



Special Rapporteur on the human rights of migrants

Submission by the Association for the Prevention of Torture (APT)

The Association for the Prevention of Torture (APT) is an international NGO based in Geneva, Switzerland, with 35 years of experience in the prevention of torture and ill-treatment.

The APT would like to thank the UN Special Rapporteur (SR) on the human rights of migrants for this opportunity to present a submission towards the first thematic report on immigration detention. The focus on migrants and detention is particularly fitting as it responds to the growing tendency to detain migrants around the world and of States to criminalise irregular migration. This category of detainees is particularly vulnerable and exposed to the risk of ill-treatment and torture.

The APT is therefore putting emphasis on the particular risks to which this population is exposed and promotes regular monitoring to all places and situations of risk by independent control mechanisms. Good practices have shown that monitoring not only sheds light on conditions and treatment in detention but can be instrumental in pressing and assisting the authorities to address and improve them.

APT would therefore like to draw the SR's attention to the Optional Protocol to the United Nations Convention against Torture (OPCAT) which is an innovative treaty that can help the rights of migrants deprived of their liberty. Sixty two States from all world regions have ratified the OPCAT.

1. Migrants: The worrying tendency of incarceration

Today the use of detention as a migration management tool (referred to as immigration detention¹) by many governments is on the rise,² resulting in migrants, refugees and asylum seekers, including those who are stateless, increasingly being subjected to arbitrary or unlawful and/or prolonged detention which in some cases amounts to ill-treatment. Places of detention are particularly sensitive as they are naturally environments where individuals are vulnerable vis-à-vis the State and can be at risk of ill-treatment, including torture.

Migrants are regularly detained in inadequate conditions unsuited to their particular situation which can be even worse than those faced by convicted prisoners in the same country. Migrants in detention frequently have limited or no access to asylum procedures and are denied other safeguards which are important to prevent torture. Such safeguards include prompt access to a lawyer, the ability to challenge detention, a medical examination by an independent physician and the ability to contact family or consular representatives.

In line with the legal and policy framework related to immigration detention, APT asserts that:

- ✓ Detaining migrants for administrative reasons rather than on the grounds of having committed a criminal offence represents a serious ongoing human rights concern worldwide and alternatives must first be pursued (such as reporting requirements or restrictions on residence).
- ✓ Detention of migrants should only be used as a measure of last resort. Detention is only permitted as a matter of international law³ where it is necessary and proportionate to the

¹ Immigration detention is generally administrative in form, but it can also be judicially sanctioned. It is generally not meant to be punitive in purpose (as opposed to criminal detention).

² Accurate statistics relating to immigration detention are very difficult to obtain. However, in Europe, the overall trend is that as the practice of detention has risen, the number of asylum applications has decreased.

³ The applicable international legal framework includes International Human Rights Law (IHR) and International Refugee Law (IRL). Both frameworks stipulate that there should be a presumption against detention and prohibit arbitrary arrest and detention, *without making further express provisions of circumstances in which deprivation of liberty is permitted*.

legitimate objective to be achieved and only after less restrictive alternatives have been found to be unsuitable in each individual case.

- ✓ When detention is used, it should be under conditions that reflect their non-criminal status and their needs. International guidance stipulates that, except for short periods, detained migrants should be “held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs”⁴. Thus the detention of migrants in unsuitable locations (such as police stations or prisons) may contribute to violations of freedom from torture and other cruel, inhuman or degrading treatment or punishment.
- ✓ Special needs of vulnerable groups of migrants must be taken into account and appropriate safeguards must be in place. Every person who is deprived of liberty is vulnerable, but beyond the vulnerability of being held, some individuals face greater risks of violations of their rights in virtue of their particular characteristics and/or situational factors. Children, women, migrants with mental health issues and/or specific health needs, victims of trafficking and the elderly are vulnerable groups of migrants and should therefore be given additional protection. Ultimately, governments should create appropriate mechanisms to respond to their needs, including placing them in open accommodation rather than jail-like facilities.

APT strongly encourages the Special Rapporteur to stress in his report the risks to which vulnerable groups of migrants in detention are exposed to ill-treatment and torture and promote regular monitoring to all places and situations of risk where migrants are detained by independent control mechanisms such as various human rights mechanisms (National Preventive Mechanisms (NPMs); National Human Rights Institutions (NHRIs)) and non governmental organizations (NGOs).

2. Migrants: The importance of monitoring places of detention and the OPCAT

Although the APT believes that the use of detention in migration management should only be a last resort, when it is used, the relevant international and regional standards need to be respected. External control mechanisms, such as under the Optional Protocol to the United Nations Convention against Torture (OPCAT) should be established to monitor States compliance and ensure transparency

The OPCAT creates a **dual system of preventive visits** to places where persons are deprived of their liberty by independent bodies: an international body, the Subcommittee on the Prevention of Torture (SPT) made up of twenty five international experts; as well as National Preventive Mechanisms (NPM), that States parties have to designate or establish.

These bodies have a **specific preventive mandate**⁵ which grants them with:

- ✓ an *operational function*: to conduct preventive visits to places where persons are deprived of their liberty and
- ✓ an *advisory function*: to provide advise, observations and recommendations on legislations and on improving domestic measures

In practice this means that these bodies conduct regular visits to places of detention in order to examine the treatment, conditions and overall functioning therein. The objective of these visits is thus to analyse all aspects of the places of detention as opposed to document individual cases of torture or denounce the situation. Following the visits, OPCAT bodies engage with the authorities to establish a constructive and ongoing dialogue and provide recommendations on systemic measures to mitigate the risks of torture and other cruel, inhuman or degrading treatment or punishment.

The SPT and NPMs have the powers to monitor places where migrants are detained

⁴ CPT Standards, Extract from 7th General Report, p54.

⁵ A common feature is the understanding that a preventive approach to ill-treatment aims at reducing the risks and creating an environment where violations (torture and ill treatment) are less likely to occur.

Article 4 of the OPCAT defines deprivation of liberty as “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 by order of any judicial, administrative or other authority”. It is worth recalling that the United Nations High Commission for Refugees (UNHCR) Revised Guidelines on detention on asylum seekers defines detention as “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones where freedom of movement is substantially curtailed”.

Given this broad concept of what constitutes a place of deprivation of liberty both in the OPCAT as well as in UNHCR Revised Guidelines, it is clear that both the SPT and NPMs have the power to visit facilities where migrants are held including airport holding centres, camps and specialist migrant detention centres, and any other places where migrants may be detained such as prisons, police cells, military installations and care homes. They can also monitor situations at risk, such as transfers and forced deportations.

The value added of SPT and NPMs for migrants

The SPT and NPMs can have a crucial role to play in monitoring places of immigration detention to:

- Reduce the risks of torture and ill-treatment by regular and unannounced visits. The mere fact that independent bodies can enter places of detention, at any time, has a strong deterrent effect.
- Facilitate a greater level of transparency and accountability with regard to conditions for, and treatment of, asylum seekers and migrants in immigration detention. These bodies can actually go inside to examine and collect first hand information on the situation of the detainees, from a holistic perspective. They not only look at documents, but speak to the migrants in private (as well as with staff) to understand the conditions, treatment, processes, systems and challenges. By analysing their findings, with reference to wider information and data, they are able to understand root causes and identify systemic changes that need to be made to reduce the risk of torture and ill-treatment occurring.
- Produce visit reports on immigration detention facilities with clear recommendations. NPMs can decide whether they wish to publish their visit reports. The SPT “shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party”⁶
- Publish annual reports on their activities which can include a section on migrants
- Advise and comment on existing or draft legislation related to migrants
- Raise awareness of the authorities concerning their international obligations towards migrants (such as on specific standards)
- Develop specific domestic preventive measures (policies, tools, trainings) & standards related to migrants.

3. Conclusion and way forward

Despite the fact that the issue of immigration detention is spread across several United Nations agencies (there is no coordinating body), international attention has increased and there has been a growing recognition in recent years on the need for the exploration and development of alternatives to immigration detention. A Global Roundtable on Alternatives to Detention⁷ was held in May 2011 at the UNHCR bringing together representatives from States, OHCHR, UNHCR and other international organizations, human rights mechanisms, national human rights institutions, and national and international non-governmental organizations. Issues related to alternatives to detention of asylum-seekers, refugees, migrants and stateless persons were explored. The Roundtable also provided the opportunity to launch the International Detention Coalition⁸

⁶ Article 16, OPCAT

⁷ For more information on this meeting see:

<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&query=alternatives+to+detention&x=9&y=17>

⁸ The IDC is an international coalition with a membership base of more than 200 non-governmental organisations, faith-based groups, academics, practitioners and individuals working in 50 countries globally. Coalition members research, advocate and provide direct services to and on behalf of refugees, asylum-seekers and migrants. The IDC advocates for greater respect for the human rights of

Handbook “There are Alternatives”⁹, aimed at preventing unnecessary immigration detention globally and outlining good practice examples of alternatives to detention from around the world.

Persons and organisations working in the refugee and migrant sector can:

- initiate and/or join in national processes for ratification and implementation of the OPCAT,
- promote monitoring to places where migrants are detained by other independent bodies such as non governmental organisation (NGOs)
- promote alternatives to detention.

In States Parties where NPMs already exist, the refugee and migrant sector can engage with these bodies in order to raise awareness and exchange information on these vulnerable groups and give NPMs the means with which to respond to their mandate with regard to migrants in detention. The OPCAT thus represents an important opportunity for both the refugee sector and the human rights sector at both the national, regional and international levels to work together in view of mobilising against the detention of migrants.

4. Summary of recommendations to include in the report on immigration detention

- ✓ Provide a clear statement on the **risks of torture and ill-treatment to which migrants in detention are exposed**, in particular vulnerable groups of migrants (including children, women, families and migrants with mental health issues);
- ✓ Recommend **concrete measures to States to prevent torture and other cruel, inhuman or degrading treatment or punishment of migrants in detention** such as facilitating access to monitoring bodies, mapping the places where migrants are detained, training staff working with migrants in detention on the human rights and refugee standards applicable and ensuring that migrants are not discriminated while accessing safeguards (this includes the systematic translation of key information and documents regarding the reasons of arrest and detention and notifying their rights in detention);
- ✓ Promote **regular monitoring to all places and situations of risks** (such as transfers and forced deportations) where migrants may be detained by independent control mechanisms;
- ✓ Promote the **ratification and implementation of the OPCAT** as an innovative instrument for protecting detained migrants;
- ✓ Recommend to existing NPMs to include in their program of visits **thematic visits to all places and situations of risks where migrants may be detained**. This would enable a cross-sectional analysis of risk factors and patterns of good and bad practice¹⁰.
- ✓ Urge monitoring bodies including NPMs to include in their **monitoring teams: a physician or qualified health professional** as their participation is necessary to assess the particular sensitive health issues¹¹ and to hire **an interpreter** if possible to conduct private interviews with the migrants in detention.

APT, 26 January 2012

detainees; this includes preventing and limiting the use of, seeking alternatives to, and using the least restrictive forms of, immigration detention. See <http://idcoalition.org/>

⁹ See <http://idcoalition.org/cap-launch/>

¹⁰ OPCAT – Implementing Manual, Revised Edition, APT & IIDH, 2010, chapter V, p241.

¹¹ For example, the most crucial moments where the use of restraints (handcuffs, leg cuffs, belly chains, immobilization) can amount to degrading or humiliating treatment is during transfers, removals and medical examinations. It is crucial to have a medical expert to evaluate the necessity and proportionality.

APT Publications and Tools

OPCAT – Implementing Manual, Revised Edition, APT & IIDH, 2010:

http://www.apr.ch/index.php?option=com_docman&task=cat_view&qid=239&Itemid=256&lang=en

“Monitoring Places of Detention – A Practical Guide”, 2004

http://www.apr.ch/component/option,com_docman/task,cat_view/qid,58/te

APT Detention Monitoring Briefings:

http://www.apr.ch/component/option,com_docman/task,cat_view/qid,128/lt

- “No1: Making effective recommendations”
- “No2: The Selection of Persons to Interview in the Context of Preventive Detention Monitoring”
- “No3: Using Interpreters in Detention Monitoring”
- “N°4 - Mitigating the risks of Sanctions related to Detention Monitoring”

“Monitoring places of detention: What role for physicians and other health professionals?”

http://www.apr.ch/component/option,com_docman/task,cat_view/qid,121/l

APT Legal Briefing “The Right of Access to Lawyers for Persons Deprived of Liberty”:

http://www.apr.ch/index.php?option=com_docman&task=cat_view&qid=134&l

In 2012 - 2013, APT is coordinating the development of a Practical Guide on Immigration Detention, a joint project between APT, IDC and UNHCR.