

MIGRATION-RELATED DETENTION A GLOBAL CONCERN

**‘I am a human being. I had a very bad time. I try to be happy.
I tried to kill myself many times in detention. I am not dangerous.’**

GEORGE, A REJECTED ASYLUM-SEEKER WHO SPENT TWO YEARS IN DETENTION IN THE UNITED KINGDOM, JANUARY 2005



Lao Hmong refugees in the Nong Khai Immigration Detention Center, Thailand.

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'It was extremely stressful for me as a mother, and my young children cried every day. Our children were locked up like prisoners. Which type of a human could keep a child locked up all day?'

A woman who spent over five months in detention with her family during an evidence hearing for the UK Independent Asylum Commission in March 2007, findings of which were published in 2008

Everyone has the right to liberty and freedom of movement. While there are permissible limitations on these rights, the practice of migration-related detention, recurrent in many states around the world, is often incompatible with international human rights standards. It often violates the rights of the detainees and is distressing and harmful to those subjected to it.

Migrants, asylum-seekers and refugees are regularly deprived of their liberty purely for administrative convenience. Many countries use detention to deter people from migrating or seeking asylum.

To be lawful under international human rights standards, detention for migration purposes should only be used in exceptional circumstances, should be proportionate to the objective to be achieved by detaining an individual and should be for the shortest possible time. Detention should only occur after an assessment has shown it is lawful and necessary in each individual case. It must be based on a detailed assessment of the individual's circumstances, including of their personal history and of the risk that they might abscond. It must be subject to a judicial review. There should be no routine detention of whole categories of asylum-seekers or migrants; detention must be a last

resort, not a first response. Some countries, however, automatically detain anyone arriving in their country without the necessary documentation, sometimes for prolonged or indefinite periods. This can include those who fled their countries to escape torture. Even children are not spared harsh confinement in some countries.

Amnesty International calls on states to end the automatic detention of asylum-seekers and migrants, to introduce a presumption against detention in law and to make alternatives to detention effectively available.

DEFINITION OF TERMS

Refugees are people seeking protection from persecution or conflicts in their countries; before their need for protection is recognized by authorities, they are referred to as **asylum-seekers**.

Migrants are people who move from one place to another to live and work, either temporarily or permanently. While distinct from asylum-seekers and refugees, migrants are sometimes also forced to leave their country of origin. For example, they may have no choice but to leave their country because of extreme poverty or environmental degradation.

AN OVERVIEW OF DETENTION PRACTICES

The **Australian** government announced in July 2008 a marked policy shift on immigration detention which includes a clear presumption against detention. While mandatory detention will remain for those arriving undocumented, the authorities will carry out individual assessments in each case. If it is found that the person does not pose a risk, he or she will be released into the community. For the last 16 years, the Australian government subjected all unauthorized arrivals, including asylum-seekers and, until 2005, children, to blanket, automatic and prolonged detention. The government retains its policy of offshore detention; asylum-seekers who are picked up in Australia's territorial waters continue to be detained on Christmas Island.

Research conducted by Amnesty International in 2005 in the **United Kingdom** indicated that detention for those who had sought asylum was protracted, caused untold suffering, was unnecessary and in many cases failed to fulfil the authorities' stated purpose of removal and was thus unlawful. Although the UK authorities say that it is their policy to ensure that detention is used sparingly and for the shortest period necessary, there is no time limit on immigration detention in the UK. In many cases,

people who have claimed asylum at some stage have been detained for prolonged periods of time.

There is no automatic judicial oversight of the decision to detain people who have sought asylum in the UK and many detainees have difficulties in finding a legal representative to apply for bail. Among those detained are pregnant women, children whose age is disputed and families.

On 18 June 2008, the European Parliament approved a new European Union (EU) Directive on common standards and procedures for returning non-EU citizens who do not have the necessary documentation. Its apparent aim is to stem migration flows to Europe. The Directive will come into force following formal adoption by the Council of the EU. It allows detention pending deportation for up to 18 months, which can be applied to rejected asylum-seekers who may not have had their claims considered substantively. Amnesty International considers the 18 months maximum limit to be excessive, disproportionate and therefore unacceptable as a common EU standard.

The Directive could lead to an increase in the use of prolonged detention in EU member states where many countries, such as **Ireland** and **Spain**, currently have much lower detention limits. Following the approval of the Directive, the **Dutch** government announced that it would implement an 18 months' detention time limit while **Italy** proposed to increase its maximum period of detention from 60 days to 18 months. Before this,



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only two states, **Malta** and **Germany**, allowed a maximum of 18 months' detention. **Latvia** continues to allow a limit of 20 months.

The Directive contains a provision for judicial review of the lawfulness of detention but EU member states can choose whether to provide this automatically or not. The Directive requires that the review must be "speedy". According to the International Covenant on Civil and Political Rights (ICCPR), anyone whose freedoms are violated has the right to an effective legal remedy including the right to have the lawfulness of their detention promptly assessed by a court.

Periods of detention in the Netherlands vary, with most people being held for less than three months. However, of the 20,000 people detained between 2004 and 2007, an estimated 11 per cent were held for between six and nine months and 10 per cent of the people spent more than nine months

Migrants in the Nouadhibou Detention Centre in Mauritania, 3 March 2008.

in detention when, for example, they were deemed to be an "undesirable alien" or if their identity or nationality was open to question.

Peter, a 40-year-old Liberian national, was refused asylum in the Netherlands. The authorities forcibly returned him to **Liberia** twice. Both times, the local Liberian authorities refused him entry saying his travel documents, which were provided by his country's embassy, were false. After the first expulsion, Peter was returned to the Netherlands directly. After the second expulsion, he was detained by the local Liberian authorities and spent a month in immigration detention before again being returned to the Netherlands. Peter's continued detention, in both countries, lasted 13 months until the Dutch government eventually released him and left him destitute.



© Refugee Solidarity Committee

This container, used to detain “irregular migrants” on the Greek island of Chios, was removed in October 2005 following campaigning on national and international levels.

The use of prolonged detention to stop irregular migration to Europe is not limited to the EU or EU member states. Governments increasingly co-operate with each other to stop migration by sharing information and by taking punitive measures against those migrating. Since 2006, thousands of migrants in **Mauritania** suspected of planning or trying to reach European countries have been arbitrarily arrested even where there was no evidence of their intentions and even though it is not an offence to leave Mauritania without authorization. Some of the detainees

are ill-treated and collectively expelled from Mauritania, sometimes not to their home countries, and without an opportunity to challenge their expulsion. These measures appear to be a consequence of EU pressure, particularly from **Spain**, on Mauritania to control migration to Europe.

Many of the detainees are held in a detention centre in Nouadhibou, northern Mauritania, known locally as “Guantanamo”. The centre, which is located in an old school building, receives up to 300 people a month but is not subject to any judicial control. The migrants are held in overcrowded conditions and some say they were arrested at home in the middle of the night. “I was arrested... in my room. I don’t know why... I have a job, I have a rickshaw, I’m not an illegal migrant,

I have been living here for two years and all my papers are in order. I have no intention of going to Europe”, a 41-year-old Malian national who spent two years at Nouadhibou told Amnesty International. “What will happen to me and my family if they send me back to Mali?”

Amnesty International’s research shows that those held awaiting expulsion did not have the opportunity to challenge the legality of their detention or challenge their collective expulsion. Mauritania is a signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families which guarantees to detainees the right to challenge the lawfulness of their detention before a court (Article 16).

DETENTION OF NON-NATIONALS AND ASYLUM-SEEKERS

According to Article 31(1) of the 1951 Convention relating to the Status of Refugees (UN Refugee Convention), "Contracting States shall not impose penalties, on account of... illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened... enter or are present in their territory without authorization...". People fleeing human rights violations are often unable to obtain or use their own passports and are often detained for not having correct documentation. However, detention should never be used to undermine the right to seek and find asylum from persecution; seeking asylum is not a crime. Still, some countries detain asylum-seekers, and irregular migrants as a matter of course and in some cases on the basis of nationality.

A draft law tabled by **Israel's** government and currently before parliament would, if passed, criminalize non-nationals entering Israel at non-authorized border crossings and with forged documents. Such people would face a five-year prison sentence regardless of why they entered the country or whether they face human rights violations in their country. Certain nationalities such as Sudanese and Iraqis would face a longer seven-year sentence.

In addition to the serious human rights violations arising out of these prolonged periods of detention, giving harsher custodial penalties to specific nationalities would violate Israel's obligations to ensure freedom from discrimination as stipulated

in several international human rights treaties such as the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination.

Asylum-seekers without documentation entering the **USA** from certain designated countries, such as Haiti, are subject to automatic detention on the basis that freeing them would be a threat to national security; they face detention throughout the entire asylum process. Other nationals who request asylum at the border are also automatically detained but are eligible for release if they meet certain criteria. The process can take weeks or months, after which they are referred to an immigration court to hear their applications. Daniel Joseph from Haiti arrived in the USA aged 17. He had fled Haiti on a wooden boat with his brother in October 2002, and arrived in Miami after four days. He was detained in Miami's Boystown detention centre for children and remained in

detention for 25 months despite having family in New York. Daniel Joseph told Amnesty International about his life at the centre in 2003: "Every time I make a friend, they leave. My best friend left today. Tomorrow my last best friend [will leave]... kids ask me why I stay so long, I can't answer because I don't know... If I can't live with my family, or live with my uncle, can I go to a foster home?"

According to the attorney general considering a bond request on behalf of Daniel Joseph's brother David Joseph, Haitian asylum-seekers arriving by boat should be detained and denied bond because they threaten national security. The attorney general claimed that freeing them might encourage other Haitians to board US-bound boats, and such immigration "surges" would "injure national security by diverting valuable Coast Guard and Department of Defense resources from [their] counter-terrorism and homeland security responsibilities".

SADDIK SAHOUR ABKAR

Saddik Sahour Abkar, from the Darfur area of Sudan, was arrested and served a one-year sentence in prison in **Egypt** after being convicted by a military court on charges of "attempting to exit unlawfully the Egyptian eastern border". He was arrested in July 2007 when he, his pregnant wife and two-year-old daughter, along with others, were spotted by Egyptian border guards as they were about to run for the Egyptian border fence with Israel. Saddik Sahour Abkar's wife, Hajja Abbas Haroun, was shot in the head and died instantly; others in the group were injured. He was separated from his daughter for a whole year.

Saddik Sahour Abkar is one of over 1,300 people tried by the Egyptian military court since 2007 on this charge in contravention of international human rights standards. They are invariably denied access to representatives of the UN High Commissioner for Refugees (UNHCR) in Egypt although many have international protection needs and may face human rights violations if returned to their countries.

In **South Africa**, thousands of refugees, asylum-seekers and migrants were displaced by violent xenophobic attacks against foreigners in May 2008. Hundreds of them were later arbitrarily detained. About 700 men were arrested in July 2008 on the grounds that they had not registered at the Glenanda displacement camp in Johannesburg and were taken to Lindela Holding Facility. A day later, those with asylum-seeker or refugee permits were released. They had nowhere to go, and wanted to wait for family and friends to leave Lindela. They established a makeshift camp on the side of the R28 highway. Six days later, the South Africa Police Service arrested them under the National Road Traffic Act and took them to Krugersdorp police station. During their detention they were reportedly coerced by the police to relinquish their rights as refugees and asylum-seekers by signing papers to this effect. They were told that if they signed the affidavits the charges against them would be dropped. On advice, none of them are reported to have signed and although the charges were later dropped they continue to be detained for "administrative processing".

CONDITIONS OF DETENTION

Detention, particularly when it is prolonged, can lead to deterioration of an individual's mental and physical health. People detained as irregular migrants, asylum-seekers awaiting a resolution to their case, or rejected asylum-seekers awaiting deportation, not only face the hardships of confinement, but overwhelming uncertainty about their fate. They sometimes do not understand the processes and the reasons for their detention and are left feeling powerless and helpless.

Under international law, the conditions of detention must be humane and detainees' human rights respected. Detainees must be given access to legal counsel, medical assistance and allowed visits from family members.

In **South Korea**, thousands of irregular migrants have been arrested, detained and removed in recent years. The large scale of arrests and detention means that necessary procedural guarantees to ascertain whether migrants are legally entitled to remain in the country and not subject to expulsion are often non-existent.

A nationwide survey by the National Human Rights Commission of Korea (NHRCK), published in January 2006, found that 20 per cent of detainees had been beaten and nearly 40 per cent suffered verbal abuse. Over 34 per cent said they had been stripped naked and searched and 5.2 per cent claimed to have been sexually abused by the immigration officers during body searches. According to a 2005 survey by the NHRCK, 21.5 per cent of the detainees were detained longer than the legally permissible period of 20 days. Poor conditions increase vulnerability to physical illness and depression: 66 per cent of inmates reported their physical health deteriorated during immigration detention. The factors contributing to this included the stress of waiting for unpaid wages and a general lack of support in an environment where conditions were poor.

'It's horrible being in detention, especially with a child. My child wanted to kill himself he said "mummy we're in prison".'

Jean, talking to Amnesty International in 2005, an asylum-seeker, later recognized as a refugee, who spent more than three months in immigration detention in the UK with her son.

SAJAD HUSSAIN WANI

Amnesty International has documented cases of torture and other ill-treatment against those subjected to migration-related detention around the world. Sajad Hussain Wani, a Pakistani national studying in **Malaysia**, was reported to have been tortured while detained in Sepang

detention centre near Kuala Lumpur for over five weeks. He was detained on the grounds that he did not have permission to remain in the country. He was, in fact, there on a valid student visa and was apparently detained when his former girlfriend asked the authorities to arrest

him. He was reported to have been beaten and had parts of his body, including his genitals, burned with cigarettes. He was held without charge until he was finally brought to court on 9 November 2007 where the judge ruled his detention illegal and ordered his immediate release.

HUMAN RIGHTS STANDARDS RELATING TO PARTICULAR GROUPS

Given the severe effects of detention on an individual's psychological wellbeing, states should take legislative measures to avoid the migration-related detention of children, torture survivors, victims of trafficking, pregnant women, those with a serious medical condition, those with physical and mental disabilities, the mentally ill and the elderly.

Where they are detained, it is advisable that certification is sought from a qualified medical practitioner that detention will not adversely affect their health and wellbeing. In addition, there must be regular follow-up and support by a relevant skilled professional. Detainees must also have access to services including hospitalisation, medication and counselling if necessary.

According to UNHCR, children made up around 44 per cent of refugees or people in refugee-like situations during 2007 (this excludes migrant children). At least 92 refugee children have spent two years in Nong Khai Immigration Detention Center in northern **Thailand**. Eleven of them were born in detention. Locked in their cell blocks for 22 hours each day, many of them are in bad health. The children are part of a group of 158 Lao Hmong refugees detained in cramped and harsh conditions since their arrests in Bangkok and Phetchabun in November 2006. The Thai authorities have not expressed any intention to release the group, even though four countries have pledged to consider resettling them. Since August 2007, UNHCR

representatives have not been allowed access to the refugees and therefore cannot take the necessary measures to facilitate their resettlement.

According to reports, 160 unaccompanied children are held in the Pagani detention centre on the Greek island of Lesbos, in degrading and inhumane conditions. The conditions are unsanitary and the rooms are permanently flooded. There are 830 irregular migrants (including potential asylum-seekers) held at the centre which has capacity for only 300 people. They are rarely allowed to go outside. **Detention of children must always be avoided and any decision on this must examine whether it is in the child's best interests as required by the UN Convention on the Rights of the Child.**

Torture victims are also particularly vulnerable in detention. Taner, an asylum-seeker in the **Netherlands**, spent eight years detained in his country of origin including several months in isolation to force a "confession" and other information on his political activities. He said he was raped, beaten on the soles of his feet, deprived of sleep, tortured with electricity and threatened with execution. During his asylum application, Taner explicitly mentioned the physical and psychological injuries he suffered. He was detained in the Netherlands in October 2006 after his asylum application was rejected, following which he made a second asylum application.

An examination by an Amnesty International Medical Examination Group confirmed that Taner's medical complaints were consistent with the torture allegations and described him



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Amnesty International Australia's campaign to release migrant children from detention, 2005.

as a severely traumatized person. It considered that Taner's immigration detention "could lead to an increase in his psychiatric problems" and that the detention could have "a disproportionately traumatizing effect". The district court ruling on the lawfulness of Taner's detention followed Amnesty International's report and ordered his release pending a decision on his asylum application. In August 2007, Taner eventually received a residence permit under a general amnesty.

The use of restraints (for example, shackles) on pregnant women is common in the **USA** in all forms of detention. It is regularly used on them during transportation, while they are in labour, and immediately after giving birth. Thirty-three-year-old Juana Villegas, an irregular migrant from

Mexico, was nine months pregnant when she was arrested for a traffic violation on 3 July 2008 and taken to the Davidson County Jail in Nashville, Tennessee. When it emerged she was an irregular migrant, she was detained at the jail. On 5 July, Juana Villegas went into labour and was taken to hospital in an ambulance where she was chained to a gurney. In hospital, she remained shackled to the bed until just before delivery of her baby boy. She was shackled again six hours after giving birth. According to her lawyer, the restraints were used against recommendations from medical staff. Throughout her time in hospital, Juana Villegas was forbidden to see or speak to her husband, friends or relatives, and the telephone in her hospital room was disconnected. She was released from custody on 8 July and is now subject to deportation proceedings.

Following substantial media attention given to the case, including at the international level, the Sheriff of Davidson County announced that from September 2008, pregnant detainees at the Davidson County Jail will not be restrained at any stage of pregnancy, except when the woman is combative or poses a threat to herself or others. However, the policy allows for placement of pregnant detainees in a metal framed chair (the "restraint chair"). In recent years, at least 18 people have died in detention facilities in the USA after being placed in the restraint chair. In 2000, the UN Committee against Torture recommended that the USA should abolish the use of restraint chairs in detention facilities.

RECOMMENDATIONS

- **States must ensure respect for the rights to liberty and to freedom of movement of migrants and asylum-seekers.**
- **States must provide effective alternative measures to the detention of migrants and asylum-seekers for immigration purposes. Detention should only be used as a last resort.**
- **States should never detain migrants and asylum-seekers unless they can demonstrate in each individual case that detention is necessary and proportionate to the objective to be achieved, that alternatives will not be effective, that it is on grounds prescribed by law, and when there is an objective risk of the person absconding.**
- **States should introduce a statutory maximum duration for detention. Detention should always be for the shortest possible time.**
- **States must ensure that alternatives to detention are always considered and made practically available without discrimination. The least restrictive measures must be considered first. These alternatives include:**
 - **Bail, bond and surety should be made available without discrimination and with conditions that are reasonable and realistic for the individual seeking release.**
 - **Reporting requirements that are not unduly onerous, invasive or difficult to comply with, especially for families with children, and those of limited financial means.**
 - **The use of open, semi-open centres, directed residence or special accommodation. The use of open centres is preferred to more restrictive alternatives.**
 - **The registration of asylum seekers and the issuance of refugee identity cards as effective ways to prevent the arbitrary detention of asylum-seekers, and to reduce the use of detention against undocumented migrants.**

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