

**UNHCR-OHCHR Global Roundtable on Alternatives to Detention, 11-12 May 2011**

**Human Rights Impact of Alternatives to Detention**

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Fellow panellists,  
Ladies and gentlemen,

As we have heard today and will hear further over the next two days, a wide range of human rights mechanisms including the human rights treaty bodies, the Special Procedures and the Universal Periodic Review have expressed their concerns about the detention of migrants. The views of these bodies, as well as of the Office of the High Commissioner for Human Rights, is that there is an urgent need to examine the impulse to use detention as a punitive sanction on migrants.

The human rights mechanisms have also called with some urgency for States to explore alternatives to immigration detention, as required by international human rights law. The view of the Working Group on Arbitrary Detention is that alternative and non-custodial measures should always be considered before resorting to detention. The Human Rights Committee has invited States Parties to provide detailed statistical data showing progress over recent years on concrete implementation of alternative measures to detention. Similarly, the Committee on the Elimination of Racial Discrimination has asked States Parties to review their mandatory detention regimes with a view to finding an alternative to detention. The Special Rapporteur on the Human Rights of Migrants has also called on States to develop and implement systems of alternatives to the detention of irregular migrants, which incorporate robust procedural safeguards and generally permit detention only as a last resort.

International human rights standards require that detention must be lawful and not arbitrary. In this regard, principles of necessity, proportionality and appropriateness must govern all decisions on the deprivation of liberty. In this context, the Human Rights Committee has asserted that in each individual case contemplating administrative detention, consideration should, in the first place, be given to “less invasive means of achieving the same ends”.

A number of different models of ATD can and have been applied by States to migrants on their territories. These can range from community-based and casework oriented models to more restrictive options. However, before this meeting embarks on an exploration of the scope and content of these various alternatives, I would like to present a few thoughts on the potential human rights impact of alternatives to detention measures.

In keeping with the practical orientation of this roundtable, these thoughts are offered in order to assist States and other stakeholders in conceptualising and implementing alternatives to detention, by raising a number of considerations in the context of the

application of ATD models. At the same time, however, I should stress that we strongly support the search for alternatives to the detention of migrants, refugees, asylum seekers and stateless persons.

#### *Alternatives to detention*

The first point to make is that the restrictions of liberty inherent in some models applied in the context of detention are such that these models should more accurately be called alternative *forms of* detention, rather than alternatives *to* detention. Electronic bracelets and tagging, for example, are severely restrictive measures which could exacerbate the stigmatization of migrants, disproportionately interfere with their freedom of movement, and have a severely negative impact on their right to health.

On the other hand, and in some situations, alternatives can *themselves* be excessively intrusive, including restrictive approaches such as high bails and bonds, and onerous and invasive reporting requirements. Excessive bails or bonds, for instance, could be discriminatory in purpose or effect, and interfere with the requirement of proportionality.

In designing alternatives to detention programmes, States should observe the principle of minimum intervention, in accordance with the UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) and other key principles and legal safeguards contained therein. Similarly, specific standards applicable to women migrants can be extrapolated from the recently approved United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) where, inter alia, the history of victimization and caretaking responsibilities of women are to be taken into account.

States should thus remain aware of the potential human rights impact on individuals of various models of ATD. They are accordingly urged to examine individual circumstances and to look closely at the effect of the measures being applied to the rights and dignity of the individual. As a point of principle, States should always use the least restrictive means necessary.

In designing ATD measures, States should ensure that adequate resources and infrastructure are made available to support the effective functioning of the alternative measure.

#### *Economic, social and cultural rights*

Some models of alternatives could potentially severely curtail the access of migrants to such rights as the right to adequate housing, health and education, as well as fundamental labour rights as provided in the International Covenant on Economic, Social and Cultural Rights. Destitution *cannot* be seen as an alternative to detention.

International law is quite clear that all migrants, wherever they are and regardless of their legal status, are entitled to enjoy all human rights, including economic, social and cultural rights by virtue of their humanity, and with very few exceptions. States are obliged to achieve progressively the full realisation of these rights according to available resources.

However, the law is also clear that there are certain immediate obligations concerning these rights which must be applied regardless of the availability of resources. These are; the elimination of discrimination in access to ESC rights; the duty of the State to take steps to realize the rights, including the adoption of programmes to protect vulnerable groups of migrants; the prohibition of retrogressive measures; and ensuring minimum core obligations. The relevant minimum core obligations would for instance include the provision of free and compulsory primary education to all, regardless of migratory status.

Negative duties, including the duty not to interfere in the enjoyment of ESC rights, are also of an immediate nature. Creating unjustified administrative or documentation burdens to the enjoyment of such fundamental rights as the right to health, the right to work or the right to education can breach these negative obligations.

In crafting models of ATD, States should thus ensure the promotion and protection of the ESC rights of all migrants, taking care to avoid both direct and de facto discrimination in this regard.

In the context of reporting requirements, for instance, where migrants are required to travel excessive distances, or where the cost of travel to the reporting centre is prohibitively expensive, concerns could be raised in regard to their right of access to employment. Where community models of ATD are applied, it is vitally important to ensure that all migrants are able to access inter alia their right to health (understood as the highest attainable standard of physical and mental health), and their right to adequate housing. Should release from detention be conditional upon the surrender of one's passport or identity documents, this should not interfere with the ability of the migrant to rent accommodation or access employment.

Economic, social and cultural rights are not a matter of charity. In designing models of ATD, States should ensure that they build the promotion, protection and fulfilment of ESC rights into the design, implementation and resourcing of the model.

#### *Impact on vulnerable individuals*

OHCHR's study on the human rights of migrant children which was presented to the Human Rights Council last September, identified that children's health, educational and emotional needs are rarely met in detention and lengthy detention, in particular, can be severely detrimental to the well-being of children. Thus States were enjoined to look with some urgency into the issue of alternatives to detention for children; particularly unaccompanied children, but also children who move with their families. Immigration control, the study noted, should not be put before the rights of the child.

Models of ATD should carefully consider the principle of family unity, and ensure that the best interests of the child govern any decisions taken in respect of children and their families, in line with the provisions of the Convention on the Rights of the Child. Guardianship programmes should be vigilant to avoid abuse or discrimination against children, be premised on the best interests of the child, and every effort should be made to enable the child to express his or her views, and to be heard.

Similarly, ATD models should protect the human rights and specific vulnerabilities of other groups of migrants, such as women, the elderly, migrants with health needs, or migrants with disabilities.

#### *Elements of a human rights based approach*

States are encouraged to premise their policies on alternatives to detention on a human rights based approach. Within the human rights framework, the migrant – as rights-holder – is able to demand protection, promotion and respect for rights from the State – the duty bearer. A network of standards and norms, institutions and processes, which have been developed and refined in practice can be called upon to provide specific protection to migrants. A rights-based approach develops the capacity of duty-bearers to meet their obligations and encourages rights holders to claim their rights.

A human rights approach to migration focuses on vulnerable migrants, sheds light on discrimination, and encourages the empowerment of affected migrant groups. It is thus important that efforts are made as far as possible to ensure that alternatives to detention are developed in a systematic and participatory manner, including through the participation of non-governmental organizations and migrants themselves.

#### *Obligations in respect of private actors*

In contemplating the release of migrants to non-governmental supervision, it is important to make the point that States do not relinquish their legal obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights.

Accordingly, it is incumbent upon the State to ensure that migrants are protected from abuse by non-state actors in the context of ATD. Further guidance on the responsibility of States in respect of private actors can be gleaned from the Guiding Principles of the Special Representative of the Secretary General on Business and Human Rights, which outline the respective roles and responsibilities of States and private actors. As the commentary on these principles notes; “As a necessary step, the relevant service contracts or enabling legislation should clarify the State’s expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises’ activities, including through the provision of adequate independent monitoring and accountability mechanisms.”

#### *Due process safeguards and access to remedies*

Safeguards surrounding alternatives to detention should be as rigorous as those applied to situations of detention, including ensuring that the alternative measure is established in law and is non-discriminatory in purpose and effect. Particular efforts should be made to ensure that the model is subject to judicial review, and that the migrant has access to effective legal counsel at all stages of the proceeding.

Similarly, any model of ATD will need to ensure that the migrant has effective and timely access to a complaints mechanism, and to effective redress and remedies in case of human rights violations.

### *Conclusion*

In conclusion, then, it is worth emphasizing that the human rights framework has much to offer the search for alternatives to the detention of migrants, refugees, asylum seekers and stateless persons.

There is an urgent need to question the assumptions under which migration policy is made and applied. Migrants have taken a rational decision to make the journey in search of a better future, which very often includes a complex mixture of the need for protection and the desire for opportunity. Very rarely have they set out with the explicit aim to defraud or exploit the host country. Migrants are first and foremost human beings with human rights, and any impulse to restrict their liberty for administrative reasons should first examine the necessity and proportionality of the decision to detain, and then implement measures of alternatives to detention that are careful to avoid adverse human rights impacts.