by the ECtHR to be in violation of his right to personal liberty. The ECtHR stressed the “undeniable sovereign right of states to control aliens’ entry into and residence in their territory”, and deduced from that undeniable

right of control a “necessary adjunct” – the power to detain immigrants who have applied for permission to enter. It then argued that as long as a state has not authorised the entry of an individual, his detention could be classified as being “to prevent unauthorized entry”, and thus in compliance with Article 5(1)(f) of the ECHR.

Cornelisse sees the ECtHR’s judgment in *Saadi* as exemplifying the “limits and blindspots” of the European human rights system when it comes to those who are “out of place” in the global territorial order.³⁵

4. Detention Conditions: Discrimination and Unequal Treatment

As stated above, the principle of equality has a dual relevance to immigration detention. First, the decision to detain should not be discriminatory; second, non-nationals should enjoy substantive equality with nationals in the rights they enjoy in detention.

Under international human rights law, the rights of irregular migrants must be respected, even if their right to stay is not protected, and to this end most human rights standards apply without distinction between citizens and foreign nationals. Principles of equality and non-discrimination require that distinctions between groups must be prescribed by law, pursue a legitimate aim, and be strictly proportionate to that aim.³⁶ Detention which discriminates on one of the prohibited grounds,³⁷ including on the basis of nationality except where different treatment is strictly required by border control, is not permissible.

The general rule is that these rights must be “guaranteed without discrimination between aliens and citizens”, with only those narrow exceptions required by border control. Rights contained in human rights treat-

ties must be available to “all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons who find themselves in the territory” of a state.³⁸ Thus, the right to liberty must be enjoyed equally and without discrimination: this means, for example, that migrant workers, regular or irregular, who are detained are to enjoy the same rights as nationals in the same situation.³⁹

The decision to detain may be arbitrary and so unlawful on the basis of discrimination. In one benchmark case, foreign nationals who had been detained in the UK on grounds of national security challenged their indefinite detention without trial, on the ground that the law applied to foreign but not to British nationals; they argued that it was not permissible for the state to discriminate between aliens and citizens as regards the right to liberty. The House of Lords, the highest UK court, agreed, ruling that a distinction between citizens and migrants in their enjoyment of the right to liberty amounted to discrimination. While the rights of citizens and aliens might differ in an immigration context, international human rights law – the ECHR and the ICCPR – did not permit discrimination between citizens and aliens in their right to liberty. A state was “not permitted to discriminate against an unpopular minority for the good of the majority”.⁴⁰

Less priority has been given to challenges to conditions within detention on the grounds that they discriminate against non-nationals, and that the principle of equality requires that the special vulnerability of immigration detainees should be recognised in the rules which apply to their detention. This is an area to which more attention should be paid.

Reports by international monitoring bodies and NGOs identify a number of areas in

which conditions fall so far below international standards as to constitute grave violations of migrants' rights. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment found that conditions of immigration detention in Greece "amount to inhuman and degrading treatment, in violation of Articles 7 and 10 ICCPR".⁴¹ On the basis of its review of individual cases, the UN Working Group on Arbitrary Detention has reported that in a number of countries immigration detainees are kept in custody without sufficient water, food, and bedding or any possibility of leaving their cells to go to the yard, to communicate with their relatives, lawyers, interpreters or consulates, or to challenge the legality of the deprivation of their liberty or deportation orders.⁴² Frequently, the rights and treatment of these immigration detainees compare negatively with those of unconvicted nationals in the countries in which they are detained.

It is, of course, axiomatic that – by definition – prisons are not suitable places in which to hold someone who is neither accused nor convicted of a criminal offence.⁴³

The ECPT has identified three of the most basic rights – and safeguards – which detained migrants should enjoy "in the same way" as other categories of detainees. These are gateway or "passport" rights, which give access to wider forms of protection. The importance of such safeguards is the greater because of the vulnerable nature of immigration detainees as a group, and because of particular needs which may arise as a result of past torture and persecution, and of the ill-treatment and deprivation many have undergone on their irregular migratory journey. These rights are: (i) to have access to a lawyer; (ii) to have access to a medical doctor; and (iii) to have contact with a relative or third party

– including a consular official. At all points, detainees should immediately be given information about these rights in a language they understand.⁴⁴

Although these appear minimal rights, information from monitoring reports suggests that many detention situations fall far below even this modest threshold, with legal access and medical treatment denied in places of detention such as in the following example (which is described as "illustrative"):

"[A] disused warehouse, with limited or no sanitation, crammed with beds and mattresses on the floor, accommodating upwards of 100 persons locked in together for weeks or even months, with no activities, no access to outside exercise and poor hygiene".⁴⁵

5. Access to a Lawyer

For all detainees, held in any type of custody, the right to prompt access to a lawyer, to information about the right and, where necessary, to free legal assistance,⁴⁶ are essential pre-requisites for legal protection. Denial prevents detainees from exercising their rights to challenge the legality of both detention and of its conditions.⁴⁷

The UN Special Rapporteur on the Human Rights of Migrants has described states' denial of the right in practice, and the consequences of denial:

"Some national laws do not provide for judicial review of administrative detention of migrants. In other instances, the judicial review (...) is initiated only upon request of the migrant (...) lack of awareness of the right to appeal, lack of awareness of the grounds for detention, difficult access to relevant files, lack of access to free legal counsel, lack of interpreters and translation

services, and a general absence of information in a language detainees can understand on the right to instruct and retain counsel and the situation of the facilities where they are being held can prevent migrants from exercising their rights in practice.”⁴⁸

Migrants and asylum-seekers are especially vulnerable when detained at airport transit zones and other points of entry, where the detention may be under no clear authority, imposed with the knowledge of government officials at the airport or simply on the instructions of airline companies, before being returned to their countries. The difficulty – or impossibility – of obtaining any outside assistance prevents the exercise of the right of the persons concerned to challenge the lawfulness of the decision to detain or remove, or for asylum-seekers to apply for asylum.

Human rights law traditionally places less stringent obligations on states in immigration proceedings than in criminal proceedings, for example as regards the right to examine evidence or call witnesses. Domestic laws and regulations governing immigration thus tend to provide fewer legal safeguards than those available to individuals facing criminal charges.⁴⁹ This means that immigration detainees may find themselves in a situation of legal inequality even where the individual is not charged with, or even suspected of, any offence.

In a recent review of immigration detention in the UK, Mary Bosworth notes that non-nationals detained under immigration law are often disadvantaged relative to prisoners, and are typically unable to access the same legal protections as those who break the criminal law. Legal and normative safeguards exist to prevent citizens from being taken from their homes without charge and placed in confinement without judicial over-

sight; even those accused of the most serious offences are entitled to court-appointed lawyers and, while awaiting trial, may apply for bail. But:

“Most of these protections simply do not apply to those under immigration control; thus, unless a detainee applies for bail, the government is never required to obtain permission from a judge to hold someone in immigration detention.”⁵⁰

Since detainees are not routinely provided with a court-appointed lawyer, research has found that many are unaware that they have a right to apply for bail. Language barriers, confusion and trauma also make it more difficult for many to access legal aid.⁵¹

Marie-Benedicte Dembour has reviewed the obstacles which had to be overcome by children who were held in a closed detention centre in Belgium, first in the Belgian courts and then in the ECtHR.⁵² The applicants were four Chechen children who were detained with their mother, Mrs Muskhadzhiyeva, who had sought asylum. An initial difficulty was legal access, since the prison authorities did not inform the detainees of their right to see a lawyer, nor was interpretation available when Mrs Muskhadzhiyeva met her lawyer; this obstacle was overcome with the help of civil society organisations. A second difficulty was the loss of contact between the detainees and their lawyer after the family was removed from Belgium to Poland; contact was resumed - with difficulty and with luck - through an NGO. Once the case was won, the lawyer found that the total costs awarded by both the ECtHR and the Belgian system did not cover even his minimal time costs and expenses. Then another difficulty arose: Mrs Muskhadzhiyeva’s children could not receive the compensation ordered by the ECtHR because by the time it was paid the

family had been released and their whereabouts were unknown; “they might have been for a while in France, from where they might have been deported and possibly returned once again to Poland”.⁵³

These difficulties are not unique to the Muskhadzhiyeva case. Similar problems arise in many immigration detention proceedings, and reflect the obstacles to the exercise and enjoyment of rights which are to be found where individuals are detained outside the criminal justice system, are unfamiliar with the language and the society in which they find themselves, have no right to stay in the country of detention, and may be removed to another country during the course of the legal proceedings. For the lawyer, these obstacles mean it is more difficult, and takes more time, to represent an immigration client, and costs are higher than would be the case in acting for a national of the country.

A recent investigation in Ukraine by the Jesuit Refugee Service noted that the state’s detention centres – built under bilateral agreements with the EU, and with EU funding – are situated in such remote areas of the country that access by lawyers and interpreters is very difficult.⁵⁴

6. Access to a Doctor

International human rights law proscribes any discrimination in access to health care, and the underlying determinants of health which has the intention or effect of impairing the equal enjoyment of the right to health. This is an essential component of the right to health, which applies:

“[T]o everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and vic-

tims of international trafficking, regardless of legal status and documentation”.⁵⁵

For immigration detainees, the starting point in terms of health rights is that detention facilities should provide access to medical care, and that particular attention should be paid to the physical and psychological state of detained migrants, whether asylum-seekers who have fled persecution, or others who have travelled on irregular land or sea routes.

The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted that non-discrimination and equal treatment are among the most critical components of the right to health; even an unintended discriminatory effect may be in breach of international human rights law.⁵⁶ In practice, health provision can have different – and unintended – impacts on different groups, and can negatively impact on vulnerable migrants in ways which would not arise in the case of nationals. The point is developed in the CPT’s *Standards*,⁵⁷ which emphasise that the mental and physical health of irregular migrants may be negatively affected by previous traumatic experiences. The loss of accustomed personal and cultural surroundings and uncertainty about one’s future may lead to mental deterioration, including exacerbation of pre-existing symptoms of depression, anxiety and post-traumatic disorder.⁵⁸

Differential impacts arise in two situations: (i) the impact of physical and mental health care, through treatment – or lack of treatment – in detention establishments; and (ii) the impact of detention and the detention environment on the underlying determinants of health.

Applying these general principles at a national level, the UK's Prison Inspectorate has set out standards for all places of immigration detention, which recognise the vulnerability of immigration detainees, and the special steps which should therefore be taken to respect their health needs and right to health. These standards are presented as the "expectations" to which detainees are entitled in terms of their conditions and treatment. Thus, the "expectations" state that, *inter alia*: (i) the provision of health services in an immigration detention centre should be sensitive to the possibility that a detainee may have been a victim of torture and staff should be trained to recognise and treat signs of trauma and torture; and (ii) there is a presumption against detention of any detained person whose mental or physical well-being is likely to be adversely affected by continued detention.⁵⁹ But these "expectations" are too often not reflected in national practice.

Recent research in the UK with detained torture survivors from countries where rape is used as a weapon of war found not only that their wellbeing had been adversely affected by detention, but also that their medical treatment was markedly inferior to that available under the National Health Service to individuals living in the same area. Many had been denied life-saving medication.⁶⁰

Reporting on the impact of detention on migrants' health in Italy, Malta and Greece, Médecins Sans Frontières (MSF) has confirmed the negative impact of detention in "appalling conditions" on health.⁶¹ It found that Greek detention centres provided no special care for pregnant women and children, medical personnel did not visit the cells and usually patients tried to attract their attention by shouting from behind bars. Many migrants arrived in Europe in relatively

good health, despite the difficult journey, but their health soon deteriorated during detention as a result of respiratory infections, communicable diseases such as scabies, chicken pox, fungal skin infections or gastrointestinal problems. In Malta, it found thirteen people suffering from chicken pox who were "isolated" in a room in one part of a detention centre together with 80 non-infected people; as a result there had then been an "uninterrupted chicken pox epidemic", with over 120 cases in five months, which the authorities had taken no effective steps to stop. MSF also found a direct link between the length of stay in detention and the level of desperation reported, noting that despite the obvious mental health needs, most detention centres had "a complete lack of mental health services".

Reporting on the wider impact of the detention environment on health, MSF noted that many detainees had already escaped war; hunger and harsh living conditions, and detention, added to their existing distress and psychological suffering:

"Overcrowded living conditions, often combined with inadequate sanitation facilities, substandard provision of shelter, food and non-food items and serious barriers to access to healthcare, including mental healthcare, inevitably have an impact on migrants' wellbeing."

7. Contact with a Relative or Third Party, Including a Consular Official

In addition to the benefits of support and of combating isolation to anyone deprived of liberty, outside contact has particular importance for detained non-nationals who have lost their personal and cultural surroundings, and are faced with an unfamiliar social, legal and linguistic environment.

Their vulnerability gives contact with the outside world even greater importance than for a national detainee.

Historically, international law recognised the specific vulnerability of aliens by giving the diplomatic representatives of the state of nationality the right to visit their detained nationals, and the right to refugees to contact UNHCR.⁶² For immigration detainees, confronted by legal proceedings in a language and under a legal system which they do not understand, consular assistance is a human right, and an essential part of due process and fairness.⁶³ However, the legally stateless are without consular support, as are many irregular migrants whose nationality is ineffective because the consulates of their legal nationality refuse assistance, or are unable to provide assistance because there is no diplomatic representation in the country of detention.⁶⁴ In these situations, as in the *Muskhadzhiyeva* case, the role of civil society is key to protection.

8. International Monitoring and Oversight

States' reluctance to accept the constraints on national policies set by international human rights law has been particularly acute in the case of irregular migrants.⁶⁵ Some national legal systems have adopted narrow and restrictive interpretations of international human rights when detention is challenged by non-nationals.⁶⁶

International oversight therefore plays an essential role in protection. As the use of immigration detention has grown, so has awareness of the challenges it presents to human rights, both within the UN, and specifically within the Human Rights Council.⁶⁷ A first step was taken by the Human Rights Commission⁶⁸ in 1997, when the mandate of the Working Group on Arbitrary Detention was

extended to cover asylum-seekers and migrants. In 1999, a special procedure to report on and monitor the human rights of migrants was created.⁶⁹ Other special procedures have since included violations of migrants' rights in their scrutiny. The UN human rights treaty bodies now include non-nationals in their review of states' treaty compliance, and states' detention practices are considered in the HRC's Universal Periodic Review.⁷⁰

As the work of the ECPT has demonstrated in Europe, an international mandate to prevent torture, cruel, inhuman and degrading treatment or punishment can play an important role in monitoring national detention practice and conditions, complemented by human rights and migrant rights NGOs.

An international development of particular significance is therefore the establishment of a new monitoring body under the Convention against Torture. An Optional Protocol to the Convention against Torture (OPCAT) entered into force in June 2006, creating a Subcommittee on Prevention of Torture (SPT), which has a mandate to visit places of detention, including places of immigration detention. The OPCAT also requires states to establish "independent national preventive mechanisms" at the domestic level, with a mandate to inspect places of detention. Under the OPCAT, the SPT has unrestricted access to all places of detention, can make unannounced visits to police stations, prisons, detention centres (including immigration detention centres), and other places where people are deprived of their liberty, and meet in private with detainees.

One practical difficulty is that international custodial standards – notably the UN Standard Minimum Rules for the Treatment of Prisoners – apply specifically to prisons,

but immigration detainees are held in many other places.⁷¹ The UN's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁷² is an important global standard, but it deals with living conditions in a more limited way than the UN Standard Minimum Rules for the Minimum Treatment of Prisoners. UNHCR's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers identify minimum conditions, but are not detailed in the standards they set.⁷³ In the context of Europe, the ECPT has therefore noted the lack of a "comprehensive instrument" setting out the minimum standards and safeguards for irregular migrants deprived of their liberty, which are in line with the specific needs of this particular group. Although the European Prison Rules apply to immigration detainees held in prisons, they do not apply to immigration detention centres, police stations, and other places of immigration detention.⁷⁴

9. Concluding Comment

International and national courts have given considerable attention to strengthening human rights protection for asylum-seekers and migrants against arbitrariness and discrimination by states in the decision to detain. But much less attention has been paid

to the unequal treatment which migrants and asylum seekers may face within immigration detention.

There is a need to recognise and redress the inequalities arising from the lesser protection given to non-nationals held in immigration detention as compared to the rights typically available to those held within national criminal justice systems. There is also a need to recognise that although standards of treatment in principle apply equally to nationals and non-national detainees, the impact on immigration detainees will not necessarily be equal because of their particular vulnerabilities.

Equal treatment in this context is not always equivalent to identical treatment. As the UK's *Immigration Detention: Expectations* recognise – for example with regard to health – special steps, positive action and even different treatment may be required to ensure substantive equality between immigration detainees and detained nationals. To be effective in protecting rights, rules and procedures will therefore need to take account of these differences. To attain full and effective equality for vulnerable immigration detainees it will sometimes be necessary to treat them differently to reflect their different circumstances.⁷⁵

¹ See International Organization for Migration, *World Migration Report 2010: The Future of Migration: Building Capacities for Change*, 2010, p. 36.

² *Ibid.*, p. 36. But research on the rates of absconding casts doubt on the belief that detention is needed to ensure compliance. (See Edwards, A., *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, pp. 82-87.)

³ In the case of the European Union, where large numbers of migrants are in detention, estimates suggest that there are now 5.5 million irregular migrants in member states. (See Hammarberg, T., *Human Rights in Europe: No Grounds for Complacency*, Council of Europe, Strasbourg, 2011, p. 84.)

⁴ UN Commission on Human Rights, *Report of UN Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3, 15 December 2003.

⁵ See generally website of the Global Detention Project, available at: <http://www.globaldetentionproject.org/home.html>. In the case of children, see Children's Legal Centre, *Administrative Detention of Children: a Global Report*, 2011, p. 61.

⁶ Hammarberg, T., *Human Rights Challenges of Migration in Europe*, Council of Europe Seminar during the Turkish Chairmanship, CommDH/Speech(2011)2, Istanbul, 17-18 February 2011.

⁷ Hammarberg, T., *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper, CommDH/Issue-Paper(2010)1, 4 February 2010.

⁸ Jesuit Refugee Service, *Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union*, 2007.

⁹ For example, Ukraine has received EU funding and technical support to build detention centres for migrants. (See Médecins Sans Frontières UK, *Focus on Ukraine*, available at: <http://www.msf.org.uk/ukraine.focus>.)

¹⁰ Hammarberg, T., *Positions on the Rights of Migrants in an Irregular Situation*, Issue Paper, CommDH/PositionPaper(2010)5, 24 June 2010.

¹¹ Agier, M., "Corridors of Exile: a Worldwide Web of Camps", *metropolitiques.eu*, 25 November 2010, translated by E. Rosencrants, available at: <http://www.metropolitiques.eu/corridors-of-exile-a-worldwide-web.html>.

¹² See, generally, reports of: the UN Special Rapporteur on the Human Rights of Migrants; the UN Working Group on Arbitrary Detention; the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the Human Rights Commissioner of the Council of Europe; Amnesty International, and Human Rights Watch. See specifically: International Commission of Jurists, *Migration and International Law*, 2011; Children's Legal Centre, *Administrative Detention of Children: a Global Report*, 2011; Ricupero, I. and Flynn, M., *Migration and Detention: Mapping the International Legal Terrain*, Global Detention Project, 2009; and Amnesty International, *Migration-Related Detention: a Research Guide on Human Rights Standards*, POL 33/005/2007, 2007.

¹³ See above, note 2, p. 121.

¹⁴ UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention*, A/HRC/7/4, 10 January 2008, Para 45.

¹⁵ Children's Legal Centre, above note 13, p. 62. The report notes a general failure by states to collect and collate data on the number of children, length of their detention and the reasons for detention.

¹⁶ A "system snapshot" of US immigration detention showed that of 32,000 in immigration detention, 18,690 had had no criminal conviction, of whom over 400 had been detained for at least 1 year. (See "Immigrants Face Long Detention, Few Rights", *Associated Press*, 15 March 2009.)

¹⁷ See Bosworth, M., "Human Rights and Immigration Detention in the UK", in Dembour, M-B. and Kelly, T. (eds.), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, 2011, p. 169.

¹⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT Standards: Safeguards for Irregular Migrants Detained under Aliens Legislation*, CPT/Inf/E (2002) 1 - Rev. 2010, available at: <http://www.cpt.coe.int/en/docsstandards.htm>, p. 53, Paras 24-26.

¹⁹ UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, A/HRC/7/12, 25 February 2008, Para 47.

²⁰ See UN Human Rights Council, *Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Greece*, A/HRC/16/52/Add. 4, 4 March 2011.

²¹ For a detailed analysis of the international law framework, see Edwards, above note 3, pp 8 and 17 et seq; see also The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, London, 2010, pp. 87-107.

²² See above, note 21, Para 45.

²³ UN International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (1966), Article 9: "Everyone has the right to liberty and security. No-one shall be subjected to arbitrary arrest or detention. No-one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

²⁴ European Convention on Human Rights, Article 5(1): "Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

²⁵ See Edwards, above note 3, p. 25.

²⁶ Council of the European Union, *Directive 2008/115/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Official Journal L 304, 20/09/2004 P. 0012-0023.

²⁷ *Ibid.*, Article 15(1) and (4).

²⁸ Baldaccini, A., “The EU Directive on Return: Principles and Protest”, *Refugee Survey Quarterly*, Vol. 28(4), 2009, pp. 114–138: “By sanctioning a prolonged pre-removal detention regime, the EU (...) has set a particularly inappropriate example for the rest of the world”, p. 137.

²⁹ *R(I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] INLR 196, Para 46; approved by the Supreme Court in *Lumba (WLO v Secretary of State for the Home Department)* [2011] UKSC 12.

³⁰ See, for example, Council of Europe Parliamentary Assembly, *Human Rights of Irregular Migrants*, Resolution 1509 (2006), 27 June 2006, Para 124.

³¹ See UNHCR, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Guidelines 2, 6 and 9; see also Edwards, above note 3; Children’s Legal Centre, above note 13; The Equal Rights Trust, above note 22.

³² Cornelisse, G., “A New Articulation of Human Rights, or Why the European Court of Human Rights Should Think Beyond Westphalian Sovereignty”, in Dembour, M-B. and Kelly, T. (eds.), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, 2011, p. 106.

³³ *Ibid.*, p.107

³⁴ *Saadi v The United Kingdom*, Appl. No. 13229/03, ECHR, 29 January 2008.

³⁵ See above, note 33, p. 99.

³⁶ See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (Art. 2, Para 2)*, UN Doc. E/C. 12/GC/20, 2 July 2009: “The ground of nationality should not bar access to (...) rights (...) The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”

³⁷ Race, sex, colour, language, religion, political or other opinion, national or social origin, birth or other status.

³⁸ See Edwards, above note 3, p. 27; UN Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant*, HRI/GEN/1/Rev.9 (Vol. I), 11 April 1986, Para 2; UN Human Rights Committee, *General Comment No.31: The Nature of the Legal Obligations Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, Para 10.

³⁹ UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158 (1990), Article 17(7).

⁴⁰ *A(FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 56, Para 136.

⁴¹ See above, note 21, Summary.

⁴² See above, note 15, Para 49.

⁴³ See above, note 19, p. 59, Para 77.

⁴⁴ *Ibid.*, Paras 81–84.

⁴⁵ *Ibid.*, Para 77.

⁴⁶ See Amnesty International, above note 13, p. 45–48; see also International Commission of Jurists, above note 13, p. 180.

⁴⁷ See above, note 21, Para 40. The absence of legal aid and interpreters, combined with the systematic detention of aliens on arrival, and the lack of any automatic judicial review, made it “extremely difficult” for aliens to challenge their detention.

⁴⁸ UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, A/HRC/7/12, 25 February 2008, Para 46.

⁴⁹ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter Terrorism and Human Rights*, 2009, p. 93.

⁵⁰ See above, note 18, p. 174.

⁵¹ *Ibid.*, p. 175.

⁵² *Muskhadzhiyeva and others v Belgium*, Appl. No. 41442/07, ECHR, 19 January 2010. The European Court of Human Rights (EctHR) found that detaining four extremely vulnerable children in a closed, adult, detention centre, while awaiting deportation, was ill-suited to the children’s needs and constituted a violation of the Article 3 right

not to be subjected to inhuman or degrading treatment or punishment. The ECtHR attached importance to the worrying state of health of the children, who exhibited serious physical and psychosomatic symptoms as a consequence of trauma.

⁵³ Dembour, M-B., "What It Takes to Have a Case: the Backstage Story of *Muskhadzhiyeva v. Belgium* (illegality of children's immigration detention)", in Abdelgawad, E.L. (ed.), *Preventing and Sanctioning Hindrances to the Right of Individual Petition before the European Court of Human Rights*, Intersentia [forthcoming], pp. 75-104.

⁵⁴ Jesuit Refugee Service, *No Other Option: Testimonies from Asylum Seekers Living in Ukraine*, 2011, pp. 8-11. EU funding for detention facilities does not extend to operational costs such as food or medical services, which have been so inadequately funded that detainees have at times been reliant on clothing and food donated by the families of the guards.

⁵⁵ See above, note 37, Para 14.

⁵⁶ UN Commission on Human Rights, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Report of the Special Rapporteur, Paul Hunt*, E/CN.4/2004/49/Add.1., 1 March 2004, Para 25.

⁵⁷ See above, note 19, p. 62, Paras 90-92.

⁵⁸ *Ibid.*

⁵⁹ Her Majesty's Inspectorate of Prisons, *Immigration Detention: Expectations, Criteria for Assessing the Conditions for and Treatment of Immigration Detainees*, HMIP, 2007, pp. 57 – 58, Paras 16 and 18.

⁶⁰ Medical Justice, *Detained and Denied: The Clinical Care of Immigration Detainees Living with HIV*, March 2011.

⁶¹ Médecins Sans Frontières, *The Impact of Detention on Migrants' Mental Health*, Briefing Paper, 2010.

⁶² Vienna Convention on Consular Relations 1963, Article 36; see also above note 40, Article 23; above note 27; UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988, Principles 15, 16 and 19.

⁶³ International Court of Justice, *Avena and Other Mexican Nationals (Mexico v United States of America)*, 31 March 2004, Para 30: "Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of other fundamental due process guarantees to which that national is entitled", and is therefore "an essential requirement for fair criminal proceedings against foreign nationals".

⁶⁴ See The Equal Rights Trust, above note 22.

⁶⁵ For example, Section 4(4) of the Migration Act of Australia (1958) requires the mandatory detention of non-citizens.

⁶⁶ See, for example, the growing case law of the European Court of Human Rights in response to applications by detainees, cited in International Commission of Jurists, *Migration and International Law*, 2011, pp. 147-162.

⁶⁷ International Detention Coalition, *The Issue of Immigration Detention at the UN Level*, January 2011.

⁶⁸ The UN Human Rights Commission became the UN Human Rights Council on 15 March 2006.

⁶⁹ UN Commission on Human Rights, *Human Rights of Migrants*, UN Doc E/CN.4/RES/1999/44, 27 April 1999. The mandate was extended in 2005, in UN Commission on Human Rights, *Human Rights of Migrants*, UN Doc E/CN.4/RES/2005/47, 19 April 2005.

⁷⁰ Lesser, T., "The Role of UN Special Procedures in Protecting the Human Rights of Migrants", *Refugee Survey Quarterly*, Vol. 28(4), 2009, pp. 139-164.

⁷¹ See, for example, UN Economic and Social Council, *Standard Minimum Rules for the Treatment of Prisoners*, 13 May 1977.

⁷² UN General Assembly, above note 63.

⁷³ See above, note 32, UNHCR, Guideline 10.

⁷⁴ See above, note 19, p. 59, Paras 77 and 78.

⁷⁵ See, for example, The Equal Rights Trust, *Declaration of Principles on Equality*, 2008, p. 5, Principle 2.