

Position paper



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Reducing the use of immigration detention in the EU

Based on their operational experience, National Red Cross Societies in the EU make the following recommendations to the EU and Member States to protect the liberty of migrants and discourage the use of detention:

1. Ensure that immigration detention is an exceptional measure of last resort – liberty should be the norm.
2. Develop and implement alternatives to detention. If there are grounds for detention, alternatives to detention should be systematically considered first.
3. End the immigration-related detention of children and other vulnerable groups.
4. Avoid the detention of refugees and asylum seekers.
5. Only use detention when it has been determined to be necessary, reasonable, and proportionate to a legitimate purpose.
6. Guarantee that detention is always subject to timely judicial reviews and effective appeal mechanisms.
7. Make sure that the conditions of immigration-related detention are non-carceral and as lenient as possible.
8. Enable migrants to restore and maintain contact with their family members and to access other relevant services.
9. Ensure regular independent monitoring and inspections of immigration detention facilities.
10. Support efforts to limit immigration detention in third countries.

“Liberty should be the norm.
Detention ought to be a
measure of last resort.”

Position paper

In recent years, the European Union (EU) and Member States have prioritised reducing migrants' irregular entry and stay by reinforcing external border controls and intensifying administrative detention as a form of migration management.

National Red Cross Societies in the EU witness how immigration detention increases the vulnerability of individuals who, for a variety of reasons, are usually already at risk. They believe that liberty should be the norm, and that detention ought to be a measure of last resort which is limited in time and of a non-carceral nature.

The purpose of this position paper is to encourage States to safeguard the liberty of migrants and to avoid the use of detention for immigration-related reasons. If there are grounds for detention however, guidance is also included to support States to develop and implement alternatives, as well as to guarantee humane treatment in immigration detention, in line with applicable international, European, and domestic laws and standards.

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Background

In many cases, migrants are exposed to detention as a result of their irregular entry into the EU and the criminalisation of irregular border crossings. Within the EU, migrants¹ can be detained in context of their initial arrival, for reasons of irregular entry and/or identification², during transfers under the Dublin system³, or to enforce return procedures⁴. Currently, the implementation of EU migration management strategies is standardising the use of detention at borders. Rather than a measure of last resort, detention is increasingly used as a first response in border procedures and the “hotspot approach”⁵, during accelerated procedures for persons with “unfounded asylum claims”, and as a sanction for secondary movements.

Most European National Red Cross Societies engage in the field of immigration detention, performing a wide range of activities⁶. Through this work, they regularly observe the negative and long-lasting effects of detention on the well-being and health of migrants⁷. Immigration detention is particularly damaging because of the uncertainty of the administrative process. The constant stress suffered can exacerbate pre-existing mental and physical health problems, as well as previous trauma experienced in countries of origin or during the journey.

Relatives of detainees are waiting to cross the Ramallah district, Hashmonaim (Ni'lin) checkpoint, Israel, July 2018 © ICRC / Alyona Synenko





A boy and his grandfather have come from Sheberghan province to the ICRC office to talk with their detained loved one, Mazar-i-Sharif, Afghanistan, April 2018

The main protection issues identified range from the use of arbitrary detention, to the detention of especially vulnerable migrants, such as children, families, people who are lesbian, gay, bisexual, transgender, or intersex (LGBTI), victims of human trafficking, and persons with mental health issues. Moreover, inadequate detention conditions have been observed in several countries, including overcrowding, limited access to healthcare, few means and opportunities to contact family members and legal services, poor hygiene, an overly securitised environment, and a lack of access to outdoor spaces⁸.

Our Recommendations

This position paper is informed by the operational experience in immigration detention of National Red Cross Societies in the EU, as well as by the Fundamental Principles of the International Red Cross and Red Crescent Movement and relevant Policies and Resolutions on migration⁹. It contains ten policy recommendations for the EU and Member States when considering the use of immigration detention and alternatives to detention. The importance of treating irregular migration as an administrative infraction, rather than as a criminal offence, is also underlined.

1. Ensure that immigration detention is an exceptional measure of last resort – liberty should be the norm.

The detention of migrants for immigration-related purposes ought to be avoided. Liberty should be the norm. If there are grounds to deprive a person of their liberty, alternatives to detention should always be considered first.

Migration should not be criminalised and breaches of migration law should be treated as administrative offences. In principle, immigration detention should be a measure of last resort. In practice however, it is being used more and more. States sometimes see it as a way to manage their borders and deter migration. While States have the sovereign right to regulate migration, this right is not absolute. State regulation, policy, and practice must always respect international law and uphold migrants' rights.

States should carefully consider the humanitarian impacts of their migration policies. The negative and potentially lasting effects of detention on people's well-being and mental health are well documented. The main mental health problems caused by detention are depression, anxiety, and post-traumatic stress disorder. The longer the period of detention, the more detrimental for the person's mental health. However, even relatively short periods of detention can have adverse consequences for the mental health of migrants. This is particularly the case for children.

2. Develop and implement alternatives to detention. If there are grounds for detention, alternatives to detention should be systematically considered first.

Alternatives to detention should be developed, prescribed by law, and systematically considered before resorting to detention. Alternatives to detention should not be used as an alternative to liberty. Their implementation ought to lead to decreased use of immigration detention. Any alternative should only be considered and applied when the formal grounds for detention exist.



Photo © ICRC / Stylianos Papadelas

The principle of legal certainty calls for the effective regulation of alternatives to detention. Like with detention, these alternatives need to be governed by law in order to avoid arbitrary restrictions to liberty or freedom of movement. Legal regulations ought to specify and explain the various alternatives available and the criteria governing their use, as well as identifying the authorities responsible for their implementation and enforcement.

If there are grounds for the deprivation of liberty, the EU and Member States should ensure that non-custodial alternatives are developed and used. There must be a shift from coercion-based options, to a more humane and engagement-based approach that avoids restricting freedom of movement and strives to involve individuals throughout the asylum and immigration processes.

The following aspects ought to be considered when it comes to alternatives to detention:

- » Alternatives to detention should not be used as alternative forms of detention. Alternative measures should be non-custodial and protect the rights, dignity, and well-being of individuals; any scheme which de facto deprives migrants of their liberty cannot be regarded as an alternative to detention. Alternatives to detention must be prescribed by law. When they involve restrictions on movement, they must be subject to similar procedural safeguards to those applied to administrative detention. The operationalisation of any alternative must always be compliant with migrants' human rights.
- » All restrictions must be reasonable and respect the principles of necessity and proportionality. A wide range of alternatives to detention should be available. The manner of implementation and the level of coerciveness must be considered when choosing which alternative to apply to a particular person (e.g. type, duration, and potential effect on the individual).

- » Alternatives to detention should be accompanied by a range of approaches and strategies to support people to comply with their administrative obligations. Access to services and support, including case management and legal advice, should be provided.

3. End the immigration-related detention of children and other vulnerable groups.

Children, whether unaccompanied or with their families, must never be detained for immigration-related purposes. The detention of especially vulnerable groups, and notably children, is particularly harmful. Even a brief period in detention negatively impacts children's physical and psychological well-being. Their best interest must be the primary consideration, in accordance with the Convention of the Rights of the Child. Liberty should always be the preferred option, with suitable child-care arrangements for unaccompanied children. When liberty is not appropriate, community-based, non-custodial measures that preserve family unity ought to be considered.

Children should not be detained based on their migration status, or that of their parents or guardians. States often assume that being detained with their families to preserve family unity is in the best interest of the child. Considerations of the best interests of the child cannot be limited to keeping the family together. Family unity is not enough to legitimise or motivate the detention of children, considering the harmful effects of detention on their mental health and cognitive development.

Nor does the solution lie in separating children from their parents. Parents and children should no longer

be separated because of their migration status, since it causes significant psychological distress to both the children and their parents. Children have the right to family unity and the right not to be separated from their parents or guardians against their will. Consistent with the principle of family unity, parents or primary caregivers should not be detained. They should be allowed to live in the community with their children. Rather, ensuring family unity in the child's best interests requires authorities to investigate alternatives to detention for the entire family.

The detention of children, especially unaccompanied minors, often depends on the result of their age assessment. It is therefore of paramount importance that age assessment procedures are conducted appropriately, with the child's informed consent and in full respect of their rights. Age assessment procedures must be carried out without discrimination by independent and suitably skilled practitioners. They should respect the dignity and physical integrity of the child. While a person's age is being assessed, or when their age cannot be established with certainty, the individual should be presumed to be a child.

The special circumstances of particularly vulnerable individuals, such as older people, pregnant women, victims of torture or human trafficking, people with mental or physical illnesses, and people with disabilities, should be taken into account when considering possible detention. Minority groups like LGBTI people, stateless people, or members of religious minorities should also be considered as vulnerable groups with specific needs. Appropriate and systematic vulnerability screening procedures should be put in place to ensure that the detention of vulnerable people does not take place. In designing alternatives to detention, it is important that States observe the principle of minimum intervention and pay close attention to the specific situation of vulnerable individuals.

4. Avoid the detention of refugees and asylum seekers.

The detention of migrants and asylum seekers at European borders is increasingly becoming the norm, instead of being an exceptional measure. In accordance with article 31 of the 1951 Convention Relating to the Status of Refugees, irregular entry or presence for the purpose of seeking international protection must not be penalised.

As everyone has the right to seek and benefit from asylum from persecution, any detention of people exercising this right must be carefully circumscribed. Generally, the detention of refugees and asylum seekers should be avoided. The grounds for depriving a person of their liberty should be narrowly defined. In addition, a migrant's irregular status or the fact that they are detained, should not prevent them from



An ICRC staff talks with a migrant at a pre-removal center in Evros, Greece, March 2018. © ICRC / Stylianos Papadoulas



“Helping to reestablish and preserve family connections is part of the work that National Red Cross Societies can carry out in detention.”

With the support of the ICRC, families are talking to their beloved ones who are detained in prisons, Afghanistan, October 2017. © ICRC / Roya Musawi

being able to apply for asylum or pursue their asylum claim. Thus, detained migrants should be given the necessary information and be allowed to exercise this right, including by being afforded access to asylum procedures.

In order to truly make detention a measure of last resort, EU and Member State decision-makers must ensure that asylum reception frameworks, including solidarity mechanisms, limit the possibilities to use detention. Specific nationalities should not be discriminated against and detained automatically. Systematic individual assessments should be guaranteed. During accelerated procedures, asylum seekers must have access to independent legal assistance and interpreters. They should also have the right to challenge asylum decisions. A thorough evaluation of the effectiveness of the “hotspot approach” and its impact on fundamental rights must be carried out before developing additional border and transit zone procedures, or replicating this type of approach elsewhere.

5. Only use detention when it has been determined to be necessary, reasonable, and proportionate to a legitimate purpose.

Immigration detention should be used as a measure of last resort, not as a tool to deter migration. Detention must be determined necessary, reasonable, and proportionate to a legitimate purpose. A person must only be deprived of his/her liberty if in accordance with grounds and procedures that are prescribed by law. Detention can only be ordered based on a decision taken for each individual case, following a careful and completely indiscriminate assessment. Individual assessments are crucial to enabling that the particular circumstances of each person are reviewed

to avoiding unnecessary detention decisions, and to ensuring that detention is justified and only used as a measure of last resort.

Justifying immigration detention based on a threat to national security or public order should be avoided. International human rights law requires that administrative detention is only used to enforce an administrative decision. Threats to security or public order should be addressed by means of criminal law measures. Using immigration detention to achieve goals attributed to criminal law posits migrants as dangerous individuals and contributes to their criminalisation.

The grounds for detention should not be expanded. In particular, they should not incorporate broad, non-exhaustive criteria to assess the risk of absconding. A “risk of absconding” should not be presumed and the criteria for assessing this risk should not be defined so widely that anyone can be considered a potential absconder. We recommend that the risk of absconding is determined following a written assessment of the individual’s likely future conduct. Indicators should be based on relevant past behaviour.

Immigration detention must not last beyond the period for which the State can provide appropriate justification – it should be limited in time and as short as possible. The timeframe (or circumstances determining the timeframe) should be known to the detainee and clear from the start of the period of detention. We recommend reducing the maximum duration of detention foreseen in the Return Directive (currently 18 months) and creating mechanisms to prevent repeated periods of detention.

6. Guarantee that detention is always subject to timely judicial reviews and effective appeal mechanisms.

Several key procedural safeguards must be guaranteed as required by existing law, or as a matter of policy and good practice. Migrants have to be promptly informed in a language and manner that they understand, of the reasons for their detention, their rights, and the options available to them, including the right to appeal against the decision.

The decision to detain must be made by a duly authorised official, in accordance with the criteria laid down by the law. The decision has to be reviewed with the least possible delay by a judicial or other independent authority, and the need to maintain the person in detention must be re-evaluated periodically thereafter. Key procedural safeguards should also ensure a person's right to appeal and challenge the lawfulness of their detention before a judicial body that has the authority to order their release if their detention was unlawful. Migrants should be allowed independent legal assistance to dispute their detention, to benefit from legal representation, and/or to be able to attend the proceedings in person.

7. Make sure that conditions of immigration-related detention are non-carceral and as lenient as possible.

Migrants must be treated humanely and afforded due process of law. The conditions of their detention should preserve their dignity. It is critical that their liberty is not constrained beyond what is strictly necessary. In line with its administrative character, immigration detention should be of a non-carceral nature. Therefore, migrants in immigration detention should be accommodated in purposefully designed centres, which offer an appropriate regime and material conditions, and where they are separate from individuals whose detention is the result of a criminal offence.

Frequently, migrants are initially held at "point of entry holding facilities", such as airport transit zones and police stations. These places are often inadequate for detention, especially for extended periods of time. The conditions of immigration detention should be carefully and systematically reviewed. All places where migrants are deprived of their liberty must provide decent, humane, and safe living conditions. The use of prisons, police stations, or facilities that are designed or operated like prisons should be avoided –by definition, they are unsuitable places to detain a person who is not suspected of, charged with, or sentenced for a criminal offence.

The detaining authorities must ensure migrants' safety and provide for their basic physical and psychological needs, including by affording access to adequate medical care. Migrants must be protected against

all forms of abuse and exploitation, including sexual violence. When women are detained, they should be accommodated separately from men, unless the latter are family members and all the individuals concerned have provided their consent. The detention of minority groups, such as LGBTI people or members of religious minorities, requires specific attention to confidentiality, non-discrimination, and the establishment of safe spaces.

8. Enable migrants to restore and maintain contact with their family members and to access other relevant services.

States must allow detained migrants to restore and maintain contact with their families. They should also ensure that migrants have the technical and financial means to do so. As part of the Family Links Network, helping to reestablish and preserve family connections is part of the work that National Red Cross Societies can carry out in detention.

The authorities should provide detained migrants with at least an initial free phone call, either in the country or abroad, to contact their family and inform them of their whereabouts. Detained migrants should also have regular access to telephones (including their own mobile phones), the internet, and computers with Voice Over Internet Protocol (VOIP) or Skype facilities. There should be a system for regular visits from family members and others, including the provision of appropriate space to facilitate interactions.

Migrants must be made aware of their right to inform and maintain communication with their consular or diplomatic authorities.



ICRC staff distribute basic items to detained migrants in a pre-removal center in Evros, Greece, March 2018. © ICRC / Stylianos Papardelas

If requested by the migrant, the relevant diplomatic or consular authorities must be informed of their detention without delay.

Migrants should also have access to relevant social services, including those provided by volunteers. These actors can play a key role in identifying vulnerable individuals, such as victims of human trafficking or unaccompanied children, and proposing their release. Meaningful everyday life activities like work, education, and leisure should also be made available inside detention. Volunteers offering humanity, community, and psychosocial support activities to detained migrants ought to be welcomed.

9. Ensure regular independent monitoring and inspections of immigration detention.

Regular independent monitoring of detention facilities is important to prevent ill-treatment and, more generally, to ensure compliance with human rights standards. National Red Cross Societies who have requested it should have the possibility to visit and communicate with migrants in immigration detention. They should also be able to conduct a confidential dialogue with relevant authorities to communicate their recommendations and any problems identified.

All staff working in detention centers (including police) must be adequately trained and knowledgeable about existing referral procedures, including available health and legal support. They ought to also be aware of the different forms of vulnerability, types of mental health issues/signs of trauma, and suicide prevention techniques. They should be equipped with tools to handle trauma, deliver psychosocial aid, and support intercultural meetings.

10. Support efforts to limit immigration detention in third countries.

The EU's efforts to build the migration and asylum capacities of third countries also include financial and technical assistance in the management of detention centres. The humanitarian impact of EU migration policies and funding on the detention of migrants beyond the EU should be evaluated. This review ought to consider the following aspects: the necessity, proportionality, and reasonableness of detention decisions, the length of detention, the rate of repeated detention, the efficiency of the legal review of detention decisions, and the availability of effective legal aid.

The EU should support third countries in reducing immigration-related detention and promote the development of a legal framework that protects the rights and dignity of all migrants, irrespective of their legal status. The EU should also push to set a maximum length of detention and to prevent arbitrary arrests. EU funding should not be directed towards supporting the management costs of detention centres. When abuses are suspected to have taken place, funding should be suspended.

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- 1 According to the IFRC's 2009 Policy on Migration, "migrants" are persons who leave or flee their habitual residence to go to new places – usually abroad – to seek opportunities or safer and better prospects. This includes migrant workers, stateless migrants, migrants deemed irregular by public authorities, as well as asylum seekers and refugees.
- 2 See: Directive laying down standards for the reception of applicants for international protection, 2013/33/EU, June 2013 and AIDA, [The detention of asylum seekers in Europe. Constructed on shaky ground?](#), June 2017.
- 3 See: Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), No 604/2013 and AIDA, [The implementation of the Dublin III Regulation in 2018](#), March 2019.
- 4 See: Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008/115/EC, December 2008.
- 5 See: Commission staff working document, [Best practices on the implementation of the hotspot approach](#), (COM(2017) 669 final), November 2017 and ECRE, [EU Hotspot approach: the 'corner stone' of EU support to Italy and Greece' still struggling two years on](#), November 2017.
- 6 Activities can include: conducting a protection dialogue with the authorities on the general treatment of detained migrants or about individual cases, material assistance, psychosocial support, Restoring Family Links (RFL), legal support and monitoring, information provision/ counselling, referral and/or support of vulnerable individuals (such as unaccompanied children and victims of human trafficking). Also see: ICRC, [Activities for Migrants](#), September 2015.
- 7 The British Red Cross has analysed the humanitarian impacts of the UK immigration detention system in a publication entitled "[Never Truly Free](#)". The study stresses the negative consequences of immigration detention on mental health. Indeed, most detainees have experienced some form of trauma in their life before detention, the effects of which can be exacerbated by detention. For this reason, the harm caused by being detained does not end when an individual is released. It continues and is deepened by a lack of support and a damaging system of immigration control. See also: ICRC, [Policy Paper on Immigration Detention](#), April 2016.
- 8 The Norwegian Red Cross commissioned a comparative study on immigration detention centres in France, Germany, Norway, Sweden and Switzerland. Conducted by the Global Detention Project, the study analyses detention conditions and regimes which are most likely to aggravate the harm individuals experience. It also identifies practices that contribute to moving away from a carceral approach in order to better reflect the administrative character of immigration detention.
- 9 IFRC Policy on Migration, 2009, Article 8. Resolution 3 on "Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion", adopted at the 31st International Conference of the Red Cross and Red Crescent Movement in 2011; ICRC, [Policy paper on immigration detention](#), 2016 and ICRC, [Second comment on the Global Compact for Safe, Orderly and Regular Migration - Focus on immigration detention](#), October 2017.



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