

COUNCIL MONITOR

International Service for Human Rights



Human Rights Monitor Series

COUNCIL UPDATE – ITEM 3 PANEL ON MIGRANTS IN DETENTION CENTRES HUMAN RIGHTS COUNCIL, 12TH SESSION 17 SEPTEMBER 2009

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Overview

On 17 September 2009, the Human Rights Council (the Council) held a thematic panel discussion on the human rights of migrants in detention centres. At its 11th session, the Council had decided to hold this panel during the 12th session. On several occasions, some States had asked for a dedicated discussion of this issue, and the High Commissioner has declared the issue of migration as one of the thematic priorities for OHCHR over the next biennium.

In comparison to other thematic panel discussion held previously by Council, the discussion was relatively detailed, and many States provided elements that could contribute to a compilation of best practices in the area. Although many of the statements were critical of the practice and conditions of detention of irregular migrants, the tone of the debate was largely constructive. There was no clear divide in position between sending and receiving, nor between developing and developed countries, as most States focused on the human rights dimensions of migration.

Presentations by panellists

The rather large panel provided a variety legal and policy perspectives on the issue of detention of migrants, but all panellists shared the view that migrants should not be detained.¹ Instead, panellists outlined several alternatives to detention. It was notable that for the first time in the Council's history of panel debates, a representative from a national human rights institution (NHRI), was among the panellists.

Ms Pillay drew attention to the increasing focus by treaty bodies, the special procedures and the UPR on violations related to the detention of migrants and asylum seekers. She particularly highlighted opinions by the Working Group on arbitrary detention and the Special Rapporteur on the human rights of migrants, which have stressed that

¹ Ms Navanethem Pillay, High Commissioner for Human Rights; Mr El Hadji Malick Sow, Chairperson-Rapporteur of the Working Group on arbitrary detention; Mr Jorge A. Bustamante, Special Rapporteur on the human rights of migrants; Mr Abdelhamid El Jamri, Chairperson of the Committee on the Protection of the Rights of Migrant Workers and Members of their Families; Ms Vanessa Lesnie, Australian Human Rights Commission and Mr Ashley William Bonaventure Gois, Migrant Forum in Asia.

criminalising the irregular stay in a country ‘exceeds the legitimate interest of States to control and regulate irregular immigration’. She urged states to not use terminology conducive to further stigmatisation of migrants, such as ‘illegal immigrants’ but instead refer to ‘undocumented’ or ‘irregular’ migrants. While emphasising that alternatives to detention should be sought whenever possible, the High Commissioner reminded States of their obligation to respect the human dignity of all persons, including detained migrants. Finally, she urged the Council to play ‘a key role’ in this regard.

Mr El Hadji Malick Sow, Chairperson-Rapporteur of the Working Group on arbitrary detention, expressed concern about the legal process of detention. He stated that detention should be avoided whenever possible and should be a final resort. However if detention is unavoidable, the legal process should respect all the rights of detained migrants. For example, Mr Sow stated that the law should set a maximum period for detention. It should also stipulate that a detention order should come only from a judge, that a detainee should have the right to appeal the detention order, and detained migrants should be adequately informed of their rights in their own language. Mr Sow also stressed that States, under the Convention on the Rights of the Child (CRC) have particular obligations related to the detention of minors.

Mr Jorge Bustamante, the Special Rapporteur on the human rights of migrants, also drew attention to the topic of migrant children, asserting that unaccompanied children should never be detained. He stated that children should never be detained for the purpose of maintaining family unification. Rather, States should find alternatives to detention that allow families to remain together. Furthermore, Mr Bustamante emphasised that while states do have the sovereign right to safeguard their borders and regulate immigration, this right does not relieve them of their obligation to ensure the basic human rights of all persons, including undocumented migrants.

Following Mr Bustamante’s comments, **Mr Abdelhamid El Jamri, Chairperson of the Committee on the Protection of Migrant Workers and Members of their Families**, drew attention to States’ shortcomings in providing adequate conditions of detention. He expressed serious concern about migrants who are not held separately from other detainees and who might be subjected to ill-treatment or even torture. Mr Jamri stressed the importance of obtaining information about migrants in all States to monitor conditions of detention.

Ms Vanessa Lesnie provided a useful perspective on behalf of the Australian Human Rights Commission by outlining various reforms made in Australia’s policies towards migrants. Ms Lesnie explained that Australia is a State in transition from a policy of migrant detention to a policy encouraging alternative methods. She stated that the Australian Government finds prolonged detention of migrants to be ‘contrary to human rights’, as well as both expensive and counterproductive. Reforms focusing on alternatives to detention and cooperation with NHRIs and NGOs have been very successful. Ms Leslie suggested that community-based programs recently implemented in Australia might be models for States considering alternatives to detention or alternative forms of detention. Ms Leslie’s self critical and forward looking statement on behalf of the Australian Human Rights Commission made an important and positive contribution to the dialogue.

Lastly, Mr Ashley William Bonaventure Gois, on behalf of Migrants Forum International, took the position that migrants should not be characterised as criminals or treated as threats to national security. He urged governments to consider the root causes of irregular migration and to reevaluate policies towards migrants with these causes in mind. He also pointed out that examining the effectiveness of ‘alternatives’ to detention should not detract from the general principle that migrants should not be detained. In addition, Mr Gois raised some interesting and practical concerns about the detention process. He urged governments to take measures to prevent private corporations from becoming involved in the detention process, emphasising that ‘the detention of human beings should not, and can never be, a profit-generating enterprise.’ He also cautioned against ‘crackdowns’ against undocumented migrants in light of the current global financial crisis.

Interactive dialogue

The majority of States that took the floor said that **criminalisation** of undocumented migrants was unacceptable and should be avoided.² Brazil pointed out that neither illegal stay in nor entry to Brazil is a criminal offense, which allows avoiding detention of migrants. Instead, Brazil advocated for the regularisation of undocumented migrants. In the context of criminalisation of migration, the International Commission of Jurists regretted that many States treat migrants as a threat to their security, and that migration is often conflated with terrorism. In contrast to the explicit call of the High Commissioner on States to refrain from criminalising irregular migration, China stressed that ‘illegal immigrants are violators of the law’, suggesting that it sees criminalisation and detention of migrants as necessary.

Several States stressed that **detention of migrants should be avoided** wherever possible and should be a measure of last resort.³ Others, by outlining their own migration policies, indicated that they see the detention of migrants as necessary.⁴ Many States gave detailed accounts of their **national or regional migration policies**. While all seemed to do this in a spirit of providing good practices, with Uruguay (on behalf of MERCOSU) highlighting legal reforms undertaken by countries in the region, and Australia sharing its ‘key immigration values’, it seemed that some statements were at least in part aimed at justifying the continued detention of migrants. Sweden (on behalf of the EU) drew attention to the EU return directive issued in 2008, claiming that detention would only be used where other means would not be sufficient, that it should be as short as possible, ordered by administrative or judicial authorities, and have reasons in fact and law. Italy, while admitting ‘certain shortcomings’ said it had a ‘strong tradition promotion and protection human rights of everyone’, and explained how its reception centres for ‘illegal migrants’ operate.⁵ Similarly, the United States, while maintaining that detaining irregular migrants is ‘the sovereign right of each State’, outlined its efforts at improving its treatment of detainees. However, the NGO Human Rights First later expressed its continued concern at US detention policies.

Like the panellists, the advocates for **alternatives to detention** to be developed, and they asked the experts to provide examples of such alternatives. Mr Gois pointed out that the Brazilian experience could be ‘an emerging framework of alternatives to detention’ as it did not criminalise migrants at any time. Ms Lesnie provided a community based project from Australian practice, whereby migrants are given temporary visas and receive assistance through the Australian Red Cross. While she stressed that this model was very successful in its pilot phase, there are still forms of detention for migrants. Migrant Rights International welcomed this alternative.

A representative from the United Nations High Commissioner for Refugees (UNHCR) drew attention to a side-event during the upcoming meeting of the UNHCR Excom, which would specifically look at alternatives to detention.⁶ This intervention by a specialised agency, although their participation is rare in the Council, showed how they can and should inform the Human Rights Council’s deliberation of thematic issues. The ICJ proposed that OHCHR conduct a comprehensive study on alternatives to detention, which would also allow for the contribution of all stakeholders. Sweden (on behalf of the EU) argued that **voluntary return** of migrants would be the best alternative to detention. Mr Gois, while agreeing that incentives for voluntary return would be a welcome alternative to mass deportation, felt that such returns should be monitored. Overall, Mr Gois made the several specific recommendations in relation to alternatives to detention. For instance, he suggested that migrants should be supported in forming and joining trade unions, which would also facilitate the search for alternatives to detention.

Much attention was also paid to **conditions of detention**. Colombia (on behalf of GRULAC) enquired how detention could best be done in compliance with human rights law. Several speakers pointed out that detention

² Mexico, Colombia (on behalf of GRULAC), Uruguay on behalf of MERCOSUR, Brazil, International Commission of Jurists.

³ Brazil, Pakistan (on behalf of the OIC), Egypt, Indonesia.

⁴ Sweden (on behalf of the EU), France, Italy, United States, China.

⁵ After first using the term ‘illegal migrants’ the speaker corrected herself and used the terminology proposed by the High Commissioner a few minutes previously of ‘irregular migrants’.

⁶ The event will take place on 30 September 2009. See <http://tr.im/excom>.

conditions are often below acceptable standards, and regretted that migrants are denied basic rights, including the lacking separation of migrants from other detainees, a denial of the right to appeal, no periodic review of reasons for detention, disruption of families and inappropriate health and legal services.⁷ Medecins Sans Frontières gave a detailed account of the deplorable health conditions of detained migrants in Greece, Malta and Italy. Several States highlighted that migrants are often denied their right to consular notice, which renders assistance by their country of origin impossible.⁸

The excessive **duration** of detention was criticised by many States and NGOs. Ecuador and the ICJ felt that the maximum of 18 months allowed under the EU directive on migration is excessive, while OMCT pointed out that the detention period in Switzerland can be up to 2 years, and indefinite in the case of Algeria.

Finally, several States highlighted the role of **international cooperation** in dealing with migration. Both France and Brazil commented positively on their bilateral agreement intended to foster regular migration and limit clandestine migration. Uruguay (on behalf of MERCOSUR) stressed that only dialogue among States could lead to a comprehensive solution, and Indonesia added that this should include agreements on consular notification. On the role of the Council, very few specific suggestions were made. Burkina Faso asked the special procedures of the Council to continue to pay attention to the issue.

Further information

For further information on the Human Rights Council, please consult the following resources:

- Follow ISHR on Twitter: [@ishr_geneva](https://twitter.com/ishr_geneva).
- Web site of the International Service for Human Rights, providing up-to-date information before, during and after sessions of the Council: <http://www.ishr.ch/council>. During the session, ISHR will provide information about the Council's proceedings on a regular but not daily basis. You can subscribe to receive alerts of our publications by sending an email to information@ishr.ch.
- Oral statements made at the Council, as well as other informal documents and draft resolutions are available on the 'OHCHR extranet' at <http://portal.ohchr.org/portal/page/portal/HRCExtranet>. Username: 'hrc extranet' Password: '1session'.
- Web site of the Office of the High Commissioner for Human Rights (OHCHR) on the 12th session of the Human Rights Council: <http://www2.ohchr.org/english/bodies/hrcouncil/12session>. For direct access to reports considered, check <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm>.

NGOs and human rights defenders seeking more specific information or individual advice on the Council session, please contact the ISHR secretariat by email or phone at +41 (0) 22 919 71 00.

⁷ Colombia (on behalf of GRULAC), Egypt, Tunisia, UNHCR, OMCT, ICJ, Ecuador, Migrants Rights International (on behalf of 140 other organisations).

⁸ Mexico, Egypt, Pakistan (on behalf of the OIC).

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