



## APT Position Paper

# UN Global Compact on Migration: Preventing torture of migrants should be at the core of the Compact

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18 July 2017

On 19 September 2016, the United Nations General Assembly adopted the New York Declaration for Refugees and Migrants, a Resolution that sets in motion a complex process to elaborate by 2018 two instruments laying out States' commitments regarding large movements of refugees and migrants. These instruments are the "Global Compact on Safe Orderly and Regular Migration" and the "Global Compact on Refugees" (not addressed in this paper).

This [paper outlines seven key messages](#) that the Association for the Prevention of Torture (APT) considers essential, from a torture prevention perspective, for the establishment of a Global Compact on Safe, Orderly and Regular Migration (hereafter the "Global Compact on Migration").

Based on APT's expertise gained in over 40 years of engagement on torture prevention, the key messages highlight the main concerns regarding the prevention of torture and ill-treatment in the context of immigration detention. The paper is addressed to APT partners, including National Preventive Mechanisms (NPMs) established under the Optional Protocol to the Convention against Torture, national authorities and civil society organisations, and other actors who engage on issues related to prevention of torture in immigration detention.

The objectives of this paper are three-fold, namely:

- to raise awareness about the UN Global Compact on Migration;
- to highlight situations of risk of torture in immigration detention;
- and to convey key messages related to preventing torture in immigration detention.

## **What is the UN Global Compact on Safe, Orderly and Regular Migration?**

The “Global Compact on Migration” has its origins in the New York Declaration adopted on 19 September 2016 at the conclusion of the UN General Assembly High Level Summit on Large Movements of Refugees and Migrants.<sup>1</sup> The Global Compact on Migration seeks to lay out a range of principles, commitments and understandings among UN Member States regarding the global governance and coordination of international migration. These principles, commitments and understandings draw inspiration from the 2030 Agenda for Sustainable Development, the UN Charter, the Universal Declaration of Human Rights and the international human rights treaties as well as other international instruments. State-level negotiations in 2018 will lead to the adoption of the Global Compact on Migration.

Within this framework, the Global Compact on Migration seeks to define States’ shared responsibility to manage large movements of refugees and migrants in a “humane, sensitive, compassionate and people-centred manner.”<sup>2</sup> It also aims to address the root causes and consequences of large movements of refugees and migrants and to condemn acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against refugees and migrants.

The New York Declaration defines the scope of the Global Compact on Migration. It addresses large movements of people crossing or seeking to cross international borders.<sup>3</sup> It does not cover regular flows of migrants from one country to another, nor issues related to internal displacement. The Declaration proposes an understanding of “large movements” of people that is defined not only in relation to the number of people arriving in a country, but also in relation to the economic, social and geographical context; the capacity of the receiving State to respond; or the impact of a movement that is sudden or prolonged.

With a mandate in preventing torture and ill-treatment, including in immigration detention contexts, the Association for the Prevention of Torture advocates for the integration of the following key messages in the Global Compact on Migration.

## KEY MESSAGES

### **1. It is not a crime to migrate. Detention of migrants must remain a measure of last resort.**

Detention is not the appropriate solution to manage migration. It should be used only exceptionally as a measure of last resort in accordance with international law standards related to specific grounds of application, lawfulness, necessity and proportionality. In the view of the UN Committee on Migrant Workers, the facts of crossing an international border in an unauthorised manner or without proper documentation or overstaying a permit of stay do not constitute crimes against persons, property or national security, but rather administrative offences<sup>4</sup> that should not be sanctioned with detention.

Evidence indicates that States around the world have toughened their immigration policies by increasing criminalisation of irregular migration, intensifying border controls, and externalising migration control policies. As a consequence, breaches of migration law are increasingly treated as criminal rather than administrative offences causing a depreciation of migrants' enjoyment of essential legal safeguards and human rights protections.<sup>5</sup> Contrary to acting as a deterrent for migration flows, harsh policies of interception and detention often further push migrants to take unsafe and irregular routes in the hands of smugglers or traffickers.<sup>6</sup>

International human rights law and refugee law permit limitations to the right to liberty and security of persons. However, all deprivations of liberty must be justified, imposed in accordance with the law and not be arbitrary.<sup>7</sup> Before imposing measures of deprivation of liberty, States are urged to give priority to the application of alternative measures to detention. Several binding instruments and soft law documents<sup>8</sup> stipulate specific criteria for the administrative immigration detention.<sup>9</sup>

In order not to be arbitrary, administrative immigration detention of migrants must be reasonable, necessary, and proportionate, decided on a case-by-case basis, enforced for the shortest period of time and only in connection to averting a danger to the public or the risk of absconding in situations where migrants' presence is required in further proceedings.<sup>10</sup> For these reasons, immigration detention used routinely as a measure of border control is likely to amount to arbitrary detention as it is neither exceptional nor applied based on an individualised assessment of risk.<sup>11</sup>

### **2. Immigration detention of children must end.**

Migrant children, including unaccompanied migrant children should never be placed in administrative immigration detention. The principle of the best interest of the child requires that rights-based and child-friendly alternative measures to detention be applied instead. Children should neither be placed in immigration detention on the basis of their parents' immigration status. The right to respect for family life and the principle of safeguarding the family unity require that children should not be separated from their family members or guardians, unless it is considered in their interest to do so. Thus, the children's family members or guardians should neither be placed in immigration detention.

States should provide children with adequate care and protection in specially designed facilities.<sup>12</sup> They should establish adequate procedures for children's identification, age assessment and vulnerability screening. Such procedures should provide for a presumption of minority. This means that when national authorities cannot establish with certainty the age of a migrant and there are reasons to believe the migrant could be a child, then the person concerned should be presumed to be a child.

As a member of the International Detention Coalition, the APT fully supports the Global Campaign to End Child Immigration Detention ([www.endchilddetention.org](http://www.endchilddetention.org)).

### **3. If migrants are deprived of liberty as a last resort, authorities should not impose criminal-like conditions of detention.**

Deprivation of liberty of migrants may ensue following an administrative detention order. In some cases, restrictions of the freedom of movement in reception or accommodation centres or at points of entry to a country, such as international zones of airports, may also amount to *de facto* deprivation of liberty.<sup>13</sup>

When deprived of liberty, the conditions and regime of detention of migrants should reflect their non-criminal status and should respond to their specific needs. When detained, migrants should be held in dedicated immigration detention places that uphold their enjoyment of human rights. While international human rights law admits that other places of detention may be used exceptionally and only for short periods of time, in practice migrants are often held in inappropriate facilities<sup>14</sup> that increase the risks of human rights violations, including torture and ill-treatment.<sup>15</sup> For instance, irregular migrants are often held in overcrowded facilities together with criminal law detainees, unable to have access to a lawyer and interpreter, to information regarding legal proceedings, to adequate accommodation, food or basic health care.

The obligations to ensure migrants' human rights apply irrespective of whether detention occurs at the moment of entry, during transit, or during proceedings of expulsion. They are binding for all detaining authorities, whether police, prison officers, immigration authorities, border guards, military and security forces, navy and coastguard.<sup>16</sup> National authorities do not relinquish their responsibility to prevent torture and ill-treatment in immigration detention places if they delegate the management and operation of such facilities to private companies.<sup>17</sup>

Migrants' regime of detention should be tailored according to their status and needs. Migrants' treatment in administrative detention should not be modelled according to the treatment of criminal law detainees. Immigration detention places should provide adequate accommodation, access to medical care, activities as well as conditions for the exercise of legal safeguards.<sup>18</sup> The staff present at detention facilities should have an adequate professional background, training, and general attitude that reflect the non-criminal setting of the place.

#### **4. Legal and procedural safeguards must be guaranteed to all migrants deprived of liberty.**

Migrants may file various legal claims in transit or in host States. They may engage in asylum and refugee status determination claims as well as in procedures related to different forms of international protection, family reunification or expulsion. The way in which such legal proceedings are conducted may increase the risk of torture and ill-treatment. In many cases, migrants do not possess a strong command of detaining authorities' language and they may also lack familiarity with the transit or host country's domestic legal system. In addition, all administrative detention that may have been lawful at the outset may become arbitrary in the absence of subsequent assessments of the continued presence of risks specific to each individual migrant that warrant the deprivation of liberty.

To prevent arbitrariness and abuse, migrants must have access to a lawyer and legal aid as well as access to an interpreter in all matters regarding immigration proceedings. Consular protection should also be available to migrants who wish to avail themselves of this mechanism. Furthermore, procedures to have decisions of deprivation of liberty reviewed periodically by a judicial or other independent authority, including a right to appeal and remedy should also be available to migrants. Throughout the period of their detention, migrants' rights to be informed of all aspects regarding their status as well as to communicate with their lawyer, consular authorities or relatives are essential.

Border authorities, the police or other detaining bodies may be the first public authorities that migrants meet on their journey. Individualised assessments of risks are essential in order to appraise migrants' particular circumstances and mitigate risks of torture and ill-treatment. Proper vulnerability screening and adequate questioning help to identify specific vulnerabilities that weigh in the determination of status and conduct of legal proceedings.<sup>19</sup>

#### **5. Forced returns increase the risks of torture and ill-treatment and should be a measure of last resort.**

The principle of *non-refoulement* constitutes a fundamental protection for migrants and asylum seekers present on States' territories but also at their borders. According to the UN Convention against Torture, the principle of *non-refoulement* prohibits a State to expel, return or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subject to torture. It represents an absolute prohibition that admits no exceptional circumstances. It applies to any territory under a State's jurisdiction in relation to any person without any form of discrimination and regardless of the status of the person concerned. To ensure an effective application of the principle of non-refoulement, States must have in place judicial and administrative procedures as well as preventive measures.

However, many States have recently introduced expedited or simplified procedures of expulsion that risk violating the principle of *non-refoulement*. Such procedures reduce migrants' opportunities to challenge their removal orders, but also disregard in some cases essential factors of vulnerability that would advise against expulsion. They may also

expose migrants to collective<sup>20</sup> or repetitive expulsions<sup>21</sup> as well as to indirect *refoulement* prohibited under human rights law.<sup>22</sup>

When a removal order is issued, States should give priority to effecting voluntary returns as they present fewer risks of human rights violations.<sup>23</sup> States should have in place procedures guaranteeing that any consent to a voluntary return is fully informed and not given under coercion. Returns must be carried out only by competent authorities on the basis of individual decisions. The execution of forced returns heightens the risks for migrants to be subject to torture or other ill-treatment. Forced returns can be operated by land, sea or air, and risks of human rights violation incur from the moment the person is fetched by law enforcement authorities until the arrival into the country of destination (whether the country of origin, residence, or a third country). The main infringements on migrants' rights include excessive use of force, non-proportionate and humiliating use of restraints, or forced sedation during the removal process. Before executing forced returns, migrants should be able to challenge the expulsion order in accordance with the right to an effective remedy with an automatic suspensive effect of the execution of the removal order.<sup>24</sup>

States should always seek to avoid such risks by appealing to migrants' cooperation. In this sense, migrants should receive adequate information about the return arrangements and opportunities to prepare for the return, including by retrieving personal belongings, communicating with relatives in the host country or country of destination, and undergoing prior medical examinations. States should also pay attention to maintain the safety of migrants as well as that of accompanying personnel and crew members during the return.<sup>25</sup>

## **6. Persons in situation of vulnerability should be diverted from detention.**

Persons in situation of vulnerability should never be placed in immigration detention and alternative measures to detention should always be sought first. Immigration detention is particularly harmful to individuals who have special needs and to those who are already at a heightened risk of discrimination, abuse and exploitation, such as women, persons with physical or psycho-social disabilities,<sup>26</sup> persons suffering from an illness,<sup>27</sup> persons discriminated against and/or persecuted based on their (actual or perceived) sexual orientation and gender identity, elderly persons, stateless persons, undocumented migrants, victims of torture or human trafficking. Moreover, persons in situations of vulnerability may face additional risks to forms of violence including gender-based violence, homophobic and transphobic violence, harassment, inadequate provision of healthcare or other forms of discrimination. State authorities must pay special attention in the determination of their status and regime of protection.<sup>28</sup>

Vulnerability assessments conducted on a case-by-case basis at reception in the host State as well as regularly throughout the period the migrant is under the jurisdiction of the host State should inform all decisions made in relation to the migrants concerned, and should aim at the application of alternative measures of detention. Such assessments should not consider vulnerability as a personal circumstance or a condition specific to migrants. Instead, they should take into account the factors that create the situation of vulnerability at the time of assessment and their evolution at a later stage.

Nonetheless, if detention is deemed necessary, States should make adequate determinations regarding the appropriate form and regime of detention as well as ensure the availability of services to respond to the needs of these persons. In addition, detaining authorities must pay particular attention and provide reasonable adjustments to avoid aggravating the situations of vulnerability.

### **7. All situations of deprivation of liberty of migrants should be regularly monitored by independent bodies.**

Regular monitoring by independent bodies of the conditions and the treatment of migrants deprived of liberty is essential to prevent the risk of torture and ill-treatment. Monitoring should cover not only designated immigration detention centres or formal detention centers, but all places where migrants are or might be deprived of their liberty. Such monitoring should be carried out at any time during the deprivation of liberty, including upon arrival or during forced return.

Monitoring bodies, in particular National Preventive Mechanisms established under the Optional Protocol to the Convention against Torture, should be granted unrestricted access to all information concerning these places and their location, all information related to the treatment and migrants' conditions of detention as well as physical access to all installations and facilities. They should also have the opportunity to carry private interviews with migrants and any other person who may supply relevant information. The existence of an NPM should not preclude other organisations, in particular public oversight bodies and NGOs, to monitor places where migrants are deprived of liberty.

No authority or official shall order, apply, permit or tolerate any sanction or other form of reprisals against any person or organisation for having communicated with the monitors.

### **How to engage in the Global Compact on migration?**

The process leading to the adoption of the Global Compact on Migration presents an opportunity to engage both national and international stakeholders to raise awareness and take action to protect migrants' human rights and prevent torture and ill-treatment in the context of migration. The intergovernmental process is composed of three phases: consultations (April to November 2017), stocktaking (November 2017 to January 2018) and intergovernmental negotiations (February to July 2018).

The consultation phase comprises six thematic sessions that take place in Geneva, New York and Vienna. The thematic sessions focus on the following topics: human rights of migrants; drivers of migration; international cooperation and governance; contributions of migrants and diasporas to sustainable development; smuggling of migrants, trafficking in persons and contemporary forms of slavery; and irregular migration and regular pathways. All the information and video recordings of the thematic sessions are publicly available on the official website of the Global Compact on Migration at [www.refugeesmigrants.un.org](http://www.refugeesmigrants.un.org).

Taking into account this is a State-led process, there are a number of constraints related to registration and accreditation that limit the opportunities to engage at international level.

Participation at the thematic sessions is limited to non-governmental organisations, civil society organisations, academic institutions, private sector entities and national human rights institutions. Representatives of parliaments can participate as part of their national delegation or through the Inter-Parliamentary Union. Nonetheless, all organisations, irrespective of registration or accreditation status, and including **NPMs, NHRIs, Ombuds institutions and Parliaments can submit written contributions addressed to the Office of the Special Representative of the Secretary General on International Migration at: [gcmigration@un.org](mailto:gcmigration@un.org).**

**Such contributions can include:**

- thematic reports in relation to immigration detention;
- reports of visits conducted in places where migrants are deprived of liberty;
- reports and analysis of domestic or regional norms and policies related to immigration detention; and
- compendia of practices at national or regional level related to immigration detention.

A number of opportunities are available for engagement at regional level. The United Nations Regional Commissions will hold four consultations from August to November 2017. They take place in Chile (30-31 August 2017), Lebanon (26-28 September 2017), Ethiopia (19-20 October 2017) and Thailand (6-8 November 2017). Ten other regional consultative meetings will be held until January 2018 in Peru, Kyrgyzstan, Switzerland, Swaziland and Morocco.

Several national processes, mechanisms and initiatives offer opportunities to engage local actors. Organisations located in **African countries** could raise issues related to prevention of torture in the context of immigration detention by following up to the outcomes of the 3<sup>rd</sup> Pan-African Forum on Migration and contribute to the High-Level Panel on International Migration in Africa established in June 2017.

In **countries in Latin America** and **the Asia-Pacific region**, the International Organisation for Migration organises a number of national meetings with governments, civil society and experts. Authorities and organisations in Chile could raise such issues during the conference "*Jornadas migratorias de Chile*" organised by the *Instituto Católico Chileno de Migración* in September 2017.

**Such processes offer opportunities to:**

- raise awareness of national authorities and regional actors;
- organise and participate in debates on issues relevant to immigration detention; and
- provide expertise in relation to: the application of norms related to immigration detention and their impact on the realisation of migrants' rights; the treatment of migrants deprived of liberty; or monitoring places of immigration detention.



## Notes

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<sup>1</sup> UN General Assembly, New York Declaration for Refugees and Migrants, A/RES/71/1, 19 September 2016.

<sup>2</sup> New York Declaration for Refugees and Migrants, §11.

<sup>3</sup> New York Declaration for Refugees and Migrants, §24.

<sup>4</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment N°2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, §24.

<sup>5</sup> Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, A/HRC/17/33, 21 March 2011, §14; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment N°2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, §2.

<sup>6</sup> Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, A/HRC/17/33, 21 March 2011, §§ 20, 24.

<sup>7</sup> International Covenant on Civil and Political Rights, Article 9; American Convention on Human Rights, Article 7; African Charter on Human and Peoples' Rights, Article 6; Arab Charter on Human Rights, Article 14; European Convention on Human Rights, Article 5; Geneva Convention on the Protection of Refugees, Article 31.

<sup>8</sup> UNHCR Executive Committee, *Conclusion No. 44 (XXXVII), Detention of Refugees and Asylum-Seekers*, 37<sup>th</sup> Session, 1986; UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, 26 February 1999, Guideline 3.

<sup>9</sup> The regime of administrative detention of migrants is significantly different from migrants' detention in relation to criminal proceedings or the protection of public order or health, as prescribed for instance by the European Convention on Human Rights, Article 5(1)(a-e).

<sup>10</sup> Human Rights Committee, General Comment N°35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, §18; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility, A/HRC/35/25, 28 April 2017, §58.

<sup>11</sup> Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility, A/HRC/35/25, 28 April 2017, §58.

<sup>12</sup> European Court for Human Rights, *Kanagaratnam v. Belgium*, Application N°15297/09, 13 December 2011; *Housein v. Greece*, Application N°71825/11, 24 October 2013; *Popov v. France*, Application N°39472/07 and 39747/07, 19 January 2012; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application N°13178/03, 12 October 2006. See also: Council of Europe, Committee for the Prevention of Torture, 19<sup>th</sup> Report of the CPT's activities covering the period 1 August 2008 to 31 July 2009 - Safeguards for irregular migrants deprived of liberty, CPT/Inf(2009)27, §77.

<sup>13</sup> European Court of Human Rights, *Amuur v. France*, Application N°19776/92, 25 June 1996; European Committee on the Prevention of Torture, 7<sup>th</sup> General Report on the CPT's Activities, 1996, §27.

<sup>14</sup> Such facilities include: designated immigration detention centres; removal or transit centres; closed reception or processing centres; airports, ports, transit and international zones, harbour facilities; vehicles, airplanes, boats or other vessels; prisons, police lockups or police centres; houses, hostels, hotels or other community-based locations; or psychiatric institutions or hospitals. See: APT, International Detention Coalition and UNHCR, *Monitoring Immigration Detention. Practical Manual*, 2014, pp. 28-29.

<sup>15</sup> European Court of Human Rights, *Charahili v. Turkey*, Application N°46605/07, 13 April 2010.

<sup>16</sup> APT, International Detention Coalition and UNHCR, *Monitoring Immigration Detention. Practical Manual*, 2014, p. 30.

<sup>17</sup> Human Rights Council, Resolution 33/4 – The use of mercenaries as a mean of violating human rights and impeding the exercise of the right of peoples to self-determination, A/HRC/RES/33/4, 29 September 2016, §7.

<sup>18</sup> Council of Europe, European Committee for the Prevention of Torture, CPT Standards of Detention, CPT/Inf/E(2002)1- Rev. 2011, §§ 25-29. See also: European Court of Human Rights, *Raid and Idiab v. Belgium*, Application N°29787/03 and 29810/03, 24 January 2008; European Court of Human Rights, *M.A. v. Cyprus*, Application N°481872/10, 23 July 2013.

<sup>19</sup> General Assembly, Interim Report of the Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, A/71/298, 5 August 2016, §79.

<sup>20</sup> Council of Europe, Protocol N°4 to the European Convention on Human Rights, 16 September 1963, Article 4.

<sup>21</sup> African Commission on Human and Peoples' Rights, *John K. Modise v. Botswana*, Communication N°97/93, 28<sup>th</sup> Ordinary Session, 23 October-6 November 2000.

<sup>22</sup> European Court of Human Rights, *Sharifi and Others v. Italy and Greece*, Application N°16643/09, 21 October 2014.

<sup>23</sup> Council of Europe, Twenty Guidelines on Forced Return, September 2005, Guideline 1.

<sup>24</sup> European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application N°27765/09, 23 February 2012. See also: Twenty Guidelines on Forced Return, Guideline 5(3).

<sup>25</sup> Twenty Guidelines on Forced Return, Guidelines 15-17.

<sup>26</sup> Human Rights Committee, *Hamilton v. Jamaica*, Communication N°616/1995, Views of 23 July 1999.

<sup>27</sup> Human Rights Committee, *Madafferi and Madafferi v. Australia*, Communication N°1011/2001, Views of 26 August 2004.

<sup>28</sup> See for instance: UNICEF, *A Child Is a Child. Protecting Children on the Move from Violence, Abuse and Exploitation*, May 2017.