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Quaker United Nations Office

Foundations for Implementation

A reference tool containing guidance drawn from the UN's Special Procedures and Treaty Bodies to support States in human rights based implementation of the Global Compact for Safe, Orderly and Regular Migration.

Objective 13: Use immigration detention only as a measure of last resort and work towards alternatives

What This Reference Tool Contains

This compilation draws on recommendations from:

- Special Procedure thematic reports that relate specifically to migrants
- Treaty Body General Comments and General Recommendations that relate specifically to migrants

This practical tool emphasises recommendations for individual State action rather than observations, and includes those recommendations that assist in turning the objectives into practical actions rather than echoing the principles and standards agreed in the Compact.

December 2018

Objective 13: Use immigration detention only as a measure of last resort and work towards alternatives

Guidance from Special Procedures

Source	Guidance
Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.10)	The irregular entry and stay in a country by migrants should not be treated as a criminal offence, and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows. Migrants must not be qualified or treated as criminals, or viewed only from the perspective of national or public security and/or health
Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.14)	Detention in the course of migration proceedings must be justified as reasonable, necessary and proportionate in the light of the circumstances specific to the individual case. Such detention is permissible only for the shortest period of time, it must not be punitive in nature and must be periodically reviewed as it extends in time
Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.17)	Alternatives to detention should be realistic and must not depend upon the ability of the individual to pay for these. Alternatives to detention may take various forms, including reporting at regular intervals to the authorities, community-based solutions, release on bail or other securities, or stay in open centres or at a designated place. The conditions in any such open centres and other facilities must be humane and respectful of the inherent dignity of all persons
Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.18)	The application of measures alternative to detention must be reviewed by a judicial authority and alternatives to detention must not be considered as alternatives to release
Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.19)	The need to detain should be assessed on an individual basis and not based on a formal assessment of the migrant's current migration status. The detention must comply with the principle of proportionality and as such, automatic and/or mandatory detention in the context of migration is arbitrary
Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.22)	The element of reasonableness requires that the detention be imposed in pursuance of a legitimate aim in each individual case. This must be prescribed by legislation that clearly defines and exhaustively lists the reasons that are legitimate aims justifying detention. Such reasons that would legitimize the detention include the necessity of identification of the person in an irregular situation or risk of absconding when their presence is necessary for further proceedings
Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.23)	The element of necessity requires that the detention be absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists in the individual circumstances of the person who is in an irregular migration situation

<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.24)</p>	<p>The element of proportionality requires that a balance be struck between the gravity of the measure taken, which is the deprivation of liberty of a person in an irregular situation, including the effect of the detention on the physical and mental health of the individual, and the situation concerned. To ensure that the principle of proportionality is satisfied, alternatives to detention must always be considered</p>
<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.25)</p>	<p>A maximum detention period in the course of migration proceedings must be set by legislation, and such detention shall be permissible only for the shortest period of time. Excessive detention in the course of migration proceedings is arbitrary. Upon the expiry of the detention period set by law, the detained person must automatically be released</p>
<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.26)</p>	<p>Indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary</p>
<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.27)</p>	<p>There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them — including non-cooperation of the consular representation of the country of origin, the principle of non-refoulement or the unavailability of means of transportation — thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary</p>
<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.29)</p>	<p>The right of anyone deprived of his or her liberty to bring proceedings before a court in order that it may decide without delay on the lawfulness of his or her detention and obtain appropriate remedies upon a successful challenge, is a self-standing human right, the absence of which constitutes a human rights violation. This right applies to everyone, including immigrants regardless of their migration status, refugees and asylum seekers and stateless persons</p>
<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.30)</p>	<p>Any detention in the course of migration proceedings that makes it impossible to mount an effective challenge to the continued detention is arbitrary</p>
<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.33)</p>	<p>Those detained in the course of migration proceedings have the right to be informed, in writing and in a language which they understand, of the nature of and grounds for the decision to detain, the duration of detention, as well as of the possibility to challenge the legality and arbitrariness of such decision</p>
<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.40)</p>	<p>Detaining children because of their parents' migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child. Children must not be separated from their parents and/or legal guardians. The detention of children whose parents are detained should not be justified on the basis of maintaining the family unit, and alternatives to detention must be applied to the entire family instead</p>

<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.41)</p>	<p>Detention of migrants in other situations of vulnerability or at risk, such as pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, or survivors of trafficking, torture and/or other serious violent crimes, must not take place</p>
<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.45)</p>	<p>Whether a place where those held in the course of migration proceedings is a place of detention depends on whether the individuals held there are free to leave it at will or not. If not, irrespective of whether the facilities are labelled “shelters”, “guest houses”, “transit centres” “migrant stations” or anything else, these constitute places of deprivation of liberty and all the safeguards applicable to those held in detention must be fully respected</p>
<p>Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex (para.48)</p>	<p>The standards restated in the present deliberation apply to all States in all situations, and factors such as the influx of large numbers of immigrants regardless of their status, asylum seekers, refugees and stateless persons cannot be used to justify the departure from these standards. The standards in the present deliberation also apply to migration detention facilities maintained by a State in the territory of another State, with both States jointly responsible for the detention</p>
<p>Special Rapporteur on the human rights of migrants (2018), A/73/178/Rev.1 (para.75(c))</p>	<p>Ensure access for all migrants in detention, regardless of their status and circumstances, to competent lawyers, interpreters and translators, legal aid and judicial assistance programmes, NGOs, consular authorities and asylum procedures, and independent external monitoring of all migrant detention facilities;</p>
<p>SR migrants (2015), A/HRC/29/36 (para.111)</p>	<p>Develop coordinated efforts to move away from the detention of all migrants, investing in alternatives that avoid punishing those arriving irregularly. Look towards a model that quickly responds to and capitalizes on the strong desire of the vast majority of migrants to work and contribute to society</p>
<p>SR migrants (2014), A/HRC/26/35 (para.100)</p>	<p>Ensure that migrants, including those in an irregular situation, can access human rights institutions, courts and tribunals, without fear of being deported. Legal aid and interpreters should be provided as required. Courts should effectively apply the international human rights law and international labour law in providing appropriate redress. Migrants who have filed cases against abusive employers should be allowed to remain in the country, and be given necessary assistance to take part in the trial against their employer and obtain justice. They should be provided with temporary immigration status that allows them to live in dignity until the case is resolved, including shelter – not detention – and food when needed</p>
<p>SR migrants (2014), A/HRC/26/35 (para.104)</p>	<p>Train judges, lawyers, law enforcement and immigration enforcement officers and ensure their sensitivity to the human rights of migrants, whatever their status, and the dignity owed to them</p>
<p>SR migrants (2012), A/HRC/20/24 (para.68)</p>	<p>Governments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure</p>

<p>SR migrants (2012), A/HRC/20/24 (para.70)</p>	<p>Administrative detention should not be applied as a punitive measure for violations of immigration laws and regulations, as those violations should not be considered criminal offences</p>
<p>SR migrants (2012), A/HRC/20/24 (para.72(a))</p>	<p>Ensuring that procedural safeguards and guarantees established by international human rights law and national law are applied to any form of detention. In particular, grounds for detention of migrants must be established by law. A decision to detain should only be taken under clear legal authority, and all migrants deprived of their liberty should be informed in a language they understand, if possible in writing, of the reasons for the detention and be entitled to bring proceedings before a court, so that the court can decide on the lawfulness of the detention. Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings;</p>
<p>SR migrants (2012), A/HRC/20/24 (para.72(c))</p>	<p>Ensuring that the law sets a limit on the maximum length of detention pending deportation and that under no circumstance is detention indefinite. There should be automatic, regular and judicial review of detention in each individual case. Administrative detention should end when a deportation order cannot be executed;</p>
<p>SR migrants (2012), A/HRC/20/24 (para.72(d))</p>	<p>Ensuring that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law. The use of privately run detention centres should be avoided. Representatives of, inter alia, national human rights institutions, OHCHR, UNHCR, ICRC and NGOs should be allowed access to all places of detention. All migrant detention facilities – whatever their form – should be subject to a common set of standards, policies and practices and should be monitored by an independent central authority that is dedicated to ensuring compliance with the common set of standards, policies and practices;</p>
<p>SR migrants (2012), A/HRC/20/24 (para.72(g))</p>	<p>Giving particular attention to the situation of women in detention, ensuring that they are separated from men, and attended and supervised only by women officers, in order to protect them against sexual violence, and avoid the detention of pregnant women and breastfeeding mothers;</p>
<p>SR migrants (2012), A/HRC/20/24 (para.72(j))</p>	<p>Taking into due consideration the particular vulnerabilities of specific groups of migrants including victims of torture, unaccompanied older migrants, migrants with a mental or physical disability and migrants living with HIV/AIDS. Detention of migrants belonging to vulnerable categories and in need of special assistance should be only allowed as a measure of last resort, and they should be provided with adequate medical and psychological assistance;</p>

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<p>SR migrants (2012), A/HRC/20/24 (para.73)</p>	<p>The Special Rapporteur would like to remind Governments that alternatives to detention should not become alternatives to unconditional release, whenever such release is a possibility. Governments should put in place safeguards to ensure that those eligible for release without conditions are not diverted into alternative measures. Alternatives to detention should have a human rights-based approach, be established by law, be non-discriminatory and be subject to judicial review and independent monitoring and evaluation. In designing alternatives to detention, Governments should pay attention to the specific situation of particular groups of migrants, such as children, pregnant women and persons with disabilities, and use the least intrusive measure possible</p>
<p>SR migrants (2012), A/HRC/20/24 (para.74)</p>	<p>The Special Rapporteur encourages States to collect disaggregated data on the number of migrants in administrative detention, the number of migrants who are subject to different types of non-custodial measures and the compliance rate with these measures, in order to evaluate their effectiveness</p>
<p>SR migrants (2012), A/HRC/20/24 (para.78)</p>	<p>The Special Rapporteur would like to encourage civil society organizations to continue their efforts to document and study the violations and abuses that migrants suffer in the context of detention, continue monitoring good practices of alternatives to detention, develop and continue assistance programmes to migrants deprived of their liberty, including legal aid, translation services and social and psychological assistance and visit regularly migrant holding centres and penitentiaries where irregular migrants are held</p>
<p>SR migrants (2010), A/65/222 (para.73)</p>	<p>States should remove laws, policies, plans and programmes aimed at criminalizing irregular migration and should not consider breaches of immigration law a crime or punish such breaches with detention</p>
<p>SR migrants (2010), A/65/222 (para.87)</p>	<p>In cases where, exceptionally, detention of migrants is justified, this should not be made in facilities for criminals. Migration-related detention centres should not bear similarities to prison-like conditions. In connection with immigration detention facilities, States should bear in mind that: (a) Authorities in charge of these facilities should not be security forces; (b) States should hold private security firms that are hired to police immigration detention facilities accountable for upholding the rule of law and compliance with human rights; (c) Officials working in immigration detention facilities should be trained in human rights, cultural sensitivities, age and gender considerations and the particular needs of vulnerable populations; (d) Disciplinary rules should be markedly different from those in place in prison facilities; (e) Social protection (including access to education, health care, recreation and legal assistance), as well as contact with family in both countries of destination and origin, should be guaranteed: contact should also be facilitated with immigrant communities in destination countries and civil society institutions</p>
<p>SR migrants (2010), A/65/222 (para.93)</p>	<p>States should provide alternatives to detention for family groups when parents are detained on the sole basis of migratory status, keeping in mind the necessary balance between the need to protect family unity and the best interests of the child. In all decisions concerning children, the best interests of the child should be the primary consideration</p>

<p>SR migrants (2010), A/65/222 (para.94)</p>	<p>States should enact and use a broad range of alternative measures. In developing such measures, States should draw on some of the existing practical alternatives already applied in some States. Alternative measures may include registration requirements; reporting or monitoring conditions; the deposit of a financial guarantee; or an obligation to stay at a designated address, an open centre or other special accommodation. Reporting requirements, where used, should not be unduly onerous, invasive or difficult to comply with. Bail, bond and surety should be made available to irregular migrants under conditions that are reasonable and realistic. The use of open centres, directed residence or special accommodation should be developed, with open centres preferred over more restrictive alternatives</p>
<p>SR migrants (2010), A/65/222 (para.95)</p>	<p>Non-custodial measures, such as reporting requirements, should always be explicitly considered before resorting to detention, with the least restrictive measures considered first. The application of alternative measures must itself be governed by international human rights standards, including the basic principles of legality, necessity and proportionality, as well as non-discrimination. Alternative measures must take into account the particular situation of irregular migrants and asylum-seekers, including their frequently unstable financial or housing situation. If any measure is applied unnecessarily or disproportionately, in a discriminatory manner or without due regard to individual factors such as the particular vulnerability of an individual, it could amount to a restriction inconsistent with international human rights standards. 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, is non-discriminatory in purpose and effect and is subject to judicial review, and that the migrant has access to legal counsel. States should always use the least restrictive means necessary as alternatives to detention</p>
<p>SR migrants (2010), A/65/222 (para.87(e))</p>	<p>Social protection (including access to education, health care, recreation and legal assistance), as well as contact with family in both countries of destination and origin, should be guaranteed: contact should also be facilitated with immigrant communities in destination countries and civil society institutions</p>
<p>SR migrants (2010), A/65/222 (para.96)</p>	<p>States should endeavour to develop these alternatives in consultation with local non-governmental organizations with expertise in meeting the needs of migrants. This could be done, for example, through joint initiatives between Government authorities and non-governmental organizations for release and supervision of irregular migrants</p>
<p>SR migrants (2009), A/HRC/11/7 (para.117)</p>	<p>State authorities should ensure that private companies in charge of managing detention facilities act in conformity with international human rights standards</p>

<p>SR migrants (2003), E/CN.4/2003/85 (para.75(d))</p>	<p>Ensuring that migrants deprived of their liberty are informed in a language they understand, if possible in writing, of the reasons for the deprivation of liberty, of the available appeal mechanisms and of the regulations of the facility. Detained migrants shall also be accurately informed of the status of their case and of their right to contact a consular or embassy representative and members of their families. A briefing on the facility and information on the immigration law should also be provided. Migrants and their lawyers should have full and complete access to the migrants' files;</p>
<p>SR migrants (2003), E/CN.4/2003/85 (para.75(e))</p>	<p>Facilitating migrants' exercise of their rights, including by providing them with lists of lawyers offering pro bono services, telephone numbers of all consulates and organizations providing assistance to detainees and by creating mechanisms, such as toll-free numbers, to inform them of the status of their case. Efforts should be made to conclude agreements with NGOs, universities, volunteers, national human rights institution and humanitarian and other organizations to provide basic services, such as translation and legal assistance, when they cannot otherwise be guaranteed;</p>
<p>SR migrants (2003), E/CN.4/2003/85 (para.75(k))</p>	<p>Ensuring that the Body of Principles for the Protection of All Persons under any Form of Detention and Imprisonment are applied to all migrants under administrative detention. The Principles include the provision of a proper medical examination as promptly as possible and of medical treatment and care whenever necessary and free of charge; the right to obtain, within the limits of available public resources, educational, cultural and informational material; the provision for regular visits of places of detention by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment, in order to supervise the strict observance of relevant laws and regulations;</p>
<p>SR migrants (2003), E/CN.4/2003/85 (para.75(m))</p>	<p>Ensuring the presence in holding centres of a doctor with appropriate training in psychological treatments. Migrants should have the possibility of being assisted by interpreters in their contacts with doctors or when requesting medical attention. Detention of migrants with psychological problems, as well as those belonging to vulnerable categories and in need of special assistance, should be only allowed as a measure of last resort, and they should be provided with adequate medical and psychological assistance;</p>
<p>Special Rapporteur on torture and other cruel, inhuman or degrading treat- ment or punishment (2018), A/73/207 (para.77(d))</p>	<p>Preventive safeguards: States should ensure that preventive safeguards against torture and ill-treatment are put into place throughout all institutions, mechanisms and procedures. In particular, persons deprived of their liberty should be given the opportunity to inform their relatives, to contact a lawyer and to see a physician immediately after arrest and to access independent complaints mechanisms at any time. Inmates, particularly those experiencing specific vulnerabilities, should be protected at all times against violence and abuse by staff and other inmates. Incommunicado detention should be prohibited and criminalized under national law. Open-ended administrative detention without regular independent review should be abolished, as should detention or forced institutionalization based exclusively on a person's disability, legal capacity, migration status or similarly appropriate criteria;</p>

<p>SR torture (2018), A/HRC/37/50 (para.65(c))</p>	<p>Migration-related detention: States should refrain from policies of mandatory, prolonged or indefinite detention of migrants. Any migration-related detention should remain an exceptional measure and should be physically separated from detention related to the criminal justice system. Migrants, especially children, should never be detained solely because of their irregular migration status or the impossibility of their expulsion. The detention of migrants should never be used as a means of deterrence, intimidation, coercion or discrimination but, within the margins set by human rights law, should be subject to the same criteria as are applicable to nationals, including the requirements of legality, necessity, proportionality and, in the exceptional cases warranting administrative or preventative detention, periodic review. Furthermore, detention conditions and treatment must always align with international standards, most notably the "Nelson Mandela Rules", duly taking into account any personal vulnerability due to factors such as migration status, age, gender, disability, medical condition, previous trauma, or membership in a minority group. Independent national, international and non-governmental monitoring mechanisms, including civil society, National Preventive Mechanisms, the SPT, the Special Rapporteur and, in armed conflict, the ICRC, should be given full access to all places where migrants may be detained or accommodated, including extraterritorial vessels, off-shore facilities, and transit zones</p>
<p>SR torture (2011), A/66/268 (para.89)</p>	<p>The Special Rapporteur reiterates that solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. He emphasizes that when solitary confinement is used in exceptional circumstances, minimum procedural safeguards must be followed. These safeguards reduce the chances that the use of solitary confinement will be arbitrary or excessive, as in the case of prolonged or indefinite confinement. They are all the more important in circumstances of detention where due process protections are often limited, as in administrative immigration detention. Minimum procedural safeguards should be interpreted in a manner that provides the greatest possible protection of the rights of detained individuals. In this context, the Special Rapporteur urges States to apply the following guiding principles and procedural safeguards</p>
<p>Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2018), A/73/216 (para.83(c))</p>	<p>Prohibit immediately the immigration detention of migrants with psychosocial, cognitive or intellectual disabilities and ensure that decisions relating to the entry, stay, naturalization and expulsion of people on the move cannot be made solely on the basis of health status, including mental health status;</p>
<p>SR health (2018), A/73/216 (para.83(d))</p>	<p>Work progressively to end all forms of immigration detention and, in the exceptional circumstances where this is used, ensure that procedural safeguards are implemented fully and that immigration detention is monitored by independent mechanisms to prevent torture, ill-treatment and violence and to prevent related interferences with the realization of the right to physical and mental health;</p>
<p>SR health (2018), A/73/216 (para.83(e))</p>	<p>Ensure that detained migrants are held in conditions that satisfy health standards and have access to essential health-care services, including mental health care and support services;</p>

<p>SR health (2018), A/73/216 (para.83(o))</p>	<p>Introduce appropriate accountability mechanisms, including the monitoring of mental health care and support services and detention settings, to ensure that people on the move have access to redress where necessary</p>
<p>Working Group on Enforced or Involuntary Disappearances (2017), A/HRC/36/39/Add.2 (para.88(d))</p>	<p>Strive to end immigration detention and never detain migrant children based on their status or that of their parents. If detention of adult migrants is absolutely necessary as a measure of last resort, proportionate and justified in law, States should hold migrants deprived of liberty in an officially recognized place of detention and make sure that their detention is formally registered, including with accurate information on their detention and place or places of detention, and independently monitored;</p>
<p>Special Rapporteur on extrajudicial, summary or arbitrary executions (2017), A/HRC/35/23 (para.106)</p>	<p>States should ensure access to effective legal representation for incarcerated women, particularly women belonging to disadvantaged minority groups and migrant or refugee women</p>
<p>Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2016), A/71/384 (para.55(e))</p>	<p>The detention of migrants, refugees and asylum-seekers should always be a last resort: detention must always comply with the principle of legality, and the grounds for detention must be exhaustively listed; minimum conditions of humane and dignified detention must always be respected; detention must never become arbitrary and must always be necessary, reasonable and proportionate; and since the detention of children can never be in their best interest, alternatives to detention must always be provided to unaccompanied migrant children and families with children;</p>
<p>SR counter terrorism (2008), A/63/223 (para.45(a))</p>	<p>Those held in detention, including in immigration detention facilities, must have access to a judicial hearing as to the legality of their detention within no longer than 48 hours of being detained. In the case of any period of extended detention occurring outside the context of actual criminal proceedings (such as investigative or preventive detention) the need for continued detention of the person must be regularly reviewed by a judicial authority, which should occur at least every seven days;</p>
<p>SR counter terrorism (2007), A/62/263 (para.81(b))</p>	<p>(b) Not to depart from the right to judicial review of the lawfulness of any form of detention which, according to the Human Rights Committee, is not subject to derogation even at times of a public emergency and, given the vulnerable situation of detained immigrants, to ensure that judicial review of any form of immigration detention is made automatic (mandatory) within a reasonable time, such as hours;</p>
<p>Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination (2017), A/72/286 (para.74)</p>	<p>States should terminate the practice of outsourcing the overall operation of prisons, jails, immigration detention facilities and other places of deprivation of liberty to for-profit private security companies</p>

<p>Working Group on the use of mercenaries (2017), A/72/286 (para.82)</p>	<p>States should establish external monitoring and inspection mechanisms and not rely solely on inspections conducted by the governmental agency contracting with a particular private security company. A body fully independent of the contracting agency should carry out regular inspections. Reports of the inspections should be made public</p>
<p>Working Group on the use of mercenaries (2017), A/72/286 (para.88)</p>	<p>Contracts for private security companies operating in places of deprivation of liberty should adhere to international human rights standards, particularly the United Nations Standard Minimum Rules for the Treatment of Prisoners. These include rules regarding the treatment of detainees and prisoners, the recruitment of trained and skilled personnel, and inspections and contact with the outside world</p>

Guidance from Treaty Bodies

Source	Guidance
<p>HRC General comment no.35: Liberty and security of person (2014), CCPR/C/GC/35 (para.I.9)</p>	<p>Decisions regarding the detention of migrants must take into account the effect of the detention on their physical or mental health</p>
<p>HRC General comment no.35: Liberty and security of person (2014), CCPR/C/GC/35 (para.II.18)</p>	<p>Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons</p>
<p>HRC General comment no.35: Liberty and security of person (2014), CCPR/C/GC/35 (para.VII.58)</p>	<p>Detainees should only be held in facilities officially acknowledged as places of detention. A centralized official register should be kept of the names and places of detention, and times of arrival and departure, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives. Prompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members. Detainees should be promptly informed of their rights, in a language they understand; providing information leaflets in the appropriate language, including in Braille, may often assist the detainee in retaining the information...Independent and impartial mechanisms should be established for visiting and inspecting all places of detention</p>

<p>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.III.C.2.27)</p>	<p>Administrative detention of migrants that is initially lawful and non-arbitrary may become arbitrary if it continues beyond the period for which a State party can provide proper justification. To prevent such a situation from occurring, a maximum period of administrative detention shall be established by law, upon expiry of which a detainee must be automatically released in the absence of such justification. Administrative detention must never be unlimited or of excessive length. The justification for keeping a migrant worker detained shall be reviewed periodically to prevent prolonged and unjustified detention, which would be considered arbitrary. Preventive detention of migrant workers often leads to prolonged detention based on vague criteria. Therefore, such detention should be imposed only following an individual assessment in each case and for the shortest time possible, in compliance with all procedural safeguards provided for in article 16 of the Convention. In cases where an expulsion order cannot be executed for reasons beyond the detained migrant worker's control, he or she shall be released in order to avoid potentially indefinite detention</p>
<p>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.III.C.2.28)</p>	<p>States parties should consider preparing standard notification forms, containing, inter alia, information on available remedies, in the languages that are most frequently used or understood by migrant workers in an irregular situation in the State party concerned. Such standard notification forms, however, should be complementary to the issuance of a detention order containing factual information and the legal grounds pertaining to the arrest</p>
<p>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.III.C.2.30)</p>	<p>Article 16, paragraph 7, provides for the right of migrant workers who are deprived of their liberty to communicate with the consular or diplomatic authorities of their State of origin or those of a State representing the interests thereof. It also requires State parties to: (a) Inform the said authorities without delay of the arrest or detention of the migrant worker concerned, if he or she so requests; (b) Facilitate any communication between the person concerned and the said authorities; (c) Inform the person concerned without delay of this right as well as of rights under other applicable treaties; and (d) Correspond and meet with representatives of the said authorities and make arrangements with them for his or her legal representation</p>
<p>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.III.C.2.31)</p>	<p>The Committee emphasizes that the detaining State shall only contact the said authorities if this is explicitly requested by the detained migrant worker. In particular, migrant workers with potential protection needs shall not be brought to the attention of the said authorities without their knowledge and consent</p>
<p>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.III.C.2.33)</p>	<p>Further reviews of the continued necessity and lawfulness of the detention should be carried out at regular intervals by a judge or other officer authorized by law to exercise judicial power. The burden of proof must rest on the detaining authorities to demonstrate that the presumption in favour of liberty should be displaced</p>

<p>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.III.C.2.34)</p>	<p>In the Committee’s view, States parties should take effective measures to ensure that all migrant workers held in migration detention centres, including those who opt for voluntary repatriation, are properly informed of their rights in a language they understand, especially with regard to their rights to consular assistance, to challenge the lawfulness of their detention and/or to release, to request asylum and to receive information about protection measures available to victims or witnesses of trafficking in persons</p>
<p>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.III.C.3.36)</p>	<p>In order to respect the inherent dignity of migrant workers and members of their families who are deprived of their liberty, States parties are obliged to ensure adequate conditions in line with applicable international standards, including the provision of adequate sanitary, bathing and shower facilities; adequate food (including appropriate food for those observing religious dietary laws) and drinking water; the right to communicate with relatives and friends; access to qualified medical personnel, and adequate opportunities to practise their faith, for example. It also requires States parties to ensure that they are not subjected to any form of inhumane treatment, including sexual violence and abuse, by guards or other detainees or inmates. States parties must therefore: (a) Train supervisory and other staff; (b) Enable regular and independent monitoring of places where migrant workers are or may be deprived of their liberty; (c) Ensure that they have access to effective and independent complaint mechanisms, including access to legal counsel and interpreters; (d) Investigate complaints of torture and other forms of ill-treatment in places where migrant workers or members of their families are deprived of their liberty; and (e) Bring those responsible to justice</p>
<p>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.III.C.3.39)</p>	<p>The Committee considers that administrative detention of migrant workers should, as a rule, take place in public establishments. Privately run migrant detention centres pose particular difficulties in terms of monitoring. States parties cannot absolve themselves of their human rights obligations by contracting out the detention of persons to private commercial enterprises. If States parties delegate such functions to private companies, they must ensure respect for the rights of detained migrant workers, as provided for under article 17 of the Convention. States parties must ensure that detention centre personnel are trained in human rights, cultural sensitivity, and age and gender considerations</p>
<p>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.III.C.3.41)</p>	<p>States parties shall eliminate de facto discrimination against detained migrant workers by removing practical barriers to their equal enjoyment of visitation rights, such as detention in a remote location, making access difficult for family members</p>
<p>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.III.C.3.45)</p>	<p>States parties must also take into consideration the special situation of women migrant workers in detention. States parties must ensure separate facilities for men and women, ensure the provision of gender-specific health care services, and also provide for the specific needs of pregnant women, breastfeeding mothers and mothers with young children. States should avoid detaining women migrant workers in the final months of pregnancy or if they are nursing. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) provide useful guidelines for States in these situations</p>

<p>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.III.C.3.46)</p>	<p>Moreover, migrant workers with disabilities and members of their families with disabilities should be provided with “reasonable accommodation” [in detention] to ensure their right to enjoy their human rights and fundamental freedoms on an equal basis with others</p>
<p>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.III.C.3.47)</p>	<p>With regard to article 17, paragraph 8, the Committee considers that detention “for the purpose of verifying any infraction of provisions related to migration” covers the entire duration of administrative detention, and that, consequently, migrant workers and members of their families subjected to administrative detention shall not bear any costs arising therefrom</p>
<p>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.III.C.3.48)</p>	<p>Considering that migrant workers deprived of their liberty are in a particularly vulnerable situation due to their predicament and the uncertainty of the circumstances, the Committee is convinced of the importance of independent monitoring in preventing torture and other forms of ill-treatment and abuse. National human rights institutions, relevant civil society actors, the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross and the Office of the High Commissioner for Human Rights should have broad access to all places of detention where migrants are or may be detained</p>
<p>CMW / CRC Joint general comment No.4 / No.23: on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (2017), CMW/C/GC/4-CRC/C/GC/23 (para.II.B.12)</p>	<p>Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family. The measures offered to the child and the family should not imply any kind of child or family deprivation of liberty and should be based on an ethic of care and protection, not enforcement. They should focus on case resolution in the best interests of the child and provide all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children’s holistic development. Independent public bodies, as well as civil society organizations, should be able to regularly monitor these facilities or measures. Children and families should have access to effective remedies in case any kind of immigration detention is enforced</p>
<p>CMW / CRC Joint general comment No.3 / No.22: on the general principles regarding human rights of children in the context of international migration (2017), CMC/C/GC/3-CRC/C/GC/22 (para.III.B.32)</p>	<p>Any measure that constrains children’s liberty in order to protect them, e.g. placement in secure accommodation, should be implemented within the child protection system with the same standards and safeguards; be strictly necessary, legitimate and proportionate to the aim of protecting the individual child from harming him or herself or others; be part of a holistic care plan; and be disconnected from migration-enforcement policies, practices and authorities</p>



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This reference tool is part of a larger document that contains guidance for all 23 objectives of the Global Compact for Safe, Orderly and Regular Migration. It is available online at: quno.org/resource/2018/11/foundations-implementation

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