

Written Contribution of Migrant Forum in Asia to CMW General Comment No. 5 Migrants' Rights to Liberty and Freedom from Arbitrary Detention April 2019



Introduction

Migrant Forum in Asia (MFA)¹ welcomes the decision of the Committee on Migrant Worker to elaborate a new general comment (No.5) on migrants' right to liberty and freedom from arbitrary detention.

Detention has become a default legal and policy response to dealing with the “problem” of irregular migration wherein undocumented and irregular migrants are detained on administrative as well as criminal grounds, especially in countries where non-documentation and irregularity is criminalized. In Asia, migrant workers continue to be vulnerable groups in the country of destination due to unstable migration management regimes. This vulnerability is exacerbated according to their nature of work (e.g: domestic work), documentation status (e.g: undocumented or irregular) and in some cases, ethnicity or nationality. Despite this, the practice of arbitrary arrest and detention continue particularly with respect to migrants facing an irregular or undocumented status; as we will observe in the paper, unlike what international covenants have established and civil society urge, arbitrary detention is carried out with impunity and rarely considered a last resort.

The practice of arbitrary arrest and detention has been understood to be a gross violation of human rights and has been recognized as such in several international covenants. The **Global Compact on Migration** has several objectives that mention arbitrary detention and the rights to be accorded in the case of detained migrants. Also, it is to be noted that all the countries whose inputs have been included in this paper are signatories to the GCM (except for Singapore who abstained from voting). **Objective 13** of the Global Compact on Migration explicitly states that migration detention must be used only as a measure of last resort and urges member states to work towards alternatives. It states, in particular, that detention must *follow due process, be non-arbitrary, be based on law, necessity, proportionality and individual assessments, is carried out by authorized officials, and for the shortest possible period of time*. It further has several provisions that specify actions signatories need to engage in to enable a rights-based approach to any detention of migrants. These include improvement of monitoring mechanisms, data collection, policy and legislation revision, provision of access to justice, information dissemination, mitigate long-term effects on migrant well-being – all from a rights-based approach. **Objective 10** on the prevention and eradication of trafficking also addresses the need for states to engage with vulnerabilities of trafficked or at-risk migrants by facilitating access to justice and safe reporting *without fear of detention, deportation or penalty* and focusing on prevention, identification, appropriate protection and assistance, and addressing specific forms of abuse and exploitation. **Objective 8** on establishing coordinated international efforts on missing migrants also mentions the necessity of enabling communication for migrants at all points, including those at points of detention.

For destination countries, migration is not without its costs. They argue that it takes resources simply to maintain border controls and the administrative processes needed to manage immigration, particularly for developing

¹MFA is a network of civil society organizations, trade unions, and individuals in Asia working together to advocate for social justice for migrant workers and members of their families. Formally organized in 1994, it has since grown into a strong migrants' rights advocacy network in Asia. To date, MFA is represented in 19 countries by 53 civil society and trade union groups, and 7 key partners in the MENA region.

nations with limited resources and growing infrastructure. Nonetheless, most countries have immigration enforcement agencies and may operate detention centers aimed at migrants who do not have a legal claim to stay. In the longer term, there are education, health-care, and social protection costs associated with integration and social cohesion for migrants. While these expenditures are additive to the destination country's GDP, but they could drain the fiscal resources of the destination country in the short term until immigrants' productivity and contribution to tax revenue rises sufficiently. However, in the countries mentioned for the input of this report, immigration and existing migrant diaspora are part of their modern history and possess contextual significance apart from only being migrant labour. For origin countries, while emigrant labour, important for their socio-economic value, are cared for by their missions; for refugees and irregular migrants from their country, governments are seen making decisions as per political contexts. Such discriminatory practices become visible with regards to ethnic or religious minorities of the origin country that request asylum in destination countries. This is primarily because, according to origin countries, detained emigrants in destination countries are criminalized for administrative situations like documentation while the responsibility of refugees and irregular migrants are largely left to relevant authorities (responsible for refugees and stateless persons) or the UNHCR. Hence, undocumented migrants, whether migrant labour or irregular migrants, in many cases remain undocumented due to non-cooperation from their missions or due to fear of arrest and detention by authorities in destination countries. This is particularly relevant with regards to Myanmar, Bangladesh, Sri Lanka, Cambodia, Yemen and Syria where migrant labour and irregular migrants are seen migrating by crossing borders through trafficking, smuggling routes and void of documentation, with or without their knowledge.

As civil society, MFA considers detention as a practice that violates basic human rights, the abusive conditions being symptomatic of unsatisfactory migration management regimes and a blatant disregard for rights-based governance. The particular contention with migration frameworks designed from the legalistic and practical approach is that without checks and balances in the form of human rights monitors, it becomes a slippery slope to put blind faith in authoritarian measures which often leads to a migration regime that is based on exploitation, abusive practices and lack of social justice. Hence, civil society considers the rights-based approach as both the foundational as well as aspirational basis for migrant-focused initiatives and endeavors in advocating for the basis to be significantly represented in migration governance.

MFA has circulated the questionnaire among its members and partners and collected responses reflective of the situation on the ground. The following members and partners are the contributors to this submission:

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Center for Indian Migrant Studies, India
INSAN Association, Lebanon
Our Journey, Malaysia
North South Initiative (NSI), Malaysia
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Unlad Kabayan, Philippines
Transient Workers Count Too (TWC2), Singapore
Joint Committee with Migrants in Korea (JCMK), South Korea
Hsinchu Migrants and Immigrants Services Center (HMISC), Taiwan ROC
Thampi Nagarjuna GTU
Partners from Oman
Partners from Kuwait

Argument against detention as a practice

In failing to give due consideration to the various and multifaceted reasons that someone might fall into an irregular situation, state officials fail to see migrants as individuals and as human beings deserving of respect and

entitled to rights under the law. The constant threat of detention and deportation instills fear in migrant communities. This fear makes migrants, whether documented or undocumented, distrustful of authorities. As such, when abuses or crimes are committed against migrants, they are unlikely to bring complaints forward. The vast and growing numbers of migrants in detention throughout the world shows that there are fundamental problems with the system—states are failing to address the reasons that people become undocumented and are resorting to arbitrary and prolonged detention and deportation as a quick fix.

Detention cannot 'deter' irregular forms of migration

Detention and deportation do not have a deterrent impact on migratory decisions and migration flows more generally. Detention as a practice is justified by countries as a way to 'deter' irregular migration to the country with the assumption that the practices of detention and the inherent fear and intimidation of authorities would prevent migrants from migrating through unauthorized routes. This unfounded assumption is evidently contradicted by another assumption of migrant lack of awareness of the practice of detention in the destination. These two inconsistent expectations allow governments to administer detention as a punitive rather than a preventive measure in most countries. Most migrants that end up in irregular situations are, in fact, unaware of detention as a practice until they reach the destination or are arrested themselves. The prospect of detention does not generally weigh into migration decisions, or decisions to remain within the country of destination in an irregular status.

Research conducted on the impact of deportations on the migration aspirations of the communities impacted by deportation and on returnees themselves found that "the inaccessibility of visas and the possibility of deportations further heighten the value of global connections and thus strengthens, rather than decreases, people's migration aspirations". Refugees and migrants frequently rely on organized criminal networks to move clandestinely, involving transactions beyond any form of regulation, and they are unable to seek recourse through the usual mechanisms of justice. This leads to high transaction costs with smugglers and traffickers having full power over such migrants. Smuggling often turns into trafficking and migrants are subjected to abuse (including gender-based violence) and human rights violations. The looming threat of detention and deportation enables employers to assert inordinate control over migrants' lives. Fear and intimidation are rampant among migrant communities, pushing them further underground and perpetuating exploitation and abuse. (ESCWA; IOM, 2015)

Detention is not cost-effective

Holding people in administrative detention is very costly and is largely unnecessary, as many migrants may opt for voluntary repatriation to regularize their status if possible. The failure of detention to deter and prevent migrants is evident in the extensive applications for amnesty periods.

The process of arrest, detention and deportation require the involvement and engagement of several governmental authorities and institutions, and significant time and money is expended in clerical, administrative and judicial processes for the detainee. Within Asia, developing countries that face irregular migration trends and carry out detention as a measure usually pay dearly from the government exchequer. The ensuing costs for detention are why detainees are put in prison facilities rather than establishing separate detention facilities. It is also why deportation for the detainees occurs months or even years after the person has been detained, unless they are able to fund their own way out. Missions in the destination country are accused of failing in their duties to meet and process the cases of detainees as the procedure for embassies to do so is expensive enough that it is an occasional initiative. This along with inattention and disinterest of frontline officers regarding their duties to determine the status of the case of their emigrants, mean that migrants end up detained for longer than necessary.

Criminalization of migrants

In spite of the clear-cut distinction between the types of offences (criminal vs. administrative), the detention of undocumented migrants serves to further the "criminalization" discourse—imprisonment denotes

wrongdoing/criminality, and serves as a mechanism to marginalize all migrants, as they are cast as “illegals” who are threats to their host societies, rather than as important contributors to their countries of origin and destination. Criminalization feeds into the practices of states that impose severe (and largely ineffective) detention measures as deterrents to would-be migrants. The practices of detention and deportation is an “out of sight, out of mind” approach that further marginalizes an already vulnerable community. It further prevents the development of consumer consciousness about the exploitative conditions faced by migrants involved in the production that characterize the production process of the products they purchase and use every day. Such policies also serve to perpetuate xenophobia and racism against migrant communities. Detention and deportation result in dangerous stereotypes and deny the fundamental right to freedom of mobility.

What do detainees face?

Migrants may be held for purposes of identity confirmation, immigration claims adjudication, and/or until deportation proceedings can be concluded, even in countries like the Philippines where the issue of irregular migration into the country is recent. People fleeing violence, war, and human rights abuses are often unable to secure proper documentation, and many are questioned and detained for not having passports, visas, or other forms of valid identification, in spite of pending asylum claims. Some countries have adopted draconian detention measures for undocumented migrants as a means to deter irregular border crossings and visa overstays, though the effectiveness of such measures is highly contentious, if not outright refutable. Arbitrary document checks, unscheduled workplace raids, and crackdowns on migrant communities to round up and deport undocumented migrants are undeniably punitive. Such measures, while giving the impression of bolstering or aiding the rule of law, diminishes it and fails to be based on rights but are widely practiced across Asia.

Migrants’ rights advocates across Asia have pointed to significant problems of access for migrants in detention. Firstly, MFA members and partners observe that commonly, migrant detainees lack **awareness of the reason for their detention** as well as their legal rights and obligations. Fear of police and immigration authorities often prevent detained migrants from pursuing claims or requesting assistance. In countries with sponsorship systems, sponsors have the right to file absconding cases and once an absconding case is filed against the migrant concerned, the migrant will lose his right to residency, leading directly to deportation. It was also observed that there is no clear explicit indicator of degree of suspicion needed or reasonably fair suspicion standards for arrest and detention. Any police or immigration officer can detain any worker on minimal to totally unsubstantiated suspicion. This is especially seen in mass arrests during raids where hundreds are detained at a time. No appeals are allowed nor is release on bond / bail permitted in such cases, unless they are punitive fines for violating immigration laws, except in Singapore where migrants are able to obtain bail and be temporarily regularized or Bahrain where they are allowed to contest the legality of their detention and deportation.

Secondly, since in many destination countries, acts of overstaying and irregular migration are criminalized, migrants are charged either under administrative or criminal law depending on their case – MFA members and partners allege there are rarely any transparent decision-making process, regardless of legislative obligations. This means that migrants may be **detained in prison facilities** with criminal offenders and there are no separate detention facilities for overstayers or irregular migrants. Typically, detention facilities house “criminal aliens” after they have completed prison sentences and are awaiting expulsion from the country, undocumented migrants, domestic workers that have absconded but require passport and approval of employers to leave, refugees who could not be resettled, and asylum seekers who claimed asylum after a pre-specified after arrival. Among the countries consulted Lebanon, Malaysia, Bangladesh and India are countries with significant populations of refugees and asylum seekers. However, the aforementioned process remained similar with few countries making efforts to provide separate facilities as per requirements. Thailand is an exception in this regard with specific facilities for detention of irregular migrants close to their border areas with Cambodia and Myanmar.

Thirdly, the duration of **the period of the detention** is unclear and the decision-making process for it is opaque, wherein detainees have been held for more than the legally specified period in detention centers, usually till deportation. By law, Kuwait specifies 30 days, Taiwan, Malaysia and Oman specifies a maximum of 2 weeks. Malaysian law further specifies a term not more than 5 years for illegal entry and overstaying, and 5-10 years for

false documents. Lebanon has no specified limit for the period of administrative detention while in Bahrain, the maximum period allowed is 10 days. In Singapore, overstayers are detained till the court trial within weeks or months and deported immediately. Even in South Korea that has significantly different system for detainees where they are accorded certain rights, the period of detention remains undefined. Nonetheless in all countries, deportation depends upon the detainee's ability to fund their own airfare to their origin country, possible through funding through embassies or diaspora organizations; or if the conditions of their detention are cleared (paying of fines, charges dropped, etc.).

Fourthly, the migrant's **ability and right to communication** is severely restricted. Those who are held in detention are often unable to connect with their families, and their families are largely powerless to assist them. When undocumented migrants are detained, either crossing borders or otherwise, family members in their country of origin often lose track of them. Phone calls to community members, embassies, legal counsel and families are often prohibited, and when migrants' mobile phones are confiscated, many lose important contact information of those who would be able to assist them. Migrants also spoke of doing favors for fellow detainees, prison officials etc to obtain and save money for a phone call. In situations where they are brought before court, they are provided with minimal to none translation services of court proceedings and documents in which their signature is required.

With regards to legal rights, detainees are rarely provided free public **legal aid and representation** for their situation, although they have specific rights for it. Embassies may assist but due to resource and personnel limitations or inattention of duties, migrants are left without proper representation and knowledge of legal proceedings. Embassies are also informed at a very later stage and sometimes it is too late for legal interventions or to provide basic support. Certain countries require migrants to request for access to consular or legal services, so it is subject to approval of detention authorities. Only embassy authorities, embassy-appointed personnel (including social workers, religious leaders), and ministry officials are allowed to visit migrants in detention centers and so civil society members are also restricted in the nature of aid they can provide the detainee. Overall, there is an absence of proactive engagement between missions and detention authorities. For the migrants themselves, in many cases they are required to fund their own legal proceedings and the costs associated with these (in cases where there are no lawyers to work pro-bono) deter migrants from attempting to gain access to justice.

Shelters and community-based alternatives have long been criticized by civil society as being variations of detention facilities with no discernible changes in the lack of rights for migrants. Since the mid-2000s, many GCC countries have set up government shelters for women and children victims of trafficking. However, they often amount to detention centers to which absconded domestic workers are confined until their deportation. (ESCWA; IOM, 2015) Furthermore, these shelters are managed and authorized by the same authorities in charge of detention (Immigration, Prison Department, Police, Ministry of Labour, etc). MFA members and partners note that in countries where the embassies run shelters in a secretive manner (usually for domestic workers), the restrictions on mobility and communication for the inmates remain. Even community-based detention alternatives, such as house arrest, ankle bracelets, or other physical surveillance mechanisms, fail to wipe away this stigma.

Detained migrants face **discriminatory behavior** towards them from the time of being arrested till their return to their own countries. Force is typically used during arrest and arrests are conducted publicly, sometimes in large numbers, regardless of gender and cultural sensitivities. Migrants also report not receiving their belongings back from enforcement officials in Malaysia, Kuwait and Oman. Migrants' rights advocates in Lebanon report that migrants are held in overcrowded prisons and are delegated menial tasks, such as the cleaning of prison cells and other facilities—tasks that are not required of non-migrant prison inmates. One rights group had calculated that each detainee at the detention center has roughly one square meter. There is no yard for outside recreation, water is available no more than two hours per day, detainees are handcuffed when they leave their cells, and there is little or no contact with the outside world. Such blatant discrimination marks further injustice. MFA

members and partners² observe that, across the board, those leaving detention facilities and returnees testified to the physical, mental and even sexual **harassment and abuse** perpetrated by either authorities or fellow detainees (especially in conditions where there is no separation between migrant detainees and criminally prosecuted individuals). Diaspora organizations, embassy personnel and other civil society members who have been involved in repatriation process of detainees state that usually the ex-detainee requires medical and psychological care immediately after release. Furthermore, Malaysia and Singapore have punitive measures against 'overstayers' that include caning in addition to imprisonment. Researchers report that migrants face serious risks upon return, which include loss of belongings, lack of identity papers, homelessness, destitution, trauma, depression, suicide, extortion, detention, and inhumane and degrading treatment.

Lastly, detention centers and shelters are generally not **gender or child sensitive** depending upon the national context. For example, in a destination country such as Kuwait, pregnant undocumented migrants or those arrested for 'adultery' are detained in a ward in the Maternity Hospital which had been converted for this purpose till their delivery and ensuing sentencing and deportation. Only women detainees, arrested under adultery charges and who give birth at the hospital detention center are permitted to keep their children with them in the prison. In most of the cases, children are moved to social rescue homes or will be deported along with the mother. In Lebanon, asylum seekers and refugee children are detained with their mothers. In its submission to the UN Universal Periodic Review mechanism, UNHCR stated that children are detained on grounds of illegal entry due to the heightened security measures in the country adopted following the 2008 security incidents in Lebanon. It also reported instances of children being detained alongside adult criminals in police stations and in penitentiary institutions. For Bangladesh and India, lack of resources has led to less than satisfactory conditions for women and children at detention facilities. Moreover, the huge influx of forced migrants from Myanmar citizens have made things more precarious for women migrants in detention. In Malaysia, minors are detained with parents as the immigration act does not differentiate between adults and minors (persons below 18 years old) and children who are in contrary to the immigration act are subjected to arrest and detention conditions akin to adults. Only trafficking victims are placed in separate shelters till their case is determined to be one of trafficking or till they are deported.

The Problematic Nature of Policy and Implementation

In most destination countries, authorities handling detention and deportation practices include the Department of Immigration and National Security departments, Ministries of Interior Affairs, Police Department and so on. However, there are some difference in the designated authorities among countries based upon their national contexts which may require quasi-independent institutions, government departments related to prison management as well as customs.

In Kuwait, it is the Directorate General of Prisons Affairs under Ministry of Interior and Ministry of Social Affairs and Labour that handle government 'shelters' for absconding or runaway migrants. In Lebanon it is an independent security apparatus particularly created for the purpose of immigration issues of foreigners called the General Directorate of General Security Office (GSO), whose activities are subject to review by the State Consultative Council. In Oman, the Royal Oman Police, Internal or Public Security department and the Ministry of Manpower are the custodial authorities. In Bahrain, detention is carried out by the Public Prosecution Directorate, the Ministry of Interior and the Labour Market Regulatory Authority. For Taiwan (ROC), the Ministry of Interior and the National Immigration Agency under the Republic of China function as the primary authorities. Malaysian authorities include the Police, Customs and Immigration Departments under the Ministry of Home Affairs while Singapore has a similar set-up called the Immigration and Customs Authority (ICA).

² A joint 2011 NGO research study on arbitrary detention and torture in Lebanon reported that foreign nationals undergoing prolonged administrative detention show both psychological and physical impacts of such detention. The psychological disorders reported included insomnia, loss of appetite, constant fear, anxiety, memory loss, depression, cognitive disruption and suicidal thoughts. In Malaysia, news agencies reported of roughly 100 detainees having passed away in detention facilities in a period of 2 years in 2017.

However, it is to be noted that certain countries with larger proportions of refugees immigrating govern their migrant labour as well as refugees with the same institutional set-up despite differences in policy and administration that is required for these two sets of migrants. In this regard, the policy and practice of **merging of administrative and criminal offenses** persists with impunity. An important distinction is to be made between migrants who are detained on criminal charges, and those who are held in administrative detention due to improper documentation. This is highlighted by the requirement in the MWC Article 17(3), that those detained for violations with respect to immigration status should be held separately from convicted persons or those pending trial. This distinction is affirmed in 17(8), in which a migrant held on administrative grounds should not bear any costs associated with his/her detention. The rights to mobility, liberty, and family reunification can all be compromised with the use of administrative detention. The Law of Entry and Exit in Lebanon provides specific criminal penalties for immigration-status related violations. Foreign nationals who are charged with criminal violations stemming from their status can face three distinct stages of incarceration: pre-trial detention (66 percent of all detainees in the country are in pre-trial detention, including nationals and foreigners); criminal incarceration upon conviction; and administrative detention while awaiting removal from the country after the completion of criminal sentence.

In countries with a **sponsorship system** where the employment status is tied to the visa status, employers can threaten detention and deportation if the conditions they impose are not met. Further, if the migrant wishes to return home, the employer must agree in order to cancel the employment visa. If this official condition is not met, the migrant risks again being found in breach of immigration laws and may simply be detained and deported. Those migrants who do flee situations of exploitation automatically lose their residence status as employers report them as absconding, facing the risk of lengthy detention and deportation, with little access to justice systems or dispute resolution mechanisms. Meanwhile, the fear of losing their regular status and finding themselves in irregular situations can facilitate the exploitation of migrants through the ease with which it allows employers to place migrants in irregular situations. Although not the sole cause of migrant exploitation in countries where this system operates, it nonetheless is a significant factor in the equation.

Detaining migrants is justified by destination countries, on the grounds that they must be held only until such time as irregularities in their immigration status can be remedied. This process is meant to be largely clerical and contingent on establishing the identity of the migrant. However, securitization of borders and heavy reliance on police and police-like immigration units blur the lines between administrative and punitive measures. During amnesty programs, migrants do not face the threat of detention but neither do authorities make the effort to allow detained irregular migrants to leave during the amnesty unless there are continuous efforts by their embassies. Moreover, during periods of amnesty (as is in Malaysia and several Gulf countries), such clerical procedures of providing an out-pass are largely left to embassies. **Detention as a punitive measure** is considered to 'deter' irregular migration although till now there is no proof that it has been able to do so effectively in any country without a solid and comprehensive immigration regime.

Monitoring and consequent reporting of detention facilities are lacking in transparency and accountability. In certain countries like Malaysia, Bangladesh, Oman officials from the National Human Rights Commissions are allowed to monitor detention facilities but by and large authorities are expected to undergo self-monitoring procedures. In Oman, while the country has a National Human Rights Commission that reportedly visits detention centers, its reports are not made public and even not shared with the migrants' embassies. The abysmal conditions within detention facilities have been noted by embassies, civil society as well as ex-detainees and returnee migrants. There exists a notable lack of specific monitoring agencies of detention facilities across Asia that are independent of government with the authority to recommend and implement changes in the system. Furthermore, the complete absence of transparency in SOP for detention as well as reporting of facility administration is a major policy gap in the accountability of institutions. Additionally, the monitoring obligation of return operations conducted by member states is not adequately implemented in all countries.

Community-based "humane" means of detention and/or surveillance should not be pursued as viable alternatives. **Alternative forms of detention** accept the premise that the practice of detention or mobility restriction in administrative cases is legitimate, even if most often, undocumented migrants pose no risk to

society or property. The criminalizing stigma and psychological burden that accompanies detention is no less severe when alternatives are administered. (Migrant Forum in Asia, 2016) Much like the rapid growth of the prison industrial complex, detaining migrants is fast becoming an industry. Detention centres are being privatized and run by large companies, and increasingly resemble prisons. In Lebanon the detention facility called the General Security Detention Center is run by a civil society organization in association with the independent security apparatus of General Security Office. Their association was recognised by an MoU between the two parties. However, it has been accused of aiding and abetting arbitrary detention practices despite overseeing social, medical, and legal assistance to all non-citizen detainees.

Memorandums of Understanding are easier to enter into with destination countries than formal agreements on migration. However, their informal nature undermines their capacity to protect migrant workers. Moreover, they contain few specifics on implementation, often reaffirming commitment to existing rules (with little to no reference to international frameworks), without accompanying time frames or action plans. Although joint committees should meet regularly to monitor the implementation of such agreements, in practice this is rare. Some agreements address domestic work but pay little heed to the specific concerns of female migrants, even though they represent the bulk of domestic workers. The model memorandum of understanding contained in ILO Recommendation No. 86 does not address important measures related to social protection, equality of treatment of migrant workers and prevention of involuntary return. Differences in the wording of agreements may create inequalities among migrant workers themselves: The Memorandum of Understanding between Saudi Arabia and Indonesia contains protective provisions (such as facilitating the provision of consular assistance to domestic workers in detention) not contained in the Memorandum of Understanding between Saudi Arabia and the Philippines. (ESCWA; IOM, 2015)

Embassies are not always informed (or if so, not promptly) of the detention of their nationals in order to render necessary assistance. Malaysian diaspora organization report of situations where the embassy knew of cases during the repatriation of mortal remains of the detainee while in detention. Language and cultural barriers make it difficult to track detainees within prison systems and in most cases, embassies are not given freedoms in this regard, neither do they aim to hold the destination country government accountable due to hesitance of working 'beyond their authority' as well as harboring views of their own detained migrants as criminals. For example, Kuwait as a country has ratified the Vienna Convention on consular service but does not possess specific law or policy indicating the freedoms of consulates to provide support to their detained migrants. The responsibility of this is largely placed on embassies, many of which are severely deficient in resources and personnel to undertake such activities without the support of authorities at the destination country.

Often, **refugees and other displaced populations** residing in urban areas face legal and policy barriers that render access difficult. In certain instances, refugees and asylum-seekers do not have the legal right to live outside camps or settlements or to access mainstream services. In other cases, they are in States that are not signatories to the 1951 Refugee Convention and face daily threats of arrest or detention. (ESCWA; IOM, 2015) In failing to give due consideration to the various and multifaceted reasons that someone might fall into an irregular situation, state officials fail to see migrants as individuals and as human beings deserving of respect and entitled to rights under the law. An individual whose asylum application has been refused is particularly vulnerable upon deportation to their country of origin due to possible information sharing between the immigration authorities of the two countries. This practice has been observed by MFA members and partners working the Middle East region wherein if irregular migrants have been blacklisted from one country, they are unable to migrate to any other country within the region. The process of issuing emergency travel documents risks undermining the confidentiality of information that has been given to immigration authorities. Often the mere fact of claiming asylum in another country is viewed as treason in the country of origin and could expose the individual and their family to serious risks. Children face additional difficulties and risks because they are often not familiar with the countries to which they are returned. (PICUM, 2017)

As mentioned about refugees and asylum seekers, returnee migrants are noted to be at risk of harm at their country of origin. Aside from limited monitoring done by NGOs and researchers, governments do not generally keep track of deportation outcomes nor are they held accountable for any harm inflicted on the migrants they

have deported. This means that deportation in some cases may be refoulement, the forced return of migrants, prohibited by international law if the person would likely be in danger of persecution. Similar concerns remain in relation to accessible and effective complaints mechanisms that would allow migrants to report human rights violations in the return procedures.

Ensuring alternative approaches

The argument for detention by state authorities is at times from the approach of practicality and rational decision-making processes in view of resource constraints, socio-economic contexts, societal attitudes towards migrant workers and irregular migrants. However, as members of civil society, we realise that the rights-based approach is imperative in migration governance and that conceding to a 'practical framework' as is commonly argued in recent times, gives rise to authoritarian practices within migration management.

Detaining migrants due to their legal status should only ever be a last resort, after all other measures have been exhausted, due process has been observed, and only ever on a case-to-case basis. Children and vulnerable persons should never be detained, and regularization should always be prioritized over detention and/or deportation. States must be held to account in terms of ensuring equal opportunity and reduce inequalities of outcome, including through eliminating discriminatory laws, policies and practices as well as empowering and promoting the social, economic and political inclusion of all irrespective of age, gender, disability, race, ethnicity, origin, religion or economic or other status. In this regard they should not be allowed to opt out of the discussion on the failure to reduce such inequalities that result from the current global labour and economic system and ensure the aforementioned human rights.

Detention in all its forms provides a convenient escape from this crucial discussion, and continually undermines the rights of migrant workers everywhere. States must acknowledge and rethink their reliance on an exploitable and vulnerable labour force and pursue policies that would extend to migrant workers the same rights as all other workers, regardless of race, gender, ethnicity, religion, and skill level. Holding states to progressive ideals based on human rights and engaging with government on monitoring and review along these lines would assist in realization of a just and fair migration regime.

Recommendations

The following recommendations should be considered with a view to establishing anti-oppressive, rights-based, and gender-responsive policies:

1. Policy and Position

- a. All states should, without delay, sign the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
- b. Adopt national asylum and refugee legislation and procedures which ensures that the specific needs of women and girls are addressed;
- c. Codify and fully respect the principle of non-refoulement and ensure that no individual who is registered with the UNHCR is deported;
 - i. Transparency of deciding refugee status and relevant processing
- d. Detention as a 'last resort' rather than as a default response.
 - i. Should be non-arbitrary, non-punitive
 - ii. Determined on a case-by-case basis, with due process and adequate consideration of the reasons for the migrant's status.
- e. Presence of independent bodies in monitoring, reporting and review of legislation and policy initiatives (including National Human Rights Institutions)
- f. Involvement of missions of origin country in detention policy and practice review.

2. Implementation

- a. Regularization or voluntary repatriation should be prioritized
 - i. Consider the adoption of “**bridging visas**” which allow migrants who have fallen into situations of irregularity through no fault of their own to apply to reinstate their regular status.
- b. Improving transparency
 - i. Data collection and data maintenance on detainees
 - ii. Transparency in criteria of arrest and deportation
 1. Formal victim identification procedure for trafficking issues
 - iii. Public availability of data and reporting on detention facilities and inmates
- c. Community-based alternatives to detention must not be pursued. There should be a presumption in favor of liberty in all cases, and individual assessments should be guaranteed.
- d. **Firewalls** between immigration and essential service providers
- e. Monitoring practices
 - i. Involvement of local civil society actors in monitoring and follow-up
 - ii. Constant engagement with missions and quasi-governmental authorities on updates and practice review
 - iii. **Judicial Review** of detention practices
 - iv. Post deportation monitoring
 - a. Data collection and reporting on human rights compliance

3. The rights of detainees:

- a. Migrants who are detained must be given access to information
 - i. In their own language or a language, they understand
- b. The right to communication with their embassies and families
- c. The right to access legal counsel/ the right to remedy
 - i. Facilitating the establishment of the right by law enforcement and immigration enforcement officials.
 - ii. Inclusion of a provision to retract statement of the migrant if obtained under duress or without undergoing due process of the law.
 - iii. Facilitating access through pro-bono actors, CSR initiatives or involvement of law educational institutions.
- d. Identify and address the specific obstacles faced by women and vulnerable groups.
- e. Pregnant women, minors, asylum seekers, and other vulnerable migrants should never be held in detention

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