

The Working Group identified four main categories of persons whose situation as immigrants or asylum seekers may be affected. These categories are: persons who have been refused entry to the country concerned; persons who have entered the country illegally and have subsequently been identified by the authorities; persons whose authorization to stay in the country has expired; and asylum seekers whose detention is considered necessary by the authorities.

The issues that need to be addressed with these categories in mind are noted as including: strategies to protect the legal rights of detainees including, eventually, the adoption of a unified approach by the international community, and the undesirability of treating asylum seekers as aliens under the immigration laws; if not already covered by legislation, the need to provide for limits to the period of detention, and to apply such limits strictly to ensure that the detention is not prolonged unreasonably; the need make appeal and review procedures effective, not mere formalities — which would include an automatic review by a judge after a specific period, a review before the authorities which took the initial decision to detain, and a right of appeal before a court or tribunal; the need for special legislative provisions for the detention of minors and/or dealing with minors who accompany asylum seekers or immigrants; and guarantee of access to legal counselling and representation because aliens seeking immigration or asylum are ill-equipped or may not have the information necessary to pursue effectively the legal rights or remedies available to them under the applicable legislation.

Referring to juridical aspects, the report notes that two questions of principle need to be addressed. The first relates to the preliminary phase of questioning, preceding custody — especially in the case of identity checks — which is often followed by a period of police custody preceding detention. The report notes that, when such checks are found to be unlawful, the question arises as to whether this factor should entail either the immediate release of the person(s) in order to avoid arbitrary deprivation of liberty or whether the whole procedure should be deemed unlawful. The second question concerns the effectiveness of guarantees for ensuring that the person is not expelled to a country in which there is a serious risk of persecution; in such a case, the expulsion could be considered a form of inhuman or degrading treatment. The WG also noted the need to consider the legal position of a person who — when expelled either by air, sea, rail or road — is under close surveillance or prevented from leaving the means of transport used.

In commentary on the places in which immigrants and/or asylum seekers may be held, the report draws a distinction between “places of custody” (“lieux de rétention”) and “places of detention” by noting that places of “detention” are run by prison authorities and are more specifically related to the penal imprisonment of offenders. The WG opted to use the term “places of custody” to refer to centres or premises designed for the temporary custody of persons whose situations do not

conform to legislation governing the entry and residence of aliens. The Group further decided that the expressions “detention” or “imprisonment” would be appropriate in considering cases of persons brought before the courts either because they are prosecuted for having committed offences, or within the framework of an extradition procedure.

The report then reviews various types of premises in which immigrants and asylum seekers may be held, notably:

- ♦ places of custody situated in frontier areas — either in international or “transit” areas, and understood to include stations, ports and airports connected to foreign countries, in addition to land frontier areas;
- ♦ police facilities — mostly used during the period preceding detention, following a check usually carried out in the street; i.e., the person is questioned on police premises in order to ascertain whether the individual’s presence in the country is in conformity with legislation governing the entry and residence of aliens;
- ♦ premises under the authority of a prison administration — which results in persons in an irregular situation being treated on a par with offenders;
- ♦ ad hoc premises — where the intention is to replace prison with premises which are not under prison authorities and, therefore, better suited to the specific legal status of the aliens concerned; i.e., where there is a concern with decriminalizing offences related to the entry and residence of aliens;
- ♦ house arrest — replacing custody with a form of restriction of liberty rather than deprivation of liberty, a measure that would mean such cases do not necessarily come under the mandate of the WG;
- ♦ international or so-called “transit” areas — another measure that would not constitute deprivation but rather restriction of liberty to come and go; i.e., the area is closed towards the requested country but remains open to other destinations. In such circumstances, the asylum seeker’s possibility of leaving the transit areas is, however, purely theoretical unless another country, which can offer the individual a degree of comparable protection, is prepared or ready to receive the person;
- ♦ gathering centres — premises which are specially prepared, in principle provisionally, to admit large numbers of foreigners fleeing from their country, usually for political reasons or on account of serious domestic unrest; and
- ♦ hospital premises — which receive persons whose health, during custody, requires hospital care and may be equivalent to deprivation of liberty if police personnel keep a close watch on the person who is forbidden to leave the premises.