

Training course on Human Rights at International Borders

Session 5

Avoiding detention and inadequate conditions of detention

Session 5 content

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Session 5 learning objectives

After this session, learners will be able to:

- Describe the right to liberty and the exceptional circumstances when it is permissible to detain someone
- Describe possible alternative measures to detention
- Identify the rights of persons who are in immigration detention and corresponding obligations of border officers and other relevant personnel, including private security companies
- Be aware of special considerations that might be required for certain migrants in situations of vulnerability

5.1

Immigration detention

5.1.1 What is immigration detention?

- Any deprivation of liberty for the purposes of border governance and immigration enforcement.
- *Deprivation of liberty* is any form of detention or imprisonment or the placement of a person in a public or private custodial setting, which that person is not permitted to leave at will – either by virtue of an order given by a public authority, or with its consent or acquiescence.
- Such detention could occur in various places: land and sea borders, “international zones” at airports, islands, boats, prisons, police lock-ups, closed camps, shelters, extraterritorially...

5.1.2 Human rights particularly at risk in immigration detention

- (a) Right to liberty and security of person, including the right not to be arbitrarily detained
- (b) Right to due process and a fair trial
- (c) Right to health
- (d) Right to food, water and sanitation
- (e) Right to education
- (f) Right to adequate shelter
- (g) Right to freedom of religion or belief
- (h) Right to family unity

Questions?

5.2

Key human rights considerations regarding immigration detention

5.2.1. Immigration detention should be a measure of last resort

Everyone has the right to liberty, regardless of:

- their migration status
- their reasons for migrating
- how they have moved

→ States should establish a *presumption against immigration detention* in law.

Immigration detention should be a measure of last resort (contd.)

- Detention may only be used when it is determined, in each individual case, to be **necessary** and **proportionate** to a **legitimate purpose** defined by law.
- Once deprivation of liberty is deemed lawful and necessary, all **alternatives to detention** should be reviewed to ensure that detention is an exceptional measure of last resort.

5.2.2. Immigration detention should not be mandatory or arbitrary

- *The prohibition of arbitrary detention is absolute.*
- Arbitrary detention can **never be justified**, including for any reason relating to national emergency, public security or large movements of immigrants or asylum seekers
 - Extends to both **territorial jurisdiction** and areas where the State exercises effective control, even **extraterritorially**
 - Automatic and/or mandatory or indefinite detention of migrants is arbitrary

5.2.3. Immigration detention of children is prohibited

- Detention of children for migration-related purposes is *never in the best interests of the child* and *always constitutes a violation* of the rights of the child.
- Children should never be detained on the basis of their or their parents' migration status
- If it is deemed that a child's parents should be detained, alternatives to detention must be **applied to the entire family** to keep them together
- Children, and girls in particular, are particularly vulnerable if detained

5.2.4. So-called “protective” detention is not appropriate

- *...is a form of deprivation of liberty imposed on an individual who the authorities consider to be at risk if they are at liberty*
- It is highly gendered in its reach, remit and application
- Detaining a migrant who is in a vulnerable situation “for their own protection” is not a suitable response to their need for protection
- Detention intensifies existing vulnerabilities and puts migrants at risk of further abuse that, in some cases, may amount to torture or ill-treatment
- *Refuges or open shelters would be the appropriate solution for migrants who are not permitted, or are unable, to move onward from the border*

5.2.5. Adequate detention conditions and dignity of the person

- Respect the **fundamental dignity** of the person and the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment
- Facilities must be clearly designated for the purposes of immigration detention and conditions must reflect their **administrative purpose**; migrants should not be housed together with criminal detainees
- **Adequate material conditions** – access to food, water, sanitation, among others – must be ensured.
- Every migrant's **safety** should be **protected** in immigration detention; men and women who are not of the same family should be detained separately

Questions?

5.3

Protecting human rights in the event of immigration detention

5.3.1. Exercise: What constitutes detention

In your groups, review the scenario and briefly discuss the following questions and note your response:

1. Does the scenario constitute detention?
2. Why/why not?

SCENARIO A – Arcadia

In Arcadia recently, many people have been crossing the border irregularly. Immigration authorities have decided that, in order to register the migrants and decide what happens next, they will accommodate the migrants in a large reception centre. The centre is an old warehouse, and beds have been placed in the large hall for people to sleep. During the day, people can move around the centre, but they cannot leave. Because people tried to leave the centre in the past, the authorities have installed high fences topped with barbed wire around the warehouse. NGOs and the human rights ombudsperson report that they are unable to make contact with the migrants inside the centre.

SCENARIO B – Elbonia

In Elbonia, crossing the border or staying in the country irregularly is considered a criminal offence under national law. Migrants who are apprehended without the correct documentation are taken to prison, where they are held in closed cells that they sometimes have to share with criminal detainees. As a special consideration, they are allowed to spend up to two hours a day in the courtyard.

SCENARIO C – Zuy

In Zuy, the law on unaccompanied children requires the State to take measures to protect such children, including identifying a legal guardian. Unaccompanied children are housed in designated shelters while waiting for a foster family to be identified. However, the shelters are surrounded by a closed perimeter fence, and the children cannot leave, even to attend school. When the shelters are too full, some children are taken to police cells.

Reminder: What is immigration detention?

→ *Immigration detention* is any form of detention or imprisonment or the placement of a person in a public or private custodial setting, which that person is not permitted to leave at will – either by virtue of an order given by a public authority or with its consent or acquiescence –, for the purposes of border governance and immigration enforcement.

5.3.2. Alternatives to detention

- *...must always be made available and sought in order to ensure that detention is an exceptional measure of last resort.*
- Presumption of liberty: unconditional release of the migrant should be the first option
- Alternatives to detention should be non-custodial, community-based, not dependent on the ability of the individual to pay and reviewed by a judicial authority
 - e.g., reporting at regular intervals to the authorities, accommodation in open centres or at a designated place with humane conditions, release on reasonable bail or other securities
- Research shows a high compliance rate with such measures

5.3.3. Procedural safeguards

→ **Judicial review and proceedings before a court**

Right to a review of the lawfulness of detention by a judicial or other independent authority:

- *Prompt initial review*: **promptly** – within 48 hours (24 hours for children) – after initial detention
- *Regular periodic reviews*: after the initial review, **regularly and periodically** to review the necessity for continued detention
- *Right to habeas corpus*: **at any time**, a migrant should be able to take proceedings before a court to challenge the lawfulness of detention

Procedural safeguards (contd.)

→ **Procedural safeguards** include the provision of:

- Information
- Legal aid
- Effective remedy

→ Keep an **up-to-date register**:

- With names, locations, other information of detained individuals, and the responsible authorities
- Readily available and accessible to the authorities

Procedural safeguards (contd.)

→ Consular assistance

- Provide access to information on consular assistance and how to contact consular office, and access to telephones/other means to make such a contact
- Contact consular officials only **if requested by** and **with the free, informed consent** of the individual

→ Outside communication

- **Facilitate** communication with the outside world, including by telephone or email, where possible

→ **Legal counsel and guardians** appointed for unaccompanied children in detention should be adequately trained

5.3.4. Conditions of detention

(a) Safe environment

- Ensure safety from violence, ill-treatment, physical, mental or sexual abuse
- Provide alternatives to detention if physical and mental security cannot be guaranteed in detention

(b) Adequate standard of living

- Ensure adequate sanitation, food, water, bedding, clothing, health care, space, light, heating and ventilation, recreation and exercise, and facilities for religious practice

(c) Adequate medical and health care

- Provide unconditional access to adequate medical and health care that is age, gender, culturally appropriate to detained individuals

Conditions of detention (contd.)

(d) Complaint mechanism

- accessible, independent, non-discriminatory, confidential complaint mechanism, without reprisals
- prompt, independent, thorough and impartial investigation into any information alleging ill-treatment of a detainee

(e) Independent monitoring

- Facilitate independent monitoring and evaluation of places of immigration detention by civil society, international organizations
- Detainees can communicate freely and in full confidentiality with monitors and report any violence or discrimination
- Inform detainees of their right to contact monitoring organizations

Questions?

5.4

Situations of vulnerability and immigration detention

5.4.1. Exercise: Situations of vulnerability in detention

Read the case assigned to your group, briefly discuss it and write your responses to the following questions on the flip chart. Nominate a rapporteur to present on behalf of the group.

1. What human rights issues can you identify in the case?
List at least four.
2. What should/could have been done differently to take the situations of vulnerability into account?
3. What gender-specific concerns can you identify in the case?
4. What steps could officials take to mitigate the issues?

CASE A

Kai, 17 years old, and Sammy, 22 years old

- Kai and Sammy are smuggled into Syldavia. However, they were intercepted by immigration officers and immediately taken to an immigration detention centre.
- They were held in a crowded, dirty and hot cell; many detainees are ill, and most are older, and they harass them. Sammy was detained before and cannot sleep at night and has lost weight. He is gay and they do not feel safe.
- They saw a judge, who only asked how they had crossed the border. He did not ask their ages nor why they were migrating. Kai wants to get advice but does not know how or who to contact. Some men tried to assault Sammy and when they sought help, the guards just laughed at them.

CASE B

Amodita, 20 years old, and Ichanga, 23 years old

- *Ichanga* was taken by immigration officials and aggressively questioned about a terrorist cell. When he did not provide satisfactory answers, they shouted at him then took him to another room where he was interrogated by men who appeared to be military officers. They were very intimidating, threatened to lock him up for life if he did not admit his terrorist connections. After several hours of threats and shouting, he was locked in the room for a few days with just a thin mattress on the floor, some food and water once a day. He could not call anyone, and he was worrying about Amodita.
- *Amodita* was told that she would be arrested and prosecuted for entering Elbonia irregularly as it was a criminal offence under the law. She was transferred to a holding facility by private security guards.

→ continued

- *Amodita* felt weak and was in pain; she told the officers that she was pregnant and asked to see a doctor, but they refused. A male officer did the security check, although she asked for a woman; they said borders were not places for women.
- She was shackled at the hands, legs and around her belly; she was sweating, but was not given any water. She was taken to a large detention facility and put in an overcrowded cell with many women and girls, some of whom were convicted of criminal activities, and told that she could lie down on a mattress on the floor.
- She started bleeding heavily that night, and was finally allowed to see a doctor, who said the bleeding was normal and dismissed her.
- Guards told her she would have to buy more sanitary towels. After three days of heavy bleeding, she fainted and was taken to a clinic. The doctor informed her that she had had a miscarriage.

5.4.2. Situations of vulnerability in immigration detention

Immigration detention can render individuals, who would not usually be considered at risk, vulnerable to human rights violations

e.g., owing to degradation of their physical and mental health, particularly in prolonged or indefinite detention

→ Vulnerability will often be contextual

Border official should therefore:

→ Avoid detention as a general rule

→ Reconsider decisions to detain migrants and consider alternatives to detention

Questions?