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SECOND ICRC COMMENT ON THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION FOCUS ON IMMIGRATION DETENTION

In the New York Declaration for Refugees and Migrants, States have agreed to “consider reviewing policies that criminalize cross-border movements” and to “pursue alternatives to detention while these assessments are under way”. They have also committed to working towards ending the immigration detention of children and to only detain children “as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child”.¹

The International Committee of the Red Cross (ICRC) welcomes these pledges but urges States to commit, through the global compact for safe, orderly and regular migration (migration compact), to avoid detaining people based solely on their immigration status, except as a measure of last resort, and to fully commit to ending the immigration detention of children.² Building on the first ICRC comment on the migration compact,³ this paper further explores the question of immigration detention,⁴ especially that of children. It aims to persuade States to make stronger commitments in that respect in the migration compact, by highlighting the negative effects of immigration detention, not only for detainees but also for States and societies.

The ICRC has first-hand understanding of the experience of migrants⁵ because of its humanitarian work with vulnerable migrants⁶ in several countries along migration routes. We visit detained migrants in both criminal and dedicated immigration detention facilities⁷ on our own, or in collaboration with National Red Cross and Red Crescent Societies. During these visits, we assess whether detained migrants are treated humanely, held in conditions that preserve their dignity, afforded due process of law, and able to maintain contact with the outside world if they wish to do so. In our dialogue with the authorities, we raise any problems that we identify, with the aim of ensuring that States fulfil their obligations under relevant and applicable international law, including with respect to the principle of *non-refoulement*.

We are observing and contributing to discussions related to the migration compact, along with the International Federation of Red Cross and Red Crescent Societies and National Red Cross and Red Crescent Societies involved in humanitarian work with migrants. We hope to see our humanitarian concerns reflected in the adopted document and we stand ready to assist States by sharing our experience and expertise.

THREE KEY MESSAGES ON IMMIGRATION DETENTION FOR THE GLOBAL COMPACT ON MIGRATION

- 1. Detention for immigration-related reasons should be avoided** – liberty should be the norm; if there are grounds for deprivation of liberty, alternatives to detention should be considered first;
- 2. States should commit to ending the detention of children and family separation for immigration-related reasons** – in our experience, the best interests of the child are not served by such detention;
- 3. Immigration detention is not only harmful for individuals, it is also costly for societies** – it is in the interest of States to avoid detention and identify non-custodial alternatives.



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1. Detention for immigration-related reasons should be avoided – liberty should be the norm; if there are grounds for deprivation of liberty, alternatives to detention should be considered first.

Many countries virtually never detain people solely because of their migratory status, even in the face of large-scale movements. But a number of countries do detain migrants for migration-related reasons – for example, while authorities establish their identity, assess their age, process their asylum claim or because they have no valid visa, or to prevent them from absconding, in particular prior to deportation.

In some instances, migrants in an irregular situation are systematically detained based on a rule for a broad category of people, regardless of their personal circumstances. Migrants are sometimes held for very short periods of time, but some are deprived of their liberty for years.

There is often little or no independent oversight in immigration detention. This is deeply concerning, as independent monitoring increases accountability and can reduce the risk of human rights violations. Conditions of detention may raise serious humanitarian concerns, as facilities that we visit in a number of countries are far from meeting international standards. Overcrowding is a recurrent problem, as are unsanitary conditions and lack of access to adequate food and health care. Migrants detained for immigration-related reasons are sometimes held with criminal law detainees, minors might be held with unrelated adults, and staff are often not well trained to care for a demographically complex detainee population.

What is wrong with immigration detention?

We believe that migration should not be criminalized. Breaches of migration law should be treated as administrative offences. In principle, the detention of migrants for immigration-related reasons should be a measure of last resort. In practice, it is being used more commonly; States sometimes see it as a means to manage migration and their borders, and to deter migration. States have the sovereign right to regulate migration. But this right is not absolute. State regulations, policies and practice must always uphold migrants' rights and respect international law. States should also carefully consider the humanitarian impact of their migration policies.

To state the obvious, systematically resorting to detention, regardless of personal circumstances, interferes with the right to liberty and security of person. To be lawful, detention must be based on such grounds and procedures as established by law. The decision to detain must not be arbitrary and must be based on an individual assessment. If migrants are detained, their rights must be respected and key procedural safeguards must be observed.

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 detention, the stronger the negative impact on people's mental health. However, even relatively short periods of detention can have an adverse impact on the mental health of migrants.⁸

Detention only exacerbates the distress of people who may have already had extremely difficult and potentially traumatic experiences in their country of origin or during their journey, and have protection and assistance needs. The negative impact of detention is also influenced by pre-existing mental and physical health problems, inadequate conditions in detention, including poor or even absent physical and mental health-care services, procedural uncertainty and limited communications with relatives, as well as people's age, gender, role and migration status.⁹

There are other options

In the migration context, liberty should always be the preferred option. If there are any grounds for deprivation of liberty, alternatives to detention should next be considered. Alternatives to detention must not be alternative forms of detention and their adoption should generally correspond with a decrease in the use of immigration detention. A range of alternatives to detention have been developed and



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implemented by States.¹⁰ The relevance of each of these alternatives is contextual, as adequate alternatives to detention have to be tailored to the specificities of each context and the particular situation of an individual or a family.

- *The migration compact should specify that immigration detention should be a measure of last resort. Liberty should be the norm. If there are grounds for deprivation of liberty, alternatives to detention should be considered first. A decision to detain can only be taken on the basis of an individual assessment, without discrimination of any kind; it must not be based on a mandatory rule for a broad category of people. Any detention must be determined to be necessary, reasonable and proportionate to a legitimate purpose. Furthermore, the rights of detainees must be respected and a number of key procedural safeguards observed, including a periodic review of the justification of continued detention, as required by existing domestic and international law, and as may be provided as a matter of policy and good practice.¹¹*

2. States should commit to ending the detention of children and family separation for immigration-related reasons – in our experience, the best interests of the child are not served by such detention.

Detention has a negative impact on the health and well-being of migrants in general. The detention of especially vulnerable groups, and notably children, is particularly harmful. Even brief detention harms the physical and psychological well-being of children.

In 2016, the ICRC visited places of immigration detention housing nearly 2,500 children in 15 countries. Our daily work clearly shows that immigration detention is detrimental to children and that child-protection safeguards are often inadequate in such settings. A large body of research supports similar conclusions.¹² Children who have been in detention exhibit increased symptoms of depression, anxiety and post-traumatic stress. Detention can aggravate trauma experienced in the home or transit country. When children and unrelated adults are detained together, children are at an increased risk of physical and sexual violence and abuse. Children in detention frequently face physical-health and behavioural problems, and developmental delays. Physical development delays may in part result from malnutrition due to poor diet and unhygienic conditions. Consequences of detention often persist long after children have been released, affecting their adjustment to life post-detention, sometimes in the very long term.¹³

The best interests of the child shall be a primary consideration in all measures concerning children.¹⁴ Children should not be detained for reasons related to their or their parents' migratory status. In the ICRC's experience and observation, the best interests of the child are not served by such detention. Any measures adopted by States must conform to their obligations under international law, as well as recognized standards, in particular those concerning the specific protection owed to children. In line with this, many countries do not detain children for reasons related to their migratory status. But thousands of migrant children are deprived of their liberty around the world, sometimes for prolonged periods.

Unaccompanied children are sometimes held while their age and status are being assessed, or while a suitable shelter is being identified. Children are sometimes detained with their parents or guardians on the basis of the latter's immigration status. States might argue that this is to preserve family unity. It nevertheless subjects children to the harmful effects of detention. The solution does not lie in separating children from their parents, as family separation for immigration-related reasons also causes significant psychological distress for both children and their parents. In other words, both immigration detention and family separation have grave mental-health consequences for children and should be avoided at all cost. Hence, neither unaccompanied children nor families with children should be detained for migration-related reasons.

Children should be treated as children first and foremost

Unaccompanied migrant children should be placed in alternative care, not detention, and be appointed an independent and competent legal guardian to defend their rights. Alternatives to detention that preserve



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family unity may include community-based non-custodial arrangements that allow children to reside with their parents or other relatives, or legal guardians, with or without reporting obligations, financial deposits or guarantors. Alternatives avoid the detrimental effects of detention and family separation, and facilitate the protection of children's fundamental rights, including to education, to health, to an adequate standard of living, and to rest, leisure and play.

Children might be challenged to prove their age before being afforded protection as children. Age assessment procedures must be carried out with the child's informed consent by independent and appropriately skilled practitioners, without discrimination. These should avoid any violations of the dignity and physical integrity of the child. While the age of an individual is being assessed, or when the age of an individual who might be a child cannot be established with certainty, the person should be presumed to be a child.

- *The migration compact should reiterate that in all actions concerning children, the best interests of the child shall be a primary consideration. It should state that detention for immigration-related reasons of unaccompanied children and families with children should be avoided. Liberty, with appropriate child-care arrangements for unaccompanied children, should always be the preferred option. When that is not appropriate, alternatives to detention that preserve family unity should be considered.*
- *The migration compact should also state that the detention of other vulnerable groups, such as victims of torture or trafficking, refugees and asylum seekers, disabled people, people suffering from serious or chronic diseases, and elderly people, should be avoided.*

3. Immigration detention is not only harmful for individuals, it is also costly for societies – it is in the interest of States to avoid detention and identify non-custodial alternatives.

The short-term and long-term costs of immigration detention are well documented: detention can enduringly affect people's capacity to lead productive lives, in addition to being expensive. These costs are paid by individuals, but also by societies. Hence, alternatives to detention are not only better for the well-being of migrants they are also, in general, far more effective than detention for societies. In the vast majority of cases, liberty and alternatives to detention are significantly cheaper than detention. Alternatives also fulfil States' objectives: it has been shown that people placed in community-based alternatives and benefiting from sustained case management are more likely to comply with immigration and case resolution processes.¹⁵

The negative effects of immigration detention on people do not resolve at the moment a person is released; on the contrary they are likely to persist long after. For example, the life-narrative of children who have been detained is generally disrupted, with lasting effects that increase their vulnerability after release. They can have more difficulty adapting to their new society, trusting public authority figures and becoming productive members of their community. Compromising the health and development of children through detention or family separation can lead to lasting health problems that can require significant support from society. Detention can thus have costly long-term effects for States having to integrate or reintegrate migrants and provide them with health and social services.

In short, alternatives to detention are, in many ways, less costly than detention for States and societies.

- *The migration compact should state that it is in the interest of States and societies to avoid detention and identify non-custodial alternatives that meet States' legitimate objectives, while also respecting the rights of migrants. This increases the likelihood that migrants cooperate with immigration officials and facilitates their eventual integration into their host society, as well as their potential reintegration in their country of origin.*

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The ICRC's mandate and exclusively humanitarian mission is grounded in international law, the Statutes of the International Red Cross and Red Crescent Movement and resolutions of the International Conference of the Red Cross and Red Crescent. We work together with National Societies to guarantee that vulnerable migrants receive the protection and assistance they require. We play a leading role in the Movement's protection work, notably by visiting detained migrants, restoring family links, clarifying the fate and whereabouts of missing people and supporting their families, and ensuring proper and dignified handling of human remains and other forensic services.

The ICRC does not try to prevent or encourage migration. We focus on responding to the needs of the most vulnerable migrants all along their journey, from when they leave their country to when they arrive in their country of destination. What distinguishes us, as a Movement, from other humanitarians is: our proximity to vulnerable migrants through our network of responders along migratory routes and our distinct vulnerability based approach that focuses on addressing the needs of migrants, regardless of why they fled and where they are. We seek to ensure that all individuals receive the protection to which they are entitled under international and domestic law, including the special protection afforded to certain categories of people, such as refugees and asylum seekers. However, while legal status determines individual rights, the ICRC's response is driven by migrants' needs.

Our work with migrants is guided by our mandate and by Resolution 3 of the 31st International Conference of the Red Cross and Red Crescent in 2011.¹⁶ It encourages States and the Movement to work together to respond to the suffering and needs of migrants, and requests States "to enable National Societies, in conformity with the Statutes of the Movement and, in particular, the Fundamental Principles, to enjoy effective and safe access to all migrants without discrimination and irrespective of their legal status".

¹ UN General Assembly, A/RES/71/1, 19 Sept. 2016: para. 33.

² While recognizing that children's characteristics and needs change as they grow up, and that customs differ from country to country, the ICRC considers that any individual under 18 years of age should be deemed a child and protected accordingly, in line with Article 1 of the United Nations Convention on the Rights of the Child.

³ Available at: <https://www.icrc.org/en/document/icrc-comment-global-compact-safe-orderly-and-regular-migration>.

⁴ This paper fits into the broader framework of the 2016 ICRC policy paper on immigration detention: <https://www.icrc.org/en/document/migrant-detainees-icrc-policy>.

⁵ The ICRC, like the rest of the International Red Cross and Red Crescent Movement, uses a deliberately broad description of "migrants" to include all people who leave or flee their home to seek safety or better prospects, and who may be in distress and need protection or humanitarian assistance. Migrants may be foreigners deemed irregular by public authorities. They can also be refugees, asylum seekers and/or stateless persons. We seek to ensure that all migrants, including refugees and asylum seekers, receive the protection to which they are entitled under international and domestic law, but we adopted an inclusive description to reflect our operational practice and emphasize that all migrants are protected under several bodies of law.

⁶ "Vulnerable migrants" refers to migrants in need of humanitarian assistance and protection. It includes migrants find themselves in a situation of danger, for instance, because they are caught in a situation of armed conflict or other situations of violence, are in distress at sea or on land, or lack access to essential services. It also includes specific categories of people, such as children, elderly persons, disabled persons or victims of trafficking.

⁷ To determine whether someone is detained, a range of criteria such as the type, duration, effects and manner of implementation of the deprivation of liberty must be considered. Places of detention can include police stations, closed transit and screening centres, camps and prisons.

⁸ Bosworth, M. 2016. *The Impact of Immigration Detention on Mental Health: A Literature Review*. Centre for Criminology. Oxford: University of Oxford; Robjant, K. et al. 2009. "Mental health implications of detaining asylum seekers: systematic review." *The British Journal of Psychiatry* 194: 306-12.

⁹ *Idem*.

¹⁰ International Detention Coalition. 2015. *There are alternatives; A handbook for preventing unnecessary immigration detention*. Melbourne: International Detention Coalition.

¹¹ For an overview of key elements that States are urged to consider with respect to immigration detention, see: <https://www.icrc.org/en/document/migrant-detainees-icrc-policy>.

¹² See, for example, Bosworth, M. 2016; Gros, H. and Y. Song, 2016. *No life for a child; A Roadmap to End Immigration Detention of Children and Family Separation*. Toronto: University of Toronto, Faculty of Law; Cleveland, J., C. Rousseau, C. and Kronick. R. 2012. *The Harmful Effects of Detention and Family Separation on Asylum Seekers' Mental Health in the Context of Bill C-31*. Brief submitted to the House of Commons Standing Committee on Citizenship and Immigration concerning Bill C-31.

¹³ *Idem*.

¹⁴ The term "best interests" generally refers to children's well-being and is assessed in relation to a range of factors, including age, physical and mental health, level of maturity, safety, experiences and the presence or absence of parents. Procedural safeguards to guarantee the implementation of the child's best interests include ensuring the right of the child to express his or her own views; the prioritization and completion of assessments in the shortest time possible; and the carrying out of assessments by qualified professionals in a friendly and safe environment. See Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, CRC/C/CG/14, 29 May 2013.

¹⁵ Gros, H. and Y. Song, 2016; International Detention Coalition, 2015.

¹⁶ See: <https://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-3-2011.htm>.