

JOINING FORCES TO PREVENT TORTURE AND OTHER ILL-TREATMENT IN THE CONTEXT OF IMMIGRATION DETENTION

Regional meeting of NPMs and CSOs of the OSCE region

Outcome report

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Background

The second regional meeting of National Preventive Mechanisms (NPMs) and civil society organizations (CSOs) from the OSCE region was jointly organized by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Association for the Prevention of Torture (APT), with the support of the Federal Department of Foreign Affairs of Switzerland and the Consolato Generale di Svizzera, in Milano.

The regional meeting aimed at providing a platform for exchange and contributing to the mutual knowledge and understanding between NPMs and CSOs on their complementary contributions to the protection of persons deprived of their liberty in the OSCE region in the context of immigration detention. Following the methodology of the first edition of the ODIHR/APT regional meeting for NPMs, the event aimed at a) addressing challenges and identifying good practices in the interactions and co-operation between NPMs and CSOs in the OSCE region, for the ultimate benefit of all individuals deprived of their liberty in the context of immigration detention; and b) strengthening regional cohesion and joint advocacy efforts for the rights of people in immigration detention and other situations of deprivation of liberty.

With the establishment of a Torture Prevention Focal Point in October 2015, ODIHR reinforced its efforts to promote the prevention of torture in the OSCE region and to assist OSCE participating States in implementing their commitment to ultimately eradicate torture and other cruel, inhuman or degrading treatment or punishment. The strengthening of the independent monitoring of all places of detention has been identified as one of the priority areas of ODIHR's anti-torture work. ODIHR closely works with international and non-governmental organizations active in the field of torture prevention, including the Civic Solidarity Platform representing over 90 non-governmental organizations (NGOs) from the OSCE region, OSCE field operations, NPMs, UN agencies, the Council of Europe and European Union institutions, research foundations and academia. The Association for the Prevention of Torture (APT) is a Swiss non-governmental organization (NGO) working since 1977 to prevent torture and ill-treatment worldwide, for societies free of torture that protect the dignity of persons deprived of liberty. The APT is at the origin of the 1987 European Convention for the Prevention of Torture and the 2002 Optional Protocol to the UN Convention against torture.

Introduction

Detention of migrants is a reality in a growing number of countries within and outside the OSCE region, despite being admissible as a last resort only under international standards¹, which specify that immigration detention should only be used for the shortest possible period and for the purpose of documenting the entry, recording claims of the person concerned and determining her/his identity. In practice, an increasing number of states are using collective and systematic detention as a way to cope with large incoming flows of migrants, including children, to their territories. In that context, risks of torture and ill-treatment are high. Vulnerabilities during immigration detention may be exacerbated by detainees' lack of access to appropriate information, including legal support, language barriers and the inability to challenge the irregularity of their detention. Moreover, certain groups or individuals have additional needs and are in a situation of increased vulnerability in detention, including: children (whether accompanied or not); people suffering from trauma, including victims of torture; people with disabilities; members of ethnic minorities; the elderly; LGBTI people; or those with urgent medical needs.² National Preventive Mechanisms (NPMs) established under the Optional Protocol to the UN Convention against Torture (OPCAT), which numbered 39 in the OSCE region as of December 2018, can play a crucial role in preventing risks of torture and ill-treatment thanks to their preventive monitoring mandate.

In the OSCE region as elsewhere, besides NPMs, civil society organizations (CSOs) play a crucial role in improving the treatment and conditions of individuals deprived of their liberty and preventing further abuses they may be subjected to. CSOs have diverse and complementary mandates to do so, including: service-providing to people deprived of their liberty; detention monitoring; investigating allegations of torture and bringing perpetrators to justice; obtaining redress, including guarantees of non-repetition; and providing rehabilitation for torture victims. CSOs' interactions with NPMs are varied and range from playing a watchdog role towards NPMs and the implementation of the OPCAT system, to full-fledged collaboration on joint initiatives and projects, including by being an integral element of the NPM system.

The regional meeting brought together NPMs and CSOs from 29 OSCE participating States. In addition, participants included representatives from the Civic Solidarity Platform (CSP), a network of over 90 NGOs from across the OSCE region, the UN Special Rapporteur on torture, and representatives of the United Nations Subcommittee on the Prevention of Torture (SPT) and the Council of Europe, including the European Committee for the Prevention of Torture (CPT). Participants discussed key challenges and identified promising practices regarding the monitoring of immigration detention and the collaboration between NPMs and CSOs.

¹ See. E.g. CPT, *Factsheet on Immigration Detention*, March 2017, page 2. Detention that goes beyond the timeframe of those purposes, should be the outcome of a legal process, based on a case-by-case analysis and is only admissible for reasons such as the likelihood of absconding, the risk of committing crimes or of acting against national security (see .e.g. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 26 February 2018, A/HRC/37/50, https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf).

² *Monitoring Immigration Detention – Practical Manual*, APT, UNHCR and IDC, 2014, https://www.apr.ch/content/files_res/monitoring-immigration-detention_practical-manual.pdf.

This report does not intend to provide a comprehensive analysis of the situation of immigration detention, nor of the legal framework or practices in the OSCE region. It only reflects key issues highlighted during the discussions among participants of the two-day event which was held under Chatham House rules.

About terminology

For the purpose of this meeting report, and in the absence of an international legal definition, the term “**migrant**” will refer to “any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence.”³ This term is used irrespective of legal status or the reason for migration.

“**Immigration detention**” is defined as the deprivation of a person’s liberty for the breach of entry, stay and transit rules in a given receiving country. Deprivation of liberty should be understood broadly, as per the definition contained in article 4(2) of the OPCAT: “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority”. Immigration detention is usually of an administrative character.⁴ It shall therefore never be punitive in either purpose or effect.⁵ States are obliged to avoid prison-like environments, and to guarantee certain standards concerning the material conditions, the length of detention and the respectful treatment in accordance with the non-criminal status of migrants in detention. In other words, the conditions of immigration detention should reflect the administrative nature of detention in comparison with the criminal justice system.⁶

³ OHCHR, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, p. 14 <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>.

⁴ *Monitoring Immigration Detention – Practical Manual*, APT, UNHCR and IDC, 2014, https://www.apr.ch/content/files_res/monitoring-immigration-detention_practical-manual.pdf

⁵ *Op.cit.*, note 1.

⁶ States shall “ensure that any detention in the context of international migration follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments, is carried out by authorized officials, and for the shortest possible period of time, irrespective of whether detention occurs at the moment of entry, in transit, or proceedings of return, and regardless of the type of place where the detention occurs.” [...] “to prioritize noncustodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only”, see Global Compact For Safe, Orderly And Regular Migration, Objective 13, 11 July 2018, to be adopted in December 2018, https://refugeemigrants.un.org/sites/default/files/180711_final_draft_0.pdf.

I. Torture prevention in the context of immigration detention - Key challenges in the OSCE region

This session looked first at legal issues, then at the conditions of detention, the specific case of children in detention, and finally focused on the monitoring challenges.

A. Legal challenges

1. Legality of detention

The legality of detention is the factor determining whether a person's right to liberty has been violated or not. Due process is an important element for the reduction of the risk for torture or ill-treatment, and includes an assurance of the examination of every aspect of detention, including its legality throughout the process: from the initial deprivation of liberty until the detention in specified facilities. People held under immigration detention should benefit from the same safeguards applicable to other individuals deprived of their liberty from the outset.

Participants agreed that as per international standards, detention of migrants should only be used **as a last resort** - in case there is a likelihood of absconding, risk of committing crimes or acting against national security. However, it was found that a vast majority of OSCE participating States tend to use it as a systematic migration management measure.

For the detention to be considered lawful, it must be grounded in legislation, time-bound, and the detainees must be informed about the process to be able to challenge its legality or the reasons for being detained before a competent, impartial and independent judicial body. Detainees must be informed, in written form and in a language they can understand, of the reason for their detention and the rights to which they are entitled. If necessary, the services of an interpreter should be made available. Participants found that the **arbitrariness** of the deprivation of liberty of migrants was a core issue that they observe on the ground.

Arbitrariness in the context of immigration detention has been defined by the European Court for Human Rights as follows: "freedom from arbitrariness in the context of immigration detention [...] means that such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed a criminal offence but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued".⁷ Although not every arbitrary detention amounts to ill-treatment as per international law, the combination of arbitrariness, prolonged detention with no prospect of release, absence of legal safeguards and remedies, and poor detention conditions reach this threshold, as stated by the UN Human Rights Committee.⁸

⁷ https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf.

⁸ [See Human Rights Committee, General Observation no 35- Article 9.](#)

In focus: lawfulness of detention and the European Court of Human Rights

Forty-seven out of the 57 participating States of the OSCE fall under the jurisdiction of the European Court of Human Rights. It is well established in the Court's case-law under the sub-paragraphs of article 5 § 1 of the European Convention on Human Rights that any deprivation of liberty must, in addition to falling within one of the exceptions foreseen in the Convention, be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention lays down the obligation to conform to national law. Compliance with national law is not, however, sufficient: article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (para. 67 Saadi v. UK⁹)

It was highlighted throughout the discussions that additional safeguards against arbitrary detention apply to children and other individuals with specific vulnerabilities who, to be able to benefit from such protection, should have access to an assessment of their vulnerability and be informed about respective procedures. Lack of active steps and delays in conducting the vulnerability assessment may be a factor in raising serious doubts as to the authorities' good faith.¹⁰

In focus: effective asylum procedures

Asylum-seekers, refugees and stateless people face a heightened risk of arbitrary detention and specific international guarantees exist to protect them and to uphold their right to access asylum procedures and related due process standards. As regards the right to access the asylum procedure, the UN Special Representative on Migration and Refugees noted that the exercise of the right to seek asylum by a person in immigration detention requires positive state action which goes beyond the removal of obstacles to seeking asylum. The competent state authorities must identify individuals in need of international protection and ensure access to an effective and fair asylum procedure. Article 31 of the 1951 Refugee Convention specifically provides for the non-criminalization of refugees and asylum-seekers having entered or stayed irregularly. This is based on general recognition of the reality that people in need of international protection in many cases are, by definition, unable to produce the documents or obtain the permissions normally required to secure lawful permission to enter a country, because of the circumstances of their flight.

Several participants during the conference identified **the criminalization of migration** in some OSCE participating States as a key issue of concern. Examples of repeated cycles of detention, release upon the payment of a fine after a certain period and renewed detention orders in cases where payments could not be made were raised during the meeting.

2. De facto deprivation of liberty: a wide scope

Besides de jure detention - mostly administrative - which already bears some serious challenges, the de facto detention of migrants in places which do not fall by law under regulated detention facilities was identified as a common practice throughout the OSCE region. Participants discussed various forms of such places where migrants are deprived of their liberty in practice, even if by law they should be free to leave at will. Such places range from immigration reception centres to so-called

⁹ [https://hudoc.echr.coe.int/eng#{%22itemid%22:%22001-84709%22}}.](https://hudoc.echr.coe.int/eng#{%22itemid%22:%22001-84709%22}})

¹⁰ See ECtHR Thimotheos v. Belgium and Abdi Mahamud v. Malta.

hotspots, border crossing points, or even vessels at sea. These informal places of detention lack all necessary safeguards. It is important to stress that National Preventive Mechanisms have the mandate to visit all places where individuals are or may be deprived of liberty. However, not being registered, these places remain more difficult to access and NPMs and civil society have to find other means to gather information to assess the situation of migrants held in those places of detention.

In focus: arbitrary detention

In **Italy**, NPM reports identified that in some hotspots, migrants were not allowed to leave even after being identified. A prosecutor and the Italian NPM visited the Dicotti vessel, where migrants were forced to remain on board for nine days with no possibility to disembark and without the required legal grounds for detention, and noted a violation of article 5 of ECHR and article 15 of the Italian Constitution and, therefore, the arbitrariness of such detention.¹¹ Furthermore, the poor conditions on board led the NPM to consider a violation of article 3 of ECHR for inhuman and degrading treatment.

3. Duration of detention

It was discussed that in the OSCE region, including within the European Union, there are no common standards on the **length** of immigration detention, which ranges from a few days to several months.

Participants repeated that any prolonged immigration detention with no prospect of release can amount to ill-treatment. Participants also mentioned that the longer immigration detention is extended, the more it carries risks of cruel, inhuman and degrading treatment of detainees. In addition, particular concerns were shared by NPM and CSO representatives that cases have been observed where the prolongation of detention is used as a deterrent or to “break” migrants’ will and coerce them into “voluntary” returns. The cycle of alternate criminal and administrative detention for a prolonged period has been observed in some countries.

More generally, indefinite detention in the migration context is, in principle, not permissible under international law and may constitute a form of arbitrary detention. If a detention is being extended, it must follow the same procedures as the initial detention. The maximum length of time for which a detention can be extended must be clearly stated in law.

4. Detention regime

As per regional standards developed by the CPT, the administrative detention of migrants should involve limited restrictions and a varied regime of activities¹² and generally reflect the difference in relation to the detention of suspects of crimes or convicted criminals within the criminal justice system. However, participants agreed that the environment of immigration detention is often prison-like in the OSCE countries represented. In the context of their monitoring work they have observed that people, including children, may be detained in former prisons or police cells. Their contacts with the outside world - including via the use of cell phones - is often limited, for no valid reason. The lack of common spaces or activities is sometimes due to the structure of the facility, or a consequence

¹¹ See Garante Nazionale, report of 24 August 2018,

http://www.garantenazionaleprivatiliberta.it/gnpl/it/rapporti.page?frame4_item=1.

¹² <https://rm.coe.int/16806fbf12>.

of the regime running that facility. Moreover, special needs of detainees in particular situations of vulnerability are often ignored and not provided for.

B. Detention conditions

1. Material conditions

As per international standards, states are obliged to avoid prison-like environments, and to guarantee certain standards concerning the material conditions, the length of detention, and the respectful treatment and regime, in accordance with the non-criminal status of migrants in detention. Addressing material conditions of detention, however, must be accompanied by an unequivocal reaffirmation that administrative detention should remain the exception rather than the rule.¹³ As such, accommodation, sanitation, hygiene, drinking water, food, clothing, bedding, safe custody of and access to personal property and effects as well as access to health care must all be provided to an adequate standard and in a manner that is safe and respectful of the dignity of individual detainees. In addition, the design and physical environment of detention facilities ought to ensure that all detainees have adequate privacy.¹⁴ The European Court has also found that inappropriate conditions of detention may amount to ill-treatment under article 3 of the ECHR.¹⁵

According to the participants, in practice in the OSCE region, the detention conditions of migrants can be extremely poor, and can sometimes amount to ill-treatment or even torture. In general, as the UN Special Rapporteur on Torture emphasized during the discussion, any detention regime which puts detainees, including migrants, in conditions incompatible with international standards, regardless of the intentional or negligent nature of these conditions, can indeed fulfil the definition of torture.

2. Access to rights and procedures

Migrants should be able to appeal their detention and benefit from effective remedies.

Provision of legal aid depends on the free legal aid system in the country. Participants discussed that in some OSCE participating States the legal aid schemes are not adequate or not sufficiently accessible, including because of language barriers.

Participants also shared key challenges of their monitoring work in the context of **timely procedures**. They explained that in some OSCE participating States, submitting an appeal to the court does not halt the deportation process. Subsequently, it happens that when lawyers appear before the court the person has already been deported.

Access to interpretation - Communication and lack of information in an understandable language were highlighted as other areas of concern. It was mentioned that in some places, there are interpreters or phone translators, but overall participants agreed that timely and sufficient quality

¹³ See e.g. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (UNHCHR Detention Guidelines):

<https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

¹⁴ https://www.apr.ch/content/files_res/monitoring-immigration-detention_practical-manual.pdf.

¹⁵ If the place and conditions of detention are not appropriate, this may also breach Article 3 of the European Convention on Human Rights (see, for example, *M.S.S. v. Belgium and Greece* [GC], §§ 205-234; *S.Z. v. Greece*, and *HA.A. v. Greece*).

interpretation is often not available. Detainees often have no clear information about their situation, how long they will be detained, or how to contact families or legal representation, which in turn hinders their access to rights and exacerbates their vulnerable condition.

The monitoring experts underlined that it is crucial that there are **updated registers** in places of detention, notably to report critical events and injuries.

3. Access to healthcare and social services

The physical and mental health of immigration detainees is particularly important and access to healthcare should be guaranteed, regardless of their legal status.

First of all, immigration detainees may suffer from trauma, in particular victims of torture, who need to be identified upon admission to a detention facility. According to the CPT, whenever injuries are recorded that are consistent with allegations of ill-treatment, such information should be brought to the attention of the relevant prosecutor¹⁶ and a person alleging previous torture should be referred to an independent medical examination free of charge, in accordance with the Istanbul Protocol.¹⁷ At the same time, regular access to psychological care should be provided. Medical screening upon arrival is therefore key to detecting those needs.

Second, there is a high chance that immigration detention has a detrimental impact on physical and mental health. Monitors should pay particular attention to this and to the consequences of a lack of access to healthcare, especially in light of the specific needs of certain groups or individuals (children, women, victims of torture and people with disabilities).

Participants also discussed the seemingly higher rate of **suicide attempts in immigration detention** and how to monitor the risk assessment and protective measures which ought to be developed by the authorities.

Participants noted that preliminary medical screenings are often scarce and superficial; contagious diseases and mental health are not properly assessed in many cases but in particular in the so-called "unofficial places of detention," and healthcare services for women are lacking in many institutions. In some OSCE participating States, there is a functioning procedure where migrants receive specialized care in local hospitals. However, monitors have observed that in some cases migrants were shackled during the transfer and examination.

Healthcare assessments also allow for the crucial process of identifying torture victims among migrant and refugee populations. The exact numbers of torture survivors among those populations is unclear and varies between different sources - especially between CSOs and states. It is however widely accepted that migrant populations include a certain percentage of torture survivors whose special needs should be addressed, including by referring them to specialized rehabilitation services.¹⁸

¹⁶ CPT, *Factsheet on Immigration Detention (2017)*, page 8.

¹⁷ Committee against Torture (CAT), *General Comment No. 4 (2017)*, para. 18 (d).

¹⁸ For more information on the right to rehabilitation of torture victims in the context of migration, see outcome report of ODIHR's workshop for OSCE participating States (2018), <https://www.osce.org/odihr/446380?download=true>; see also the ODIHR/CTI practical tool for States on how to provide rehabilitation services to torture victims at <https://www.osce.org/odihr/385497?download=true>.

C. Vulnerable groups: the case of children

Although this is not regulated under any binding standard, there is a wide international consensus that children under 18 should not be detained based on their or their parents' migration status, even as a last resort. In a recently adopted General Comment, the UN Committee on the Rights of the Child and the UN Committee on the Rights of All Migrant Workers and their Families stated that detention of children as a measure of last resort cannot apply in any immigration proceedings.¹⁹ The UN Special Rapporteur on torture has also stated that "*within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.*"²⁰ If children are exceptionally detained, states shall promptly ensure that they are released and accommodated in a childcare arrangement, which may include residential homes and foster arrangements.²¹

Participants highlighted that in practice, the **detention of children** is rather common across the OSCE region, within the growing use of detention by states to manage migration flows. The argument of the "best interest of the child" is sometimes used to justify their detention with their families, when this best interest would in fact require that the family is not detained to ensure that the child can benefit from age-appropriate activities, appropriate food and educational possibilities. Concerns were also raised regarding existing **pushbacks** of children, as they could be returned without consideration of their best interest.

According to the European Court for Human Rights, in addition to issues related to the arbitrariness of detention, immigration detention of children and other vulnerable individuals can raise issues under the prohibition of torture and other ill-treatment, with particular attention being paid to the conditions of detention, its duration, the child's particular vulnerabilities and the impact of the detention on him or her.²² In several judgements, the European Court of Human Rights has set out the general principle that detention of children is prohibited if conditions are incompatible with the child's needs, irrespective of the duration of detention. The Court also found that, even when the

¹⁹ See UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017. See also the *Joint General comment No. 4 (2017) of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, paras 5, 9-10; see also ECtHR, *Abdullahi Elmi and Aweys Abubakar v Malta*, App. nos. 25794/13 and 28151/13.

²⁰ See UN Special Rapporteur on torture, 5 March 2015, A/HRC/68/28, para. 80. See also CPT, *Factsheet on Immigration Detention*, <https://rm.coe.int/16806fbf12>: "every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a child".

²¹ UN CRC, Arts 20 (2) and (3); ECtHR, *Mohamad v. Greece*, 70586/11, §§ 82-86; UNHCR Detention Guidelines, Guideline 9.2, para. 51; Guidelines for the Alternative Care of Children adopted by the UN GA, A/RES/64/142, para. 140.

²² In respect of the detention of accompanied children see *Popov v. France* and the overview of the European Court of Human Rights' case-law in *S.F. and Others v. Bulgaria*; in respect of unaccompanied children see *Abdullahi Elmi and Aweys Abubakar v. Malta*; *Rahimi v. Greece*; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, where the Court found a violation of Article 3 in respect of both the detained child and the child's mother who was in another country.

material conditions are “appropriate”, the psychological and emotional aggressions to which children in administrative detention are subjected to entail such negative consequences that they may as such violate article 3 ECHR. It ruled that “*the protection of the child’s best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort.*”²³

Practice pointer

Some States do not detain children as a matter of policy or clearly state in their national legislation that the best interest of the child is paramount. Alternatives to detention of children were successfully identified in states such as **Estonia**.

Participants stressed that **age determination** also represents a challenge; the widespread use of X-Rays to determine bone age is not scientifically correct and the more complex and trusted multidisciplinary means, sometimes foreseen in law, are often not applied in practice. A case of age identification was shared where children were photographed naked. The NPM successfully intervened to stop this practice, which amounted to degrading treatment. Other observations included that age determination can be lengthy and result in the detention of children with adults. Participants also mentioned that they observed cases where children chose not to identify themselves as such because they feared to be separated from their parents.

It became clear during the discussions that monitoring bodies face challenges related to **data collection concerning children in immigration detention**. To obtain data regarding the procedure of identification of age and the number of children detained, when children are often scattered throughout different facilities, seems to be a key challenge of immigration detention monitoring.

Several organizations, in particular from civil society, have advocated for ending immigration detention of children, calling for alternatives to detention.²⁴ Positive examples of such alternatives have been reported, including by NPMs of the OSCE region.²⁵ Ways to reduce children’s trauma involve community-based care arrangements, ensuring access to education and healthcare, providing age-tailored information regarding rights and procedures, and appointing a guardian and a lawyer as soon as possible in cases of unaccompanied minors.²⁶

D. Monitoring the detention of migrants

Participants agreed that it is key for **NPMs, national civil society and other relevant bodies**, including international mechanisms, to keep monitoring the legality and conditions of any detention of migrants.

²³ ECtHR, *Popov v. France*, §§ 140-141; European Court of Human Rights, Factsheet on “Accompanied migrant minors in detention”, April 2018:

https://www.echr.coe.int/Documents/FS_Accompanied_migrant_minors_detention_ENG.pdf.

²⁴ See <https://endchilddetention.org/>.

²⁵ See, for example, *Monitoring places of detention - Eighth Annual Report of the United Kingdom’s National Preventive Mechanism*, February 2018, https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2018/02/6.4122_NPM_AR2016-17_v4_web.pdf.

²⁶ Report on access to justice for migrant persons, General Assembly, United Nations Special Rapporteur on Human Rights of Migrants, 25 September 2018, A/73/178/Rev.1, <http://undocs.org/A/73/178/Rev.1>.

1. General considerations

Participants highlighted that a key challenge for monitors in this regard was to be able to identify the various places where migrants could be deprived of their liberty not in law, but in practice. A wide range of internal and external sources of information had to be monitored to identify those, and a regular and prolonged monitoring of these places carried out, to be able to identify cases falling within their monitoring mandates. NPMs and international monitoring bodies benefit as per their mandates from unhindered access to all places where they suspect deprivation of liberty may take place. **Access of CSO monitors** to detention facilities varies across countries and can sometimes be strictly limited. Whilst the limitations in CSOs' funding resources can be an issue, in certain cases, it is a governmental policy not to open doors of the places of immigration detention to them. In certain countries of the OSCE region, the **shrinking space for civil society** poses an additional threat to CSOs' access to migrants in detention, and their wider work on migrants' rights.

In addition, some OSCE participating States have criminalized the support provided to migrants by individuals and CSOs by newly adopted laws or by using existing provisions in law to press charges. The threat of criminalization obviously has a negative impact on the monitoring of immigration detention, in particular for civil society monitors.

Participants agreed that the monitoring by independent bodies should remain fully **independent** and not subjected to any political pressure. In some countries of the OSCE region, NPMs were asked to participate in the FRONTEX European Pool of Experts who are monitoring return operations carried out by the agency and where the findings, unlike NPM reports, are not made public. Such additional activities can negatively affect the NPMs' resources and strategic planning of their monitoring work as they have to mobilize staff and dedicate time to the detriment of their own priorities, which NPMs select based on their independent assessment of the risks of torture and ill-treatment in detention.

Sometimes there is lack of communication between monitoring bodies which can lead to duplication of work.

2. Monitoring of forced returns

Participants identified the **monitoring of forced returns**, a highly risky practice, as an important but also particularly challenging part of the monitoring of immigration detention.

In focus: forced returns

Forced return, or deportation, is defined as the compulsory return of an individual to the country of origin, transit or a third country on the basis of an administrative or judicial order. While the right to regulate the entry, stay and removal of foreigners in their territory is a sovereign right of nation-states, these are subjected to a number of principles of international human rights law, including the principle of 'non-refoulement' enshrined in article 33 of the 1951 Refugee Convention and article 3 of the Convention against Torture, which prohibits the extradition and removal of a person to a country, or further removal to a subsequent country, where they may be subjected to torture, inhumane treatment, or persecution.²⁷ Despite these principles, and their operationalization being clearly defined in a number of instruments and communications, returns regularly take place in violation of the rights of those being deported, particularly in Western countries including in the

²⁷ Furthermore, returns are also subject to the principles of prohibition of collective expulsion, the prohibition of forced labour and the respect of the right to life.

European Union, which has progressively built a comprehensive framework to operationalize 'effective returns'.²⁸ In practice, the nature of those forced returns often involves the use of coercive measures and therefore entails high risks for the protection of individuals against ill-treatment.

In recent years, particularly in Western countries, there has been a policy shift towards facilitating the 'speedy return' of undocumented migrants, including refused asylum seekers. This is evident in the European Union, which has progressively built a comprehensive framework to operationalize 'effective returns'.²⁹ Determining return as a priority in the EU's external action has led to a number of policies without proper consideration of human rights implications and significant consultation with stakeholders. Outside the EU, fair and consistent migration and asylum systems which properly consider individual circumstances, including the above-mentioned human rights principles and especially the non-refoulement clause, must also be reinforced.

Participants discussed that the issues at stake are manifold: **challenges with the provision of non-refoulement** and cases where forcibly returned individuals endured torture and other ill-treatment upon their return; **lack of information or last-minute information** about the return modalities and timing, including for detainees themselves; **lack of access to procedures and appeals**, especially in cases of returns by land which can be immediate; **excessive use of force, including restraints** and **lack of individual assessments** to justify these; **absence of consideration of specific vulnerabilities** (in case of children for instance).

It became clear during the discussion that in light of those risks, NPMs in several countries have started to regularly monitor return procedures, including, for some of them, actual return flights. They have developed solid methodologies and dedicated many efforts to it, also to tackle the challenge of often not being able to access advance information on the planned returns. The monitoring of return flights is particularly time- and resource-intensive, beyond being very challenging in the absence of advance information about the planning of returns. Nevertheless, some NPMs have successfully monitored those situations, issued recommendations and improved the conditions of such forced returns. NPMs also try to make sure that their monitoring includes the follow-up to cancelled forced return procedures - including medical screenings - and the follow-up to the **deportation process, after the return of a migrant to his/her country of origin**, which can be challenging in certain contexts.

II. Joining forces to prevent torture in immigration detention: good practices identified

A. Modalities

NPMs and CSOs are **two key actors** in the prevention of torture. Where communication and co-ordination are established, they complement each other's mandates and means of action, increasing the protection for the rights of persons deprived of their liberty, including migrants in detention.

²⁸ Those include among others: the EU "Return Directive" (currently proposed to be reviewed or 'recasted') and the EU Action Plan on Return and the Migration Partnership Frameworks as part of its foreign policy.

As such, **the co-operation of NPMs and CSOs** is key to preventing torture and holding states accountable. In the OSCE region, their interactions can be divided into five different categories:

1. **Formal co-operation** when **CSOs are part of an NPM's operations**, including its monitoring mandate, as per formal agreements – also called the “ombudsman plus” model.
2. **Formal co-operation** when **CSOs are part of an NPM's advisory body** (consultative councils and similar bodies), which usually entails a policy-making role rather than a programmatic one.
3. **Ad hoc operational co-operation** when the CSO and NPM can decide when and on what to work together (monitoring, reporting, advocacy, training, in some cases joint long-term projects, etc).
4. **Informal exchanges and contacts** between NPM and CSOs on individual cases or specific issues without regular co-operation.
5. **A watchdog role of CSOs towards NPMs.**

In general, co-operation between NPMs and CSOs as described in points 1-4 is paramount to strengthening the protection of people held in immigration detention. Successful experiences of co-operation exist in most OSCE countries, to different degrees.

Practice pointer

The **Kazakhstani, Ukrainian and UK NPMs** involve not only CSOs, but also **civilian monitors** - also called “lay visitors”- in their monitoring activities. Whilst this poses certain challenges in terms of methodology, it ensures a meaningful, wide and transparent coverage of places of detention with grassroots contributions from the wider society.

B. Advantages

Participants underlined that the co-operation between NPMs and CSOs allows for a **vital exchange of information**. All NPMs present at the meeting highlighted the fact that without CSO inputs, they would not be able to correctly identify all issues and implement their mandate properly and strategically. Participants from one OSCE participating State highlighted that in their national context, the strategic collaboration between the NPM and CSOs had led to a change in legislation regarding migrant children in detention. Upon information received by CSOs, the NPM issued a report and recommendations. These were then again used by CSOs during a strategic litigation, resulting in a court finding a violation of human rights, which in turn led to a change in legislation.

For the monitoring of immigration detention and on particular issues, such as pushbacks and forced returns, co-operation of monitoring actors across borders is key. Participants shared that prompt communication between NPMs and CSOs of different countries (usually, origin and destination countries) has given interesting results and led to the drafting of joint reports that depict a more comprehensive picture of the phenomenon, including in South Eastern Europe.

Good co-operation between monitoring actors not only reinforces actions taken but provides for greater visibility, better information and ultimately **better impact** of all actors involved. Whilst NPMs have, as per their mandate, unprecedented conditions of access to individuals in detention, CSOs can bring a complementary, multidisciplinary expertise, and key information about individual cases they deal with. NPMs and civil society often have complementary means to address violations - including

strategic litigation by CSOs and reporting to the parliament, and high-level dialogue between NPMs and responsible state institutions.

Participants also agreed that in those OSCE participating States with an increasingly shrinking space for CSOs, strong coalitions and support from NPMs and other independent human rights institutions is vital to their work.

C. Challenges in the cooperation and how to address them

Some NPMs explained that **the confidentiality** of the data collected by NPMs, which should not disclose any identifiable information without expressed consent of their interviewees, may be difficult to preserve if independent experts from CSOs accompanying them on visits are not well-briefed on the requirements of the OPCAT mandate.

The establishment of NPMs, in some cases, has led some states **to close the doors** or to complicate the access for civil society monitors to places of detention. All participants agreed that the establishment of NPMs should neither weaken nor impede the work of existing civil society monitoring mechanisms. The OPCAT itself states that NPMs should complement, not replace any existing detention monitoring schemes. Participants recommended that in such cases, NPMs support civil society in gaining access to detention centres.

It was also discussed that whilst certain models of co-operation guarantee a meaningful involvement of civil society in NPM activities, some models of formal co-operation, such as the involvement of CSOs in an NPM Advisory Body, can remain **superficial**.

In order to address such challenges for co-operation, participants suggested that the **modus operandi and rules of co-operation** as well as potential outcomes of an NPM-CSO agreement should be formulated and set out so that roles and responsibilities are attributed clearly, and as early as possible, to avoid any misunderstanding, frustration or conflict. Such agreements must cover all stages of the co-operation, including the drafting of reports, the strategic follow-up on recommendations and outreach to the wider public.

Also within close co-operation, it is vital to maintain **a clear division between CSOs and NPMs** and their respective independent mandates. Both have different but complementary approaches and bring something different to society.

Practice pointer

In **Slovenia**, the CSOs working alongside the Ombuds institution as part of the NPM have a double monitoring activity: as part of the NPM, and independent, in their own name. They thus write NPM reports, but also their own independent reports, which have complementary approaches and focus.

More generally, the **strategic** co-operation of NPMs and CSOs is one of the keys to successful prevention of torture. Whatever models of co-operation are adopted, together they can better identify violations of the absolute prohibition against torture and other ill-treatment and other human rights of persons deprived of their liberty, and better address them by mobilizing all stakeholders and decision-makers.

Annex I: Background Paper

Preventing torture in the OSCE region in the context of immigration detention

Within and outside the OSCE region, an increasing number of States are using collective and systematic detention as a way to cope with large incoming flows of migrants, including children, to their territories.

For the purpose of this meeting, and in the absence of an international legal definition, the term “migrant” will refer to “any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence.”³⁰ This term is used irrespective of the reason for migration or legal status. “Immigration detention” is defined as the deprivation of a person’s liberty for the breach of entry, stay and transit rules in a given receiving country. Deprivation of liberty should be understood broadly, as per the definition contained in article 4(2) of the Optional Protocol to the UN Convention against Torture (OPCAT): “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority”. Immigration detention is usually of an administrative character.³¹ It shall therefore never be punitive in either purpose or effect.³² States are obliged to avoid prison-like environments, and to guarantee certain standards concerning the material conditions, the length of detention and the respectful treatment in accordance with the non-criminal status of migrants in detention. In other words, the conditions of immigration detention should reflect the administrative nature of detention in comparison with the criminal justice system.³³ The deprivation of liberty of migrants is admissible as a last resort measure only, for the shortest possible period and for the purposes of documenting the entry, recording claims of the person concerned and determining her/his identity.³⁴ Detention that goes beyond the timeframe of those purposes, should be the outcome of a legal process, based on a case-by-case analysis and is only admissible for reasons such as the likelihood of absconding, the risk of committing crimes or of acting against national security.³⁵

Vulnerabilities during immigration detention may be exacerbated by detainees’ lack of access to appropriate information, including legal support, language barriers and the inability to challenge the irregularity of their detention. Moreover, certain groups or persons have additional needs and are in a situation of increased vulnerability in detention, including: children (whether accompanied or not), persons suffering from trauma, including victims of torture, persons with disabilities, members of ethnic minorities, the elderly, LGBTI persons, or those with urgent medical needs.³⁶

Monitoring immigration detention

³⁰ OHCHR, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, p. 14 <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf> and <https://refugeesmigrants.un.org/definitions>.

³¹ *Monitoring Immigration Detention – Practical Manual*, APT, UNHCR and IDC, 2014, <https://www.apr.ch/content/files/res/monitoring-immigration-detention-practical-manual.pdf>.

³² *Op.cit.*, note 30.

³³ States shall “ensure that any detention in the context of international migration follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments, is carried out by authorized officials, and for the shortest possible period of time, irrespective of whether detention occurs at the moment of entry, in transit, or proceedings of return, and regardless of the type of place where the detention occurs.” [...] “to prioritize noncustodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only”, see Global Compact For Safe, Orderly And Regular Migration, Objective 13, 11 July 2018, to be adopted in December 2018, https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf.

³⁴ CPT, *Factsheet on Immigration Detention*, March 2017, page 2.

³⁵ See e.g. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 26 February 2018, A/HRC/37/50, https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf.

³⁶ *Monitoring Immigration Detention – Practical Manual*, APT, UNHCR and IDC, 2014, <https://www.apr.ch/content/files/res/monitoring-immigration-detention-practical-manual.pdf>.

Monitoring immigration detention, including its legal and administrative framework, is an important part of efforts to prevent torture and other ill-treatment for National Preventive Mechanisms (NPMs) and NGOs alike. Visiting immigration detention facilities is a key element of monitoring as a continued process that needs to take into account any condition that may lead to ill-treatment. Monitoring also involves issuing reports about the findings of the visits, making recommendations and building a cooperative and constructive dialogue with the relevant authorities.³⁷ In addition, many NPMs of the region have integrated in their mandate the monitoring of forced returns, a practice which entails several risks and ought to be monitored to ensure effective protection of the rights of returning migrants.

The European Committee for the Prevention of Torture (CPT), who has visited hundreds of immigration detention facilities over its nearly 30 years of existence, has developed standards for monitors to observe in the context of immigration detention on the following areas: detention as a last resort; safeguards during detention; suitable premises; adequate material conditions for longer stays (over 24 hours); open regime; qualified staff; procedures for discipline, segregation and means of restraint; effective monitoring and complaints mechanisms; adequate health care; care of vulnerable persons (in particular children).³⁸

Working groups

Participants will be divided in four parallel working groups to:

- Address key issues in relation to immigration detention and the role of NPMs and CSOs in their respective countries in preventing torture and other forms of ill-treatment in those detention settings
- Share experiences and expertise based on realities from different countries
- Identify good practices, including in relation to cooperation between NGOs and NPMs

Working Group 1: Legality of immigration detention and ensuring access to rights and procedures

The legality of detention is the factor determining whether a person's right to liberty has been violated or not. Due process is an important element for the reduction of the risk for torture or ill-treatment and includes an assurance of the examination of every aspect of detention, including its legality throughout the process: from the initial deprivation of liberty until the detention in specified facilities. Persons held under immigration detention should benefit from the same safeguards applicable to other persons deprived of their liberty as from the outset. For the detention to be considered lawful, it must be grounded in legislation, time-bound and the detainees must be informed about the process to challenge its legality or the reasons for being detained before a competent, impartial and independent judicial body. Detainees must be informed of the reason for their detention and the rights to which they are entitled in written form and in a language they can understand. If necessary, the services of an interpreter should be made available. If a detention is being extended, it must follow the same procedure. The maximum length of time for which a detention can be extended must be clearly stated in law. Indefinite detention in the migration context is, in principle, not permissible under international law and may constitute a form of arbitrary detention.

In particular, asylum-seekers, refugees and stateless persons face a heightened risk of arbitrary detention and specific international guarantees exist to protect them and to uphold their right to access asylum procedures and related due process standards. As regards the right to access the asylum procedure, the UN Special Representative on Migration and Refugees noted that the exercise of the right to seek asylum by a person in immigration detention requires positive state action which goes beyond the removal of obstacles to seeking asylum. The competent state authorities must identify persons in need of international protection and ensure access to an effective and fair asylum procedure. Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees (and asylum-seekers) having entered or stayed irregularly. This is based on general recognition of the reality that people in need of international protection in many cases are, by

³⁷ *Ibid.*

³⁸ See CPT, *Factsheet on Immigration Detention* (2017), <https://rm.coe.int/16806fbf12>.

definition, unable to produce the documents or obtain the permissions normally required to secure lawful permission to enter a country, because of the circumstances of their flight.

Questions for discussion:

- 1) What are immigration detainees' access, in practice, to an effective remedy to challenge the lawfulness of the deprivation of their liberty and what are the challenges related to it, including enjoyment of the rights to access a lawyer, doctor, notification of a third party and to consular assistance?
- 2) What are the needs of specific groups or persons in situation of particular vulnerability in immigration detention that ought to be considered? How can NPMs and CSOs address those needs?
- 3) How do NPMs and CSOs monitor the legality of immigration detention? What are the challenges faced in doing so?
- 4) What are successful examples of alternatives to detention and how can NPMs and CSOs contribute to their development?

Working Group 2: Forced returns

Forced return, or deportation, is defined as the compulsory return of an individual to the country of origin, transit or a third country on the basis of an administrative or judicial order. While the right to regulate the entry, stay and removal of foreigners in their territory is a sovereign right of nation-states, these are subjected to a number of principles of international human rights law. These include the principle of 'non-refoulement' enshrined in Art 33 of the 1951 Refugee Convention and Art 3 of the Convention against Torture, which prohibits the extradition and removal of a person to a country, or further removed to a subsequent country, where they may be subjected to torture, inhumane treatment, or persecution.³⁹

Despite these principles, and their operationalisation being clearly defined in a number of instruments and communications, returns regularly take place in violation of rights of those being deported. In practice, the nature of those forced returns often involves the use of coercive measures and therefore entails high risks for the protection of persons against ill-treatment. In light of those risks, NPMs in several countries have been regularly monitoring return flights.

In recent years, particularly in Western countries, there has been a policy shift towards facilitating the 'speedy return' of undocumented migrants, including refused asylum seekers. Nowhere is this more evident than in the European Union, which has progressively built a comprehensive framework to operationalise 'effective returns'.⁴⁰ Determining return as a priority in the EU's external action has led to a number of policies without proper consideration of human rights implications and significant consultation with stakeholders. Outside the EU, fair and consistent migration and asylum systems which properly consider individual circumstances, including the above-mentioned human rights principles and especially the non-refoulement clause must also be reinforced.

Furthermore, the current shift on return practice has seen a move-away from a thorough understanding and application of the best interest of the child principle. It is commonly understood that when children are affected by return orders, be them accompanied or not, States have an obligation to identify durable solutions to safeguard the rights of the child. Currently, this is not fully accounted for in the design of policies nor in the process of determining whether a return order should be signed or at the implementation stage.

Questions for discussion:

- 1) What are the risks of ill-treatment related to the practice of forced returns?

³⁹ Furthermore, returns are also subject to the principles of prohibition of collective expulsion, the prohibition of forced labour and the respect of the right to life.

⁴⁰ Those include among others: the EU "Return Directive" (currently proposed to be reviewed or 'recasted') and the EU Action Plan on Return and the Migration Partnership Frameworks as part of its foreign policy.

- 2) What is the practice of NPMs and challenges faced in monitoring forced returns?
- 3) What is the role of NPMs and CSOs in contributing to greater transparency, accountability and respect for human rights (including guaranteeing the best interest of the child) in the design and implementation of return policies (incl. formulation of external agreements with third countries)?
- 4) How could NPMs and CSOs advocate for effective remedies for wrongful returns, taking into account specific vulnerabilities of persons subjected to this practice?

Working Group 3: Material conditions of immigration detention and ensuring access to healthcare and social services in detention

Immigration detention being administrative in nature, it shall never be punitive in either purpose or effect. States are obliged to avoid prison-like environments, and to guarantee certain standards concerning the material conditions, the length of detention, and the respectful treatment and regime, in accordance with the non-criminal status of migrants in detention. Addressing material conditions of detention, however, must be accompanied by an unequivocal reaffirmation that administrative detention should remain the exception rather than the rule.⁴¹ As such, accommodation, sanitation, hygiene, drinking water, food, clothing, bedding, safe custody of and access to personal property and effects must all be provided to an adequate standard and in a manner that is safe and respectful of the dignity of individual detainees. In addition, the design and physical environment of detention facilities ought to ensure that all detainees have adequate privacy.⁴² Elements to be looked at by monitors include: access to health care, including access to a doctor of one's choice, selection and profile of staff (gender-mixed staff), activities, outdoor exercise and leisure, access to newspapers, periodicals and other publications, radio or television transmissions.

The physical and mental health of immigration detainees is particularly important and access to healthcare should be guaranteed, regardless of their legal status. First of all, immigration detainees may suffer from trauma, in particular victims of torture, who will need to be identified upon arrival. According to the CPT, this includes that, whenever injuries are recorded that are consistent with allegations of ill-treatment, such information should be brought to the attention of the relevant prosecutor⁴³ and that a person alleging previous torture should be referred to an independent medical examination free of charge, in accordance with the Istanbul Protocol.⁴⁴ At the same time, regular access to psychological care should be provided. Medical screening upon arrival is therefore key to detect those needs. Second, because there is a high chance that immigration detention have a detrimental impact on the persons' physical and mental health. Monitors should pay particular attention to this and to the consequences of lack of access to healthcare, in light of the specific needs of certain groups or persons (children, women, victims of torture and persons with disabilities).

Questions for discussion:

- 1) What are the key recommendations of NPMs and CSOs regarding material conditions and issues related to health in immigration detention?
- 2) What should adequate access to healthcare entail in the context of immigration detention? What are the main barriers to ensure this access and how to overcome them? How have NPMs and CSOs addressed this?
- 3) What are the specific vulnerabilities with regard to immigration detainees' physical and mental health, and how to respond to the specific needs of different persons? What is the role of NPMs and CSOs in addressing those needs?

⁴¹ See e.g. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (UNHCHR Detention Guidelines): <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

⁴² https://www.apr.ch/content/files_res/monitoring-immigration-detention_practical-manual.pdf.

⁴³ CPT, *Factsheet on Immigration Detention* (2017), page 8.

⁴⁴ Committee against Torture (CAT), General Comment No. 4 (2017), para. 18 (d).

Working Group 4: Ending detention of children

As stated by the UN Special Rapporteur on torture, *"within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children."*⁴⁵ In a recently adopted General Comment, the UN Committee on the Rights of the Child and the UN Committee on the Rights of All Migrant Workers and their Families stated that detention of children as a measure of last resort cannot apply in immigration proceedings. This applies whether the child is accompanied or unaccompanied or separated, and irrespective of his/her legal/migratory status or that of his/her parents.⁴⁶

If exceptionally detained, the requirement is that States shall promptly ensure that children are released and accommodated in a childcare arrangement, which may include residential homes and foster arrangements.⁴⁷ In several judgements, the European Court of Human Rights has set out the general principle that detention of children is prohibited, if conditions are incompatible with the child's needs, irrespective of the duration of the detention. The Court also found that, even when the material conditions are "appropriate", the psychological and emotional aggressions to which children in administrative detention are subjected to, entail such negative consequences that it may as such violate art 3 ECHR. It ruled that *"the protection of the child's best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort."*⁴⁸ In reality, migrant children are being increasingly detained within the growing use of detention by States to manage migration flows. Several organizations, in particular from civil society, have advocated for ending immigration detention of children, calling for alternatives to detention.⁴⁹ Positive examples of such alternatives have been reported, including by NPMs of the OSCE region.⁵⁰ Ways to reduce children's trauma involve community-based care arrangements, ensuring access to education and healthcare, providing age-tailored information regarding rights and procedures and appointing a guardian and a lawyer as soon as possible in case of unaccompanied minors.⁵¹

Questions for discussion:

- 1) What are the main challenges and lessons learned regarding the monitoring of immigration detention of children?
- 2) What are good practices and alternatives to detention of migrant children observed by NPMs and CSOs?
- 3) What have NPMs and CSOs recommended to state authorities with regard to the detention of migrant children?
- 4) What are successful examples of joint advocacy efforts between NPMs and CSOs to end children immigration detention?

⁴⁵ See UN Special Rapporteur on torture, 5 March 2015, A/HRC/68/28, para. 80. See also CPT, *Factsheet on Immigration Detention*, <https://rm.coe.int/16806fbf12>: "every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a child".

⁴⁶ See UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017. See also the *Joint General comment No. 4 (2017) of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, paras 5, 9-10; see also ECtHR, *Abdullahi Elmi and Aweys Abubakar v Malta*, App. nos. 25794/13 and 28151/13.

⁴⁷ UN CRC, Arts 20 (2) and (3); ECtHR, *Mohamad v. Greece*, 70586/11, §§ 82-86; UNHCR Detention Guidelines, Guideline 9.2, para. 51; Guidelines for the Alternative Care of Children adopted by the UN GA, A/RES/64/142, para. 140.

⁴⁸ ECtHR, *Popov v. France*, §§ 140-141; European Court of Human Rights, Factsheet on "Accompanied migrant minors in detention", April 2018: https://www.echr.coe.int/Documents/FS_Accompanied_migrant_minors_detention_ENG.pdf.

⁴⁹ See <https://endchilddetention.org/>.

⁵⁰ See, for example, *Monitoring places of detention - Eighth Annual Report of the United Kingdom's National Preventive Mechanism*, February 2018, https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2018/02/6.4122_NPM_AR2016-17_v4_web.pdf.

⁵¹ Report on access to justice for migrant persons, General Assembly, United Nations Special Rapporteur on Human Rights of Migrants, 25 September 2018, A/73/178/Rev.1, <http://undocs.org/A/73/178/Rev.1>.

Annex II: Agenda

General objective:

To contribute to the mutual knowledge and understanding between NPMs and CSOs on their complementary contributions to the protection of persons deprived of their liberty in the OSCE region in the context of immigration detention.

Specific objectives:

- To address challenges and identify good practices in the interactions and cooperation between NPMs and CSOs in the OSCE region, for the ultimate benefit of all persons deprived of their liberty in the context of immigration detention.
- To strengthen regional cohesion and joint advocacy efforts for the rights of persons in immigration detention and other situations of deprivation of liberty.

3 December | Preventing torture in the OSCE region in the context of immigration detention

Time	Topics
09:00- 09:20	<p><i>WELCOME AND OPENING</i></p> <p>Omer Fisher, Head of Human Rights Department, OSCE/ODIHR Barbara Bernath, Secretary General, APT</p> <p>Introduction of objectives and methodology Eva Csergö, Europe and Central Asia Programme Officer, APT</p>
09:20- 10:50	<p><i>SESSION I- PREVENTING TORTURE IN THE CONTEXT OF IMMIGRATION DETENTION IN THE OSCE REGION: AN OVERVIEW</i></p> <p>Introduction by the moderator Stephanie Selg, Adviser on torture prevention, OSCE/ODIHR</p> <p>Panel discussion: Nils Melzer, UN Special Rapporteur on Torture Mykola Gnatovskyy, Chairperson, European Committee for the Prevention of Torture (CPT) Massimiliano Bagagli, Head of Unit Migrants and deprivation of liberty, Office of the National Guarantor for the rights of persons detained or deprived of liberty (NPM Italy) Mushegh Yekmalyan, Co-Chair of the Torture Prevention Working Group of the Civic Solidarity Platform</p>
10:50- 11:15	Coffee break
11:15- 12:45	<p><i>SESSION II- IMMIGRATION DETENTION: KEY ISSUES</i></p> <p><i>Each participant will attend two out of the four thematic working groups (one before and one after lunch).</i></p> <p><u>Four parallel working groups on:</u></p>

	<p>1. Legality of immigration detention and ensuring access to rights and procedures <i>Moderated by Stephanie Selg, OSCE/ODIHR</i> <i>Rapporteur: Kahramondzhon Sanginov, Rule of Law Officer, OSCE Programme Office in Bishkek</i></p> <p>2. Forced returns <i>Moderated by Pablo Rojas Coppari, Migration & Freedom of Movement Adviser, OSCE/ODIHR</i> <i>Rapporteur: Barbara Bernath, APT</i></p> <p>3. Material conditions of immigration detention and ensuring access to healthcare and social services <i>Moderated by Isabelle Heyer, Research and Advocacy Adviser, APT</i> <i>Rapporteur: Mari Amos, SPT</i></p> <p>4. Ending detention of children <i>Moderated by Eva Csergö, APT</i> <i>Rapporteur: Omer Fisher, OSCE/ODIHR</i></p>
12:45- 14:00	Lunch
14:00- 15:30	<p><i>SESSION II- IMMIGRATION DETENTION: KEY ISSUES (CONTINUED)</i></p> <p><u>Rotation- Four parallel working groups on:</u></p> <p>1. Legality of immigration detention and ensuring access to rights and procedures</p> <p>2. Forced returns</p> <p>3. Material conditions of immigration detention and ensuring access to healthcare and social services</p> <p>4. Ending detention of children</p>
15.30- 16.00	Coffee break
16:00- 17:30	<p><i>SESSION III- PLENARY DISCUSSION</i></p> <ul style="list-style-type: none"> • Summary of working group discussions (by rapporteurs) • Ways forward: Discussion in plenary <p><i>Moderated by Isabelle Heyer, APT</i></p>
18:00– 20:00	<i>RECEPTION “APERITIVO MILANESE” HOSTED BY THE SWISS CONSULATE IN MILAN AT THE VENUE</i>

	Welcoming remarks by Tommaso Tabet, Deputy Consul General of Switzerland in Milan
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4 December | Preventing torture in the OSCE region: roles, strategies and effective cooperation for change

Time	Topics
09:00- 10:15	<p><i>SESSION IV- ADVANCING JOINTLY THE PREVENTION OF TORTURE</i></p> <ul style="list-style-type: none"> • Introductory remarks on NPM and CSO cooperation by Barbara Bernath, APT • Comments by: Mari Amos, Head of Europe regional team, UN Subcommittee on Prevention of Torture Natalia Taubina, Co-Chair of the Torture Prevention Working Group of the Civic Solidarity Platform • General discussion on interactions, good practices and challenges regarding cooperation between NPMs and CSOs <i>Participants will be asked to share concrete examples of good practices and/or challenges.</i> <p><i>Facilitated by Eva Csergö, APT</i></p>
10:15- 10:30	Coffee break
10:30- 11:45	<p><i>SESSION V- REINFORCING COOPERATION TO ACHIEVE CHANGE ON IMMIGRATION DETENTION</i></p> <p><u>Four parallel working groups will discuss the following four aspects:</u></p> <ul style="list-style-type: none"> • How to consolidate legal and policy frameworks? • How to improve practices related to immigration detention? • How to strengthen oversight? • How to raise awareness of the wider public? <p><i>Discussions moderated by:</i> <i>Eva Csergö, APT</i> <i>Omer Fisher, OSCE/ODIHR</i> <i>Isabelle Heyer, APT</i> <i>Stephanie Selg, OSCE/ODIHR</i></p>
11:45- 13:00	<p><i>SESSION VI- PLENARY: WAYS FORWARD</i></p> <ul style="list-style-type: none"> • Summary of working group discussions (by rapporteurs) • Ways forward: discussion in plenary

	<i>Moderated by Stephanie Selg, OSCE/ODIHR</i>
13:00- 13:30	<p>CLOSING AND EVALUATION</p> <p>Wrap-up and concluding remarks Omer Fisher, Head of Human Rights Department, OSCE/ODIHR Barbara Bernath, Secretary General, APT</p> <p><i>Evaluation of the meeting (forms will be circulated)</i></p>
13:30- 14:30	Lunch

PEER-TO-PEER MEETING FOR NATIONAL PREVENTIVE MECHANISMS

14:30- 16:30	<ul style="list-style-type: none"> • Joining forces to achieve change on immigration detention issues • Joining forces to achieve change on other thematic issues: needs and challenges- open forum for NPMs • Towards an NPM-led network <p><i>Facilitated by APT and OSCE/ODIHR</i></p> <p><i>Coffee and refreshments will be available at the end of the meeting</i></p>
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