



International Institute of Humanitarian Law  
Institut International de Droit Humanitaire  
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## 41<sup>st</sup> ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW

*“Deprivation of liberty and armed conflicts: exploring  
realities and remedies”*

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### **Humanitarian consequences of migration-related detention**

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I was asked to speak on the humanitarian consequences of migration detention, and will seek to angle my presentation from an operational viewpoint - a practitioner’s perspective so to say – reflecting the experiences of UNHCR’s work in more than 120 countries around the world. The legal framework will, as I understand, be presented in more detail by my fellow panelists.

Before I start my presentation, I want to specify that when we are speaking of detention for immigration- related reasons, we are in most cases speaking of detaining persons who are fleeing from armed conflict and crossed an international border in search of safety, rather than detention of persons inside, during or directly linked to, an armed conflict. While these two may converge, this is most often a question which comes up outside of, or removed from, the theatre of war, such as when refugees find themselves on the territory of a neighboring State which is not party to the conflict. So we are speaking of a different legal and factual framework than what we have been talking about so far in this roundtable, where international human rights law and international refugee law are prominent.

I also wanted to specify that, while UNHCR’s mandate covers refugees, asylum seekers and stateless persons, in this particular area, it’s important to be

aware of and take into consideration the broader migration context, as refugees and migrants will often move across borders side by side, through the same means, face the same challenges and difficulties, and be detained together. It can also be difficult for a State, at first, to distinguish one from the other, in a large influx. At operational level, UNHCR, therefore, recommends joint approaches to immigration detention, whenever feasible, and works closely with IOM, the ICRC, and other agencies and partners to that regard. Just to specify that what I present today is mainly based on UNHCR's experiences related to refugees.

In terms of what UNHCR is seeing at operational level, I wanted to highlight three key trends and developments. First, putting refugees and migrants in detention has, in many States become a routine – rather than an exceptional – response, a default reaction when faced with arrivals at their borders. Secondly, some States see detention as a deterrent, a way of reducing the number of arrivals, basically seeking to discourage and dissuade others from taking the same journey. And thirdly, an increasing rate and use of detention for immigration purposes globally, also of children. This is happening in the context of the highest levels of forced displacement since the Second World War, with an unprecedented 68.5 million people around the world who have been forced to leave their homes, of whom around 25 million are refugees.

The main challenges and difficulties that we see from this, from a humanitarian perspective, are: i) The lack of individualized approach in many States (which means no real assessment of necessity and proportionality of detention, in legal terms); ii) Inadequate reception and screening mechanisms at the borders, as well as thereafter (which means vulnerability and international protection needs are not identified in a timely manner and, therefore, unnecessary instances of detention are avoided); iii) The practice of long term or, in some cases, indefinite detention, which is a particular concern for stateless persons, who often, for lack of documentation, are left in detention because the State simply does not know what else to do with them, or have other options available; iv) Substandard conditions of detention; and, v) in some countries, we also see that detention limits the detainees' access to seek asylum.

The consequences of such detention, for the individual and communities, are well documented by researches, humanitarian agencies and medical professionals alike. And I will here refer to the distinguished panelist yesterday, Mrs. Racu from the Committee Against Torture, who spoke about the human cost of detention, and clearly listed the extensive and negative

effects, both in the short and the long term. Just to add that, for refugees and asylum seekers, detention often exacerbate past traumatic experiences, as they have themselves often been subject to, or have witnessed, serious rights violations, such as torture, executions, and sexual violence. In addition, detention isolates and separates migrants and refugees from the community, and thereby diminishes their capacity to be independent and self-sufficient members of this community after their release.

The detention of children is of particular concern, with devastating effects on their development and well-being. And research shows that such negative effects occur even if they are accompanied by family members, and even when it's "only" for a short period of time. For that reason, UNHCR's position is that children should not be detained for immigration related purposes, irrespective of their legal/ migratory status or that of their parents. Detention is never in their best interests.

To wrap up my presentation, I also wanted to point out a few solutions or ways forward, as requested by the organizers. UNHCR has, since 2014, been working on a Global Strategy on detention,<sup>1</sup> focused on three key areas: i) The non-detention of children; ii) Alternatives to detention; and iii) Ensuring that conditions of detention – where detention is necessary and unavoidable – meet international standards. We have been working towards these three goals for 5 years now, in 20 focus countries who have agreed to take on this issue, and develop National Action Plans to that regard, in cooperation with UNHCR.

Among these States, half of them have agreed to, and are piloting, some form of alternatives to detention, most of them for unaccompanied and separated children or families. Five countries have, since the beginning of our work, declared the end to the detention of children, and two others have significantly reduced the number of children in detention. We have witnessed an overall drop of 14% less children in migration detention in these countries over the first two years and a significant progress has been made since then in several other countries as well.

Procedurally, we have seen improvements in age-appropriate information to children and the prioritization of children's asylum claims, but there are still challenges remaining around the effective considerations of best interest of the child throughout the process, and the availability of family-based care options. We have seen several States introduce maximum time-limits for immigration detention and enhanced access to legal counsel, but there are still challenges in terms of non-penalization of refugees for illegal stay and entry, in

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<sup>1</sup> <http://www.unhcr.org/detention.html>

contravention of the 1951 Refugee Convention. In addition, migrants and refugees are often mixed with detainees who are suspected or convicted of crimes, and in substandard conditions.

From this work, I also wanted to share three key lessons for further discussion and reflection.

1. First, UNHCR would like to highlight the importance of effective screening and referral mechanisms as part of the overall reception of refugees and migrants. This is essential for the identification of persons in need of international protection, and persons at risk or vulnerable. An individualized approach also ensures timely access to specialized services.
2. Secondly, pilot projects on alternatives to detention have been very positive. Such alternatives to detention range from registration or deposit of documents, designated residence, community release, reporting conditions, to care arrangements for unaccompanied and separation of children. They speak to States' legitimate interest for security, but also to the long-term humanitarian considerations of individuals and communities, as well as cost considerations.
3. Thirdly, and lastly, legislative change and strategic litigation have made significant headway in several States and speaks again to the importance of partnerships in this area, with academics, NGOs, different government institutions (such as ombudsmen and human rights committees), and the judiciary, to name a few.