

EUROPEAN COURT OF HUMAN RIGHTS

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*Raoufi and others*

v

*Greece*

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**Intervener Brief**

filed by the

**United Nations High Commissioner for Human Rights<sup>1</sup>**

pursuant to leave granted by the Court on 2 September 2016

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<sup>1</sup> This third party intervention is made on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

## Statement of Interest

1. The United Nations (UN) High Commissioner for Human Rights (the High Commissioner) intervenes as a third party in this case, by virtue of his mandate to protect and promote all human rights, including the rights of migrants<sup>2</sup>, regardless of their migration status. The High Commissioner's submissions covers international legal issues related to the present case. Those issues include the ambit of the human right to liberty of person in relation to the lawfulness and arbitrariness of detention, including with regard to the inherent rights contained therein, notably the right to be informed of the reasons of detention and to bring proceedings before a court on the lawfulness and arbitrariness of the detention. The questions in the present case also contemplate the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment) relating to the conditions in detention. The decision of the Court in those regards is of great interest to the High Commissioner, considering its potential implications for the interpretation and application under international human rights law of the right to liberty of person, the prohibition of arbitrary detention and the prohibition of torture and ill-treatment in cases of immigration detention.

## Summary

2. The High Commissioner focuses his submission on the right to liberty of person and the prohibition of arbitrary detention, as well as the prohibition of torture and ill-treatment in cases of immigration detention. The prohibition of arbitrary detention requires a strict review of the lawfulness, duration, necessity and proportionality of any measure depriving anyone, including non-nationals, of his/her liberty. Accordingly, any deprivation of liberty in the context of migration requires an individualized assessment as to whether the measure is necessary and proportionate to the legitimate aim being sought, or if that aim can be achieved by less invasive means considering the human rights impact in each individual case. The right to liberty of person also contains due process and fair trial guarantees, including the right to be informed of the reasons for the detention and of the person's rights, including the right to bring proceedings before a court on the lawfulness and arbitrariness of the detention. Any decision to deprive an individual of his/her liberty, including for purposes of immigration control, should ensure due respect for the dignity of the person by ensuring that conditions in detention adhere to all relevant international standards and do not amount to torture or ill-treatment.

## Introduction

3. Recent years have seen a worrying trend in all regions towards the detention of migrants in breach of international human rights principles. Despite the drastic impact of the deprivation of liberty on individuals, migrants are frequently subjected to administrative detention, which in some cases can be mandatory or even indefinite.<sup>3</sup> Criminalization of irregular entry into a country by migrants who have not committed any crime against persons, property or national security leads to unnecessary detention of migrants.<sup>4</sup> Irregular migrants are not criminals per se and should not be treated as such.<sup>5</sup>
4. In many cases, procedural safeguards for the detention of migrants are fewer than for those detained in relation to or as a result of criminal proceedings, including a lack of measures to determine the arbitrariness of arrest and examine the necessity and proportionality of continued detention. Migrants in detention are often denied access to information, legal aid and/or interpretation services and, thus, may not understand why they are detained and how to exercise

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<sup>2</sup> In the absence of a universally accepted definition, OHCHR has provided that an "international migrant" refers to any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situations. See *OHCHR Recommended Principles and Guidelines on Human Rights at International Borders* (2014), footnote 2.

<sup>3</sup> OHCHR report to the Human Rights Council on the promotion and protection of the human rights of migrants in the context of large movements, 13 September 2016, A/HRC/33/67, para. 48.

<sup>4</sup> CMW, General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families (2013), CMW/C/GC/2, para. 24.

<sup>5</sup> Report of the Special Rapporteur on the human rights of migrants, 2 April 2012, A/HRC/20/24, para.

their rights, such as to contact their lawyers, families or consular officials and to challenge the lawfulness and arbitrariness of their detention.

5. Migrants in detention are often exposed to inadequate conditions, such as denial of access to medical care, including mental health care, insufficient space, food, water and sanitation or recreational facilities. Migrants in detention often are victims of violence, including sexual violence, and experience a deterioration in their physical and mental health.<sup>6</sup>

**Assessment of the human rights situation in Greece in particular with regard to migrants by the United Nations Human Rights Mechanisms and the Office of the High Commissioner for Human Rights monitoring mission**

6. Greece has ratified a number of international human rights treaties<sup>7</sup> and is periodically reviewed by UN human rights treaty bodies. Since 2015, Greece has been reviewed by the Committee on the Elimination of Racial Discrimination (August 2016), the Human Rights Committee (October 2015) and the Committee on Economic, Social and Cultural Rights (October 2015). These treaty bodies have expressed concern about the detention of migrants and asylum-seekers for periods exceeding the maximum legal period of administrative detention and the lack of due process guarantees while in detention. They have also expressed concern about the substandard conditions of the reception and identification centers.
7. In August 2016, the Committee on the Elimination of Racial Discrimination (“CERD”) expressed concern about detention of migrants in Greece for periods exceeding the maximum legal period of administrative detention as well as lack of due process guarantees while in detention; substandard conditions of the reception and identification centres on Greek islands; inadequate access to immigration and asylum procedures; lack of appropriate information provision to new arrivals about immigration and asylum procedures and timelines, notably since the conclusion of the EU-Turkey deal; and the de facto practice of detaining children, including in substandard conditions and with unrelated adults.<sup>8</sup>
8. In this regard, CERD urged Greece to eliminate automatic detention of migrants arriving to its islands after the conclusion of the EU-Turkey statement; introduce alternatives to detention; ensure that those deprived of their liberty enjoy due-process; and take measures to convert the reception and identification centres on the islands into open centres. CERD also urged Greece to improve the living conditions in reception and identification centres; ensure that everyone in these centres has access to medical care, interpreters, adequate food, and social support; uphold the rule of law in reception and identification centres; redouble its measures to protect everyone staying in these centres from all forms of violence; and ensure regular and clear flow of information on immigration and asylum procedures to all migrants arriving in Greece.<sup>9</sup>
9. In November 2015, the Human Rights Committee expressed concern about reported cases of persons in Greece who were detained for periods longer than six months and regretted that Presidential Decree 116/2012, which extended the maximum length of immigration detention from 12 to 18 months was still in force. The Committee noted with concern that migrants were sometimes detained for prolonged periods of time without regard for their individual circumstances.<sup>10</sup>

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<sup>6</sup> OHCHR report on the situation of migrants in transit, A/HRC/31/35, 27 January 2016, para. 40.

<sup>7</sup> ICCPR and its Optional Protocols, ICESCR, CERD, CAT, OPCAT, CRC and its Optional Protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, CEDAW, OPCEAW, CED, CRPD and OPCRPD.

<sup>8</sup> CERD, Concluding observations on the 20<sup>th</sup> to 22<sup>nd</sup> periodic reports of Greece, CERD/C/GRC/CO/20-22, August 2016, para. 22.

<sup>9</sup> CERD, Concluding observations on the 20<sup>th</sup> to 22<sup>nd</sup> periodic reports of Greece, CERD/C/GRC/CO/20-22, August 2016, para. 23.

<sup>10</sup> HRC, Concluding observations on the 2<sup>nd</sup> periodic report of Greece, CCPR/C/GRC/CO/2, December 2015, para. 27.

10. Furthermore, the Committee regretted that conditions of detention for migrants and asylum seekers were inadequate, particularly in facilities with unsanitary conditions and inadequate access to food and health care. In this regard, the Human Rights Committee stated that Greece should ensure that detention of all irregular migrants is reasonably necessary and proportionate and for the shortest possible period of time, that alternatives to detention are available in law and implemented in practice, and that any decision to detain asylum seekers and refugees is based on their individual circumstances and takes into account less invasive means of achieving the same end. The Committee further stressed that Greece should strengthen its efforts to ensure decent living conditions in all reception and detention centres for migrants and asylum seekers, by providing adequate health-care services, food, sanitary conditions and access to transportation, and to ensure that conditions in the reception so-called “hot spots” are adequate.<sup>11</sup>
11. In October 2015, the Committee on Economic, Social and Cultural Rights (CESCR) expressed concern about the insufficient number of, and substandard conditions in, reception centres for migrants and refugees.<sup>12</sup> The Committee recommended that Greece take measures to improve the living conditions in reception centres, and ensure that everyone therein has access to medical care, interpreters, adequate food, clothing and social support.<sup>13</sup>
12. The Special Rapporteur on the Human Rights of Migrants and the Working Group on Arbitrary Detention undertook visits to Greece in December 2012, May 2016 (follow-up visit) and January 2013 respectively.<sup>14</sup> Both UN Special Procedures mandates raised concern at the policy of systematic detention of irregular migrants, the excessive duration of immigration detention (up to 18 months), and the inappropriate conditions in detention, including limited access to toilets, insufficient access to quality medical services and adequate food, and lack of heating, hot water, hygiene products, blankets and leisure facilities. They also noted the pressing need for specialized staff in detention facilities, including doctors, nurses, psychologists, social workers and interpreters. Both mandates stressed that detainees had little or no information in a language they could understand about the reasons for detention, its duration, or the right to challenge their detention and deportation, despite the fact that Law 3386/2005 (Article 76.3) provides for the right to be informed about the reasons for detention in a language he or she understands. The Special Rapporteur on the Human Rights of Migrants, on his most recent follow-up visit in 2016, raised concerns about the Greek government’s policy of increasing the use of detention, including of children and families; the contradictory information migrants received regarding procedures and timelines; as well as the insufficient procedural safeguards in detention facilities for migrants. On the mandatory detention introduced by law 4375/2016, the Special Rapporteur on the human rights of migrants noted that often detention goes beyond the 25 days prescribed by law and said that “detention should be for the shortest possible time, in cases – for example – of a documented risk of danger to others (which families rarely present).”<sup>15</sup>

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<sup>11</sup> HRC, Concluding observations on the 2<sup>nd</sup> periodic report of Greece, CCPR/C/GRC/CO/2, December 2015, para. 28.

<sup>12</sup> CESCR, Concluding observation on the 2<sup>nd</sup> periodic report of Greece, E/C.12/GRC/CO/2, October 2015, para. 11-12.

<sup>13</sup> CESCR, Concluding observation on the 2<sup>nd</sup> periodic report of Greece, E/C.12/GRC/CO/2, October 2015, para. 11-12.

<sup>14</sup> See Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/23/46/Add.4, 18 April 2013, Sections V and IX. In 2012, the Special Rapporteur on the human rights of migrants visited Athens, Evros, Lesbos and Patras. He also visited 11 detention centres: Tycherio Border Police Station in Evros, Venna and Komotini detention centres in the neighbouring Rodopi regional unit, the central police station in Mytilini on Lesbos, the central police station in Patras, the coast guard’s detention facility at the port in Patras, Korinthos detention centre, Amygdaleza detention centre, Amygdaleza detention centre for minors, Agios Panteleimonas police station and Petrou Ralli detention centre. In his follow-up visit in May 2016, he visited Athens, Idomeni, the Polykastro police station, the Elliniko detention center for migrant women and the Reception and Identification Centres in Lesbos and Samos; Report of the Working Group on Arbitrary Detention, A/HRC/27/48/Add.2, 30 June 2014, Sections IV and VI.

<sup>15</sup> Special Rapporteur on the human rights of migrants end of mission statement after follow-up visit to Greece, 16 May 2016;

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19972&LangID=E>.

13. The Special Rapporteur and the Working Group noted that, while migrants may present in writing and in Greek language objections to their detention (Law 3386/2005, Article 76.3 and Law 3907/2011, Article 30.2), this was not automatic and did not provide for a direct review of the lawfulness of the detention. In addition, they stressed that since access to an interpreter and lawyer was not guaranteed, the possibility to object to the detention decision was virtually impossible. Both Special Procedures mandates recommended that Greece end the policy of systematic detention of all irregular migrants, explore alternatives to detention, improve detention conditions and procedural safeguards, including by informing detained migrants in writing and in a language they understand of the reasons for their detention, its duration, their right to have access to a lawyer, the right to promptly challenge their detention and of their right to seek asylum.
14. In April 2016, the Office of the High Commissioner for Human Rights (OHCHR) deployed a monitoring mission to Greece to examine the human rights situation of migrants. Amongst other areas, the monitoring team visited the hotspots in Chios and Lesbos. The monitoring team noted concern about the legality and arbitrariness of immigration detention and the conditions within the detention facilities. The team noted that while Law 4375/2016 (Article 14) provides for the restriction of freedom of movement up to 25 days in the “hot spots” during registration and identification, in practice at the time of the mission all new arrivals were effectively detained in the hot spot, and some individuals reported being held in the centre without registration already prior to 20 March and therefore for longer than this maximum time. The mission also noted that although Greek law includes the requirement to individually assess the necessity of detention, migrants arriving after 20 March were all subjected to mandatory detention, without any individualized assessment, a detention order or in practice the possibility to challenge the legality of their detention, including due to the absence of detention orders or effective access to information and legal assistance. Migrants interviewed during the mission indicated difficulties in accessing information and interpretation services, and reported inadequate conditions in the facilities, including inadequate access to health care and inadequate food. Following the mission, OHCHR recommended to the authorities to establish a presumption against detention in law, to end the practice of mandatory detention of persons without having undertaken an adequate assessment of the legality, necessity and proportionality of detention in each individual case, and when detention is necessary and lawful, to ensure that individuals held in detention have access to adequate and appropriate services.

**The right to liberty and security of person and the prohibition of arbitrary detention in international human rights law**

15. The right to liberty of person is a fundamental human right, enshrined in the Universal Declaration of Human Rights (Article 3) and international and regional human rights instruments. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides that “[e]veryone has the right to liberty and security of person. 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”.
16. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) specifies that migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention (Article 16 (1,4)).
17. Article 37 (b) of the Convention on the Rights of the Child (CRC) stipulates that States shall ensure that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily”.
18. The Convention Relating to the Status of Refugees (1951 Convention) provides that States “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization (...)” (Article 31).

19. The High Commissioner submits that any restrictions on the liberty of anyone, including migrants regardless of their migration status, asylum seekers and refugees, must be: a measure of last resort; of limited scope and duration; necessary and proportionate; imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes; and subject to periodic re-evaluation and judicial review.<sup>16</sup>
20. The enjoyment of human rights is not limited to citizens but applies to everyone, regardless of nationality or statelessness.<sup>17</sup> Furthermore, the safeguards related to the right to liberty apply not only in criminal cases, but also where persons are deprived of their liberty for purposes of immigration control or in the implementation of expulsion, deportation or extradition.<sup>18</sup> Whether or not the detention is classified as such in national law is immaterial for the purposes of international human rights law.
21. In particular, deprivation of liberty includes *inter alia* administrative detention, police custody, involuntary hospitalization, the imposition of house arrest or curfews, placing individuals in temporary custody in protective detention or in international or transit zones in stations, ports and airports, retention in recognized and non-recognized centres for non-nationals or any other facilities where individuals remain under constant surveillance as this may not only amount to restrictions to personal freedom of movement, but also constitute a *de facto* deprivation of liberty.<sup>19</sup> Other circumstances could include deprivation of liberty in the course of transporting a migrant involuntarily.
22. OHCHR's *Recommended Principles and Guidelines on Human Rights at International Borders* address *inter alia* the issue of immigration detention. Therein OHCHR recommends that States should put in place or amend legislation as necessary to establish a presumption against detention in law, and to legally prescribe human rights compliant alternatives to detention.<sup>20</sup>

### **Prohibition of arbitrary deprivation of liberty**

23. ICCPR, Article 9 (1) provides that deprivation of liberty must not be arbitrary, and must be carried out with respect of law. The Human Rights Committee has noted that the notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.<sup>21</sup>
24. The Human Rights Committee has indicated that while detention in the course of proceedings for the control of immigration detention is not *per se* arbitrary, the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.<sup>22</sup> It noted that asylum seekers who unlawfully enter a State's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt, but that detaining them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual,

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<sup>16</sup> HRC, General Comment no. 35 (2014), para. 18; *OHCHR Recommended Principles and Guidelines on Human Rights at International Borders*, Guideline 8.1; Report of the Working Group on Arbitrary Detention, United Nations *Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court*, A/HRC/30/37, July 2015, para 108.

<sup>17</sup> HRC, General Comment No. 15, para. 1 and 7; HRC, General Comment No. 35 (2014), para 3.

<sup>18</sup> HRC, General Comment No. 8 (1982), para 1; HRC, General Comment No. 35 (2014), para. 60.

<sup>19</sup> HRC, General Comment no. 35 (2014), para. 5; Report of the Working Group on Arbitrary Detention, *Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court*, A/HRC/30/37, July 2015, para. 9.

<sup>20</sup> OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, (2014), Guideline 8(1).

<sup>21</sup> HRC, General Comment No. 35 (2014), para. 12; HRC, *Saed Shams and Others v. Australia*, Communication No.1255/2004, 11 September 2007; HRC, *Samba Jalloh v. the Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002; HRC, *A-Gertani v. Bosnia Herzegovina*, Communication No. 1955/2010 (2013).

<sup>22</sup> HRC, General Comment No. 35 (2014), para. 18, and 560/1993, *A. v. Australia*, paras. 9.3–9.4; 794/1998, *Jalloh v. Netherlands*, para. 8.2; 1557/2007, *Nystrom v. Australia*, paras. 7.2–7.3.

such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

25. Furthermore, decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health, and that any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons.<sup>23</sup>
26. In relation to children, the Committee on the Rights of the Child has established that the detention of a child because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.<sup>24</sup>
27. The High Commissioner submits that the prohibition of arbitrariness in the deprivation of liberty requires a clearly defined law, which lays out the legitimate purposes for detention and the limited duration thereof, and ensures due process safeguards –including provision of information and access to remedies- as well as necessity and proportionality of any measure depriving anyone of their liberty.<sup>25</sup> Furthermore, it requires a strict and individualized review, which must consider relevant factors case-by-case and not be based on a mandatory rule for a broad category. It must take into account less invasive means of achieving the same ends –including consideration of the human rights impact of the measure in each case, such as in the individual's physical and mental health- and must be subject to periodic re-evaluation and judicial review.<sup>26</sup> When physical and mental security cannot be guaranteed in detention, authorities should provide alternatives to detention.<sup>27</sup>
28. The procedure of individualized review of any measure to deprive anyone of their liberty should be non-discriminatory and take into account the rights, needs and vulnerabilities of each individual.<sup>28</sup>

### **Procedural safeguards while deprived of liberty, including the rights to information, legal aid, review and compensation**

29. The right to liberty of person requires States to follow specific procedural rules to ensure that no individual is subjected to unlawful and/or arbitrary deprivation of liberty. The Human Rights Committee considers that arbitrary detention creates risks of torture and ill-treatment and several of the procedural guarantees related to Article 9 of the ICCPR serve to reduce the likelihood of such risks.<sup>29</sup>

#### Right to information

30. The right to information constitutes a condition to challenge the lawfulness and arbitrariness of the detention in court and thus to effectively exercise the right to judicial review. Any person deprived of his or her liberty, including for the purposes of immigration control, has the right to be informed promptly and in a language that he/she understands, of the reasons for his/her detention.<sup>30</sup>

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<sup>23</sup> HRC, General Comment No. 35 (2014), para. 18.

<sup>24</sup> CRC, Report of the 2012 Day of General Discussion on the rights of all children in the context of migration (2012), para. 78.

<sup>25</sup> See also Working Group on Arbitrary Detention, A/HRC/27/48, 2013, para. 83; Working Group on Arbitrary Detention, *Principles and Guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court* (2015), A/HRC/30/37, para. 11.

<sup>26</sup> HRC, General Comment No. 35 (2014), para. 18.

<sup>27</sup> Working Group on Arbitrary Detention, *Principles and Guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court* (2015), A/HRC/30/37, para. 111.

<sup>28</sup> OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, (2014), Guideline 8.3. The document recommends States to individually screen and assess migrants at international borders to ensure that detention is only imposed for limited lawful objectives in accordance with international human rights law, and only when no alternatives to detention are available.

<sup>29</sup> HRC, General Comment No. 35 (2014), para. 56.

<sup>30</sup> ICCPR, Article 9(2), ICMW, Article 16(5), ECHR, Article 5(2), EU Return Directive, Directive 2008/115/EC, Article 16(4).

31. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment stipulates that the information should be provided by the authority responsible for the detention at the moment of arrest and at the commencement of detention, or promptly thereafter, with “information on and an explanation of his rights and how to avail himself of such rights”.<sup>31</sup> The Body of Principles further establishes that a person who does not adequately understand or speak the language used by the authorities responsible for the detention is entitled to receive promptly and in a language which he/she understands, information on the reason for his/her arrest, any order of detention together with the reasons therefore, as well as to have the assistance, free of charge, of an interpreter (Principle 14).
32. The High Commissioner submits that, in order to protect persons deprived of their liberty against any form of arbitrariness, the authority responsible for the detention should systematically and promptly provide a detention order and information orally and in writing of the reasons for the detention and the individual’s rights in connection with the order.<sup>32</sup> The reasons for detention should reflect that the relevant authorities have conducted an individualized assessment of necessity proportionality, and that no less restrictive alternatives could be identified.
33. The High Commissioner reiterates that the information pertaining to the individual’s rights should include sufficient details on the right to bring proceedings before a court to challenge the legality, necessity, proportionality and other elements determining the arbitrariness or unlawfulness of the deprivation of liberty, the right to seek legal aid,<sup>33</sup> the right to communicate with the consular authorities,<sup>34</sup> and the right to have the free assistance of an interpreter and translator at no cost for the detainee<sup>35</sup>. Moreover, this information should be provided in a language used by the person detained and in means, modes, and formats he/she understands.

#### Access to legal aid

34. Anyone deprived of their liberty, including for the purposes of immigration control, shall have the right to prompt and regular access to legal representation and advice<sup>36</sup>, if necessary free of charge, to challenge the lawfulness of detention or for other purposes such as accessing asylum procedures and effective remedies for human rights violations and abuses.<sup>37</sup> This should be provided as soon as possible in order to help the person understand his/her rights.<sup>38</sup>

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<sup>31</sup> *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. A/RES/43/173 (1988), Principle 13.

<sup>32</sup> Report of the Working Group on Arbitrary Detention, *United Nations Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court* (2015), A/HRC/30/37, para. 42 and 109.

<sup>33</sup> Report of the Working Group on Arbitrary Detention, *Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court* (2015), A/HRC/30/37, para. 42; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum- Seekers and Alternatives to Detention* (2012), Guideline 7(ii).

<sup>34</sup> Vienna Convention on Consular Relations, Article 36 (1a), ICMW, Article 16(7) b), *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 16 (2). OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, (2014), Guideline 8.16. In this regard, the EU Return Directive, Directive 2008/115/EC, provides in Article 16 (4) that “Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4 [Relevant and competent national, international and nongovernmental organisations and bodies].”

<sup>35</sup> Report of the Working Group on Arbitrary Detention, *United Nations Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court* (2015), A/HRC/30/37, May 2015, para. 42.

<sup>36</sup> HRC, General Comment No. 35 (2014), para. 46

<sup>37</sup> CMW, General Comment No. 2 (2013), CMW/C/GC/2, para. 33; *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 32 (1); *OHCHR Recommended Principles and Guidelines on Human Rights at International Borders* Guideline 8.14; Report of the Working Group on Arbitrary Detention, *Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court* (2015), A/HRC/30/37, para. 60.

<sup>38</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum- Seekers and Alternatives to Detention* (2012), Guideline 7(ii).

Right to bring proceedings before a court, periodic review of detention and compensation

35. International law requires that any person deprived of his/her liberty be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness and/ or arbitrariness of the detention and obtain without delay the detainees release if the detention is not lawful.<sup>39</sup>
36. The High Commissioner reiterates that in order to establish control mechanisms towards unlawful and arbitrary detention, the judicial review must be carried out promptly and in such a way as to guarantee compliance with the law and the detainees' effective enjoyment of their rights, taking into account their situation of vulnerability. The requirement applies to all forms of detention including by official action or pursuant to official authorization.<sup>40</sup>
37. This procedural safeguard should be guaranteed at the moment of the deprivation of liberty as well as periodically throughout the duration of the detention. Indeed, the necessity for the continuation of any required detention should be automatically reviewed at reasonable periods of time by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary.<sup>41</sup> Importantly, the scope of judicial review should not be confined to a formal assessment of the individual's migration status as it requires an individual assessment of the elements pertaining to the lawfulness and arbitrariness of the measure.<sup>42</sup>
38. Regarding the length of detention, States also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by the right to liberty of person in all cases.<sup>43</sup> The length of the measure should also be taken into account when assessing the necessity of the continuance of the detention. In this vein, detention should not continue beyond the period for which the State can provide appropriate justification, without which the detention may be considered arbitrary, including when related to irregular entry to a territory.<sup>44</sup>
39. Anyone who has been the victim of unlawful or arbitrary detention should be released (either unconditionally or conditionally)<sup>45</sup> and should have an enforceable right to compensation.<sup>46</sup> Accordingly, damage incurred because of acts or omissions by a public official contrary to the right to liberty of person shall be compensated according to the applicable rules on liability provided by domestic law.<sup>47</sup>
40. To ensure that the exercise of the right to bring proceedings before a court to challenge the lawfulness and arbitrariness of detention and receive appropriate remedy is accessible and effective, States should facilitate independent monitoring and evaluation of immigration

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<sup>39</sup> ICCPR, Article 9(4); ICMW, Article 16 (8); ECHR, Article 5 (4), Report of the Working Group on Arbitrary Detention, *Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court* (2015), A/HRC/30/37, para. 50.

<sup>40</sup> HRC, General Comment No. 35 (2014), para. 40.

<sup>41</sup> HRC, General Comment No. 35 (2014), para. 15, *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. A/RES/43/173 (1988), Principle 11(3), UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum- Seekers and Alternatives to Detention* (2012), Guideline 5(iii); HRC, *Danyal Shafiq v. Australia*, Communication No. 1324/2004, 13 November 2006, para. 7.2.

<sup>42</sup> Report of the Working Group on Arbitrary Detention, *Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court* (2015), A/HRC/30/37, para. 115.

<sup>43</sup> HRC, General Comment No. 35 (2014), para. 15.

<sup>44</sup> Human Rights Committee, *A. v Australia*, Communication No. 560/1993, views 30 April 1997; HRC, *D and E, and their two children v. Australia*, Communication No. 1050/2002, 9 August 2006.

<sup>45</sup> 473/1991, *Barroso v. Panama*, paras. 2.4 and 8.2 (habeas corpus for bail).

<sup>46</sup> ICCPR, Art.9 (5), ECHR, Article 5(5).

<sup>47</sup> *UN Body of Principles for the Protection of All Persons under Any For of Detention or Imprisonment*. A/RES/43/173 (1988), Principle 35.

detention, including by National Preventive Mechanisms, national human rights institutions, international organizations, civil society organizations and others.<sup>48</sup>

### Conditions in immigration detention

41. Any decision to deprive an individual of his/her liberty, including for purposes of immigration control, should guarantee due respect for the dignity of the person by ensuring that conditions in detention adhere to all relevant international standards and do not amount to torture and ill-treatment. International human rights law provides that no one shall be subjected to torture and other cruel, inhuman or degrading treatment or punishment<sup>49</sup> and requires States to take appropriate measures to prevent violations from occurring<sup>50</sup>, in particular in detention.
42. Certain conditions in detention can amount to torture or ill-treatment. The Human Rights Committee has noted that the manner in which the detainees are treated must relate to the purpose for which they are ostensibly being detained.<sup>51</sup> In addition, practices such as holding foreigners in transit areas under questionable sanitary and social conditions akin to arbitrary detention and can lead to inhuman and degrading treatment.<sup>52</sup>
43. In this line, the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment has provided that within the context of administrative immigration enforcement detention is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.<sup>53</sup>
44. The High Commissioner, following the guidance provided in *OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders*,<sup>54</sup> submits that States ensure that conditions in detention facilities adhere to the UN Standard Minimum Rules on the Treatment of Prisoners and all other relevant international standards on conditions of confinement.<sup>55</sup>

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<sup>48</sup> Report of the Working Group on Arbitrary Detention, *Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court* (2015), A/HRC/30/37, para. 110; *OHCHR Recommended Principles and Guidelines on Human Rights at International Borders*, Guideline 8.19.

<sup>49</sup> ICCPR, Article 7 ; ECHR, Article 3.

<sup>50</sup> CAT, Article 2 (1).

<sup>51</sup> HRC, General Comment No. 35 (2014), para. 14.

<sup>52</sup> HRC, *UN Human Rights Committee: Concluding Observations: Belgium*, 12 August 2004, CCPR/CO/81/BEL.

<sup>53</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, A/HRC/28/68, para. 80.

<sup>54</sup> *OHCHR Recommended Principles and Guidelines on Human Rights at International Borders*, Guidelines 8.7-8.13.

<sup>55</sup> See also CERD, *General recommendation 30 on discrimination against non-citizens*, 2014, CERD/C/64/Misc.11/rev.3 para. 19.