

Chapter 3: In-depth Study: Arrest, Detention and Deportation



This chapter discusses the issues relating to arrest, detention and deportation (ADD) of migrants which were the thematic focus for the MMN 2005-2006 collaborative research. In the first section (International Human Rights Framework on ADD), the current international laws relating to the ADD are summarised in order to provide a human rights lens through which to view the findings of the MMN research. In the following sections, specific findings regarding the ADD in Thailand, China, Vietnam and Cambodia are discussed. In the final section, the regional recommendations concerning the ADD are presented.

Photo courtesy of Yang Chi Oo Workers Association



Migrant workers around the world face arrest on grounds such as irregular state border crossing, use of false documents, leaving of their residence without authorisation, irregular stay, and breaching or overstaying their conditions of stay. Mae Sod, Thailand, 2006.

International Human Rights Framework on Arrest, Detention and Deportation

The [Global] Commission [on International Migration] endorses the principle that entering a country in violation of its immigration laws does not deprive migrants of their fundamental human rights, nor does it affect the obligation of states to protect migrants in irregular situations.

As the multi-country studies for this book developed, the teams collecting data realised how frequently they, the migrants, and the authorities referred to international law regarding refugees, trafficking and smuggling, compared to how rarely they consulted international laws related to arrest, detention and deportation. This was the case despite the fact that migrants are arrested and deported on a daily basis for not being documented, for having the wrong documentation, for being in the wrong place, for having a communicable disease, for being pregnant and for a whole host of other non-criminal reasons, and that these arrests are a matter of international concern since they involve at least two countries.

This section aims therefore to summarise current international law relating to the arrest, detention and deportation of migrants, and to provide a human rights lens through which to view

the findings of our research.

All UN Member States have accepted – in part or in whole – the six core human rights treaties: two key covenants protecting civil, political, economic, social and cultural rights, and four conventions which provide more specific protections – for children and for women, against racial discrimination, and against torture. These treaties are understood by the Member States as constituting legal obligations to which their national law and policy must conform, and which protect everyone, both citizen and non-citizen. The central principles are non-discriminatory and egalitarian; human rights, therefore, cannot be linked to citizenship but are instead universal. Although States are allowed to make some distinctions between citizens and non-citizens, any denial of rights must serve a legitimate State objective and be proportionate. States parties' interpretation of their obligations to non-citizens under these human rights treaties is vague and open to various interpretations. This leaves migrants vulnerable and subject to the often unfettered discretion of particular States or global trends in attitude.

1. The Right to Move

The right of human beings to move freely is enshrined in the Universal Declaration of Human Rights and other international conventions.¹

“Everyone has the right to leave any country, including his own, and to return to his country.”²

(Article 13(2) Universal Declaration of Human Rights). However, modern-day concepts of national sovereignty, national borders and nation states challenges the realisation of this

freedom of movement. On a practical level, the Human Rights Committee has stated that “Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents”.³ According to international law, no State may expel its nationals, and all States are expected to readmit their citizens. This notion, embedded in international law, is not reiterated in the ASEAN Declaration on Migrant Workers as an obligation of the sending countries.⁴ Regarding the entry or presence of non-citizens, according to the international framework, it remains the sovereign prerogative

Glossary:

(a) “**Arrest**” means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) “**Detained person**” means any person deprived of personal liberty except as a result of conviction for an offence;

(c) “**Imprisoned person**” means any person deprived of personal liberty as a result of conviction for an offence;

(d) “**Detention**” means the condition of detained persons as defined above;

(e) “**Imprisonment**” means the condition of imprisoned persons as defined above: Body of Principles for the Protection of All Persons under Any Form of Detention or imprisonment,

Deportation: The act of a State in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain. (IOM)
Deportation is generally done directly by the government's executive apparatus rather than by order or authority of a court, and as such is often subject to a simpler legal process (or none), with reduced or no right to trial, legal representation or appeal. (Wikipedia)

Exclusion: the formal denial of an alien's admission into a State

Expulsion: An act by an authority of the State with the intention and with the effect of securing the removal of a person or persons (aliens or stateless persons) against their will from the territory of the State.

Source: International Organization of Migration

of States to regulate the presence of foreigners on their territory. States do not have unqualified rights to regulate who enters and leaves their country, however, as international human rights law places some restrictions on the exercise of this power, particularly when there would be an infringement on other human rights, as in the case of refugees.

2. Deportations/Expulsions

Within the international human rights framework exist three types of protection related to deportation or expulsion, substantive protection against deporting people who would consequently face serious human rights violations; procedural safeguards during the deportation procedure; and protection regarding the method of expulsion.

Adopted in 1951, the Refugee Convention was the first international instrument to place legal restrictions on State parties' power to expel foreigners. Article 33 lays down the prohibition of "refoulement" according to which no State party "shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Since all asylum seekers are presumed to be refugees until proven otherwise, they benefit from the protection afforded by Article 33, until their claim to refugee status is rejected. However, such protection against "refoulement" cannot be invoked by refugees who pose a security threat to the country or who have committed a particularly serious crime. This principle of "non-refoulement" has become a cornerstone of international refugee law and, it has been argued, is now part of customary international law.

While Article 33 of the 1951 Refugee Convention applies only to refugees, Article 3 of the Convention against Torture, adopted in 1984, has expanded the scope of the protection against expulsion since it explicitly prohibits States parties from seeking to "expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

Article 7 of the International Covenant on Civil and Political Rights, adopted in 1976, has been interpreted as including a prohibition of expulsion if there is a risk of torture. Indeed, when commenting on Article 7 of the Covenant, the Human Rights Committee held "State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement." The Committee has also decided that a person should not be returned to a country where his illness - which was in whole or in part caused by the State party's violation of his

"Common principles on removal of irregular migrants and rejected asylum seekers" submitted by the INGO Coalition, August 2005, includes the following principles:

1. voluntary return should always be the priority,
2. vulnerable persons should be protected against removal,
3. persons subject to a removal order should have access to effective remedies,
4. detention pending removal should be the last resort,
5. family unity should be respected,
6. independent monitoring and control bodies should be created,
7. re-entry ban should be prohibited, and
8. legal status should be granted to persons who cannot be removed.

See <http://hrw.org/english/docs/2005/09/01/eu11676.htm>.



Photo courtesy of John Hulme

Arrested strikers from the Nasawat apparel factory in Mae Sod being taken away for deportation. Thailand, 2006.

rights - cannot be treated⁵.

The Convention on the Elimination of Racial Discrimination, adopted in 1969, does not contain any specific provisions on expulsions. Nevertheless, the Committee on the Elimination of Racial Discrimination has adopted a General Recommendation on Discrimination against non-citizens in which it has made several pronouncements on expulsions. The Committee recommended that national laws on expulsion should not discriminate, in purpose or effect, against foreigners on the basis of race, colour, or ethnic or national origin, and that non-citizens should have equal access to the right to challenge expulsion orders. It reiterated that non-nationals should not be returned to a country where they are at risk of serious human rights abuses. Finally, the Committee recommended that State parties avoid expulsions of foreigners, especially long-term residents, which would result in disproportionate interference with their right to a family life.

While the Convention on the Rights of the Child does not contain any specific provisions on expulsions, the Committee on the Rights of the Child has recently adopted a detailed General Comment on the treatment of unaccompanied and separated children outside their country of origin, which does address the subject. In that General Comment, the Committee stated that States parties should not return a child to a country “where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Articles 6 and 37 of the Convention”. The Committee further specified that whether the harm was inflicted by non-State actors was irrelevant. It



Photo courtesy of John Hulme

An arrested strike organiser. Arrest, detention and deportation are often used as a deterrent for migrant workers filling a complaint. Mae Sod, Thailand, 2006.

added that “the assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services”. With reference to Article 38 of the Convention, in conjunction with Articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child, which address the involvement of children in armed conflict, the Committee also suggested, “States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties”.

The 2000 Protocol to Prevent, Suppress and Punish Trafficking of Persons, Especially Women and Children, supplementing the Convention against Transnational Organized Crime, contains very few provisions dealing with the protection of victims of trafficking. Article 7 of the Protocol merely provides that State parties “shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in their] territory, temporarily or permanently, in appropriate cases”. In doing so, State parties shall “give appropriate consideration to humanitarian and compassionate factors”. Article 8 of the Protocol deals mainly with inter-State cooperation to facilitate the repatriation of victims of trafficking, yet, it merely provides, “[S]uch return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary”. Mention should be made here of the OHCHR

International Convention on the Protection of the Rights of Migrant Workers and Their Families Article 22

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.
2. Migrant workers and members of their families may be expelled from the territory of a State party only in pursuance of a decision taken by the competent authority in accordance with law.
3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.
4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.
5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law, and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.
6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.
7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.
8. In case of expulsion of a migrant worker or a member of his or her family, the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.
9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Recommended Principles and Guidelines on Human Rights and Human Trafficking, in which Guideline 6 provides that the State should “ensur[e] the safe and, where possible, voluntary return of trafficked persons and explor[e] the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely)”.

While Article 13 of the International Covenant on Civil and Political Rights applies only to aliens who are lawfully in the territory of a State party to the Covenant and, according to the Committee, does not allow “illegal entrants and aliens who have stayed longer than the law of their permits allow” to invoke its protection. Article 22 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, however, applies to all migrant workers and members of their families, regardless of their immigration status. The procedural guarantees contained in Article 22 are much more extensive than those contained in Article 13 of the Covenant. (see box)

Mention should also be made of Article 23, which deals with consular or diplomatic

protection. It provides that, in the case of expulsion, the person concerned shall be informed without delay of his or her right to have recourse to the protection and assistance of the consular or diplomatic authorities of the State of origin, and that the authorities of the expelling State shall facilitate the exercise of such right. Like Article 22, Article 23 applies to all migrant workers and members of their families, regardless of their legal status.

In contrast, Article 56 applies only to migrant workers and members of their families who are documented or in a regular situation. It provides that they may not be expelled from a State of employment, except for reasons defined in the national legislation of that State and subject to the safeguards listed above. It also prohibits expulsions, undertaken for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorisation of residence and the work permit. Finally, Article 56 provides that in reaching an expulsion decision, consideration should be given to the humanitarian considerations and the length of time that the person concerned has already resided in the State of employment.

[This section was adapted from Expulsions of Aliens in International Human Rights Law, OHCHR Discussion paper, Geneva, September 2006.]

3. Collective Expulsions/Mass Deportations

Migrant workers are entitled to protection against arbitrary or collective expulsion under Article 13 of the ICCPR and Article 22 of the Migrant Workers Convention.

It is also considered a general prohibition since the body of law safeguards against arbitrary expulsions whereby each migrant is entitled to an individual decision on his or her expulsion. The collective nature makes it impossible for a government to provide the necessary guarantees or to monitor who may be entitled to remain in the country. Mass expulsions run a very high risk of preventing the proper identification of people entitled to special protection, such as refugees, victims of trafficking, women at risk of systematic rape etc. In some cases, legal residents or even nationals are entangled in such mass deportations. Further, it is not possible to execute mass deportation in a humane and dignified manner; mass deportations run serious risks of exposing migrants to dangers, and of increasing stigmatisation and discrimination against migrant communities.

Concluding Remarks of the OHCHR Discussion paper on Expulsions of Aliens in International Human Rights Law, Geneva, September 2006.

A legal framework regulating States' powers to expel foreigners from their territories has gradually emerged. Indeed, several general provisions have been interpreted in such a way as to provide some protection to persons who are subject to expulsion orders. These jurisprudential developments are relatively recent, dating back only to the early 1990s. It is now well-established that no one should be returned to a country where there is a real risk of torture, or cruel, inhuman or degrading treatment, and this prohibition has been held to be absolute. In addition, some expulsions should not be enforced where they would result in a violation of the right to private and family life of the person concerned. The scope of the procedural safeguards suggests that collective expulsions are unlawful under international and regional human rights law. In contrast, methods of expulsion are not specifically mentioned in any of these instruments, but there is no doubt that the general provisions on cruel, inhuman or degrading treatment apply in this respect and that no one should be expelled in a manner that would put his life or physical integrity at risk.

4. Methods of Deportation and Expulsion

There are no provisions in international and regional human rights instruments which explicitly deal with methods of expulsion. Even though human rights abuses may take place during deportations, migrants who have already been returned to their countries of origin are unlikely to bring proceedings against those who deported them. Therefore, the lack of protection is particularly problematic. However, general provisions of human rights standards should still apply. When executing a deportation order, States are still bound by their obligations to respect the right to life or physical integrity and should not subject any person, including any foreigner being expelled from the country, to cruel, inhuman or degrading treatment. The former Special Rapporteur on the human rights of migrants stated that “the expulsion, deportation or repatriation of undocumented migrants should be carried out with respect and dignity”.⁶ In other regions of the world, recommendations and guidelines for expulsion procedures have been developed.⁷ However, the ASEAN Declaration on Migrant Workers makes no reference to the deportation of migrants, nor do the MOUs signed between Thailand and neighbouring countries contain any provisions to ensure safe deportations.

The Berne Initiative, following consultations with governments from around the world, made recommendations on “mandatory return” in their meeting in December 2004. It was suggested that mandatory return policies should be transparent, humane and fair; that mandatory returns be conducted in safety and with dignity; that forced return to conditions of danger should be avoided; that mandatory return should be in conformity with international law standards; and that mandatory return should be implemented with the full knowledge and agreement of the country of origin.⁸

Declaration on the Human Rights of Individuals who are not nationals of the country in which they live, adopted by the UN General Assembly in 1985: Nothing in this Declaration shall be interpreted as legitimizing any aliens’ illegal entry into and presence in a State, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that state, including those in the field of human rights. UNGA Res 40/114 Art 2(1) 13 Dec 1985

5. Arrest and Detention⁹

Migrants, as with nationals, have the right to liberty and to freedom from arbitrary detention, according to Articles 3 and 9 of the UDHR, Article 9 of the ICCPR, and Article 16 of the Migrant Workers Convention. This has been reaffirmed by the Human Rights Committee in General Comment No 8, which states that these provisions are also applicable in cases of immigration control. Migrant workers around the world face arrest on grounds such as irregular State border crossing, use of false documents, leaving of their residence without authorisation, irregular stay, and breaching or overstaying their conditions of stay (E/CN.4/2003/85 of the Special Rapporteur on Migrants). While the arrests may be within the law, the motivation behind arrests of migrants is often not related to the actual breaking of immigration law. Crackdowns and arrests of migrants are used as a deterrent for potential migrants, as a political

show to campaign for support, or to persuade the population that the government is actively fighting terrorism and protecting national security. There has been a pattern towards an increase in the use of detention by governments, either as an administrative measure pending deportation or expulsion, or under criminal law for acts such as overstaying, breaching conditions of stay, or use of false documents. In her reports, the UN Special Rapporteur has criticised the high degree of discretion and the broad powers to detain, which are given to immigration and law enforcement officials in many countries and which can give rise to abuses. She has expressed concern about prolonged detention periods, the arbitrary nature of detention decisions, detention of trafficking victims, overcrowding and poor hygienic conditions, and the absence of legal assistance and judicial review procedures.

The UNHCR has developed Guidelines on the Detention of Asylum Seekers, but there are no such guidelines for the detention of migrants. Nevertheless, the conditions of detention of migrants should be consistent with the Standard Minimum Rules for the Treatment of Prisoners (www.unhchr.ch/html/menu3/b/h_comp36.htm) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988. (www.unhchr.ch/html/menu3/b/h_comp36.htm). According to the latter, all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person (Principle 1). Principle 6 states, “No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatsoever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment”. Principle 8 states, “Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from convicted criminal prisoners”. According to Principle 14 of the Body of Principles and Article 16.5 of the Migrant Workers Convention, a migrant who does not adequately speak or understand the language is entitled to receive the necessary information promptly and in a language which he or she understands, and to have the assistance, if necessary, of an interpreter, free of charge, in connection with legal proceedings subsequent to his or her arrest.

Principle 15 of the Body of Principles, the Migrant workers convention and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (Article 10) establish that migrants have the right to communicate with the appropriate diplomatic authorities without delay regarding the situation surrounding their arrest or detention and that migrants should have adequate access to the legal and judicial system of the receiving states (Article 9). The practice is rooted in the reciprocal interest of all States to safeguard their

Human rights treaties

The most important basis for the legal and normative framework affecting migrants is to be found in the Universal Declaration of Human Rights and seven UN human rights treaties which give legal effect to the rights in the Declaration: the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 1966 International Covenant on Civil and Political Rights; the 1966 International Covenant on Economic, Social and Cultural Rights; the 1979 Convention on the Elimination of All Forms of Discrimination against Women; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1989 Convention on the Rights of the Child, and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

nationals abroad. The importance of this practice has grown in the contemporary world as labour migration – both regular and irregular – has increased, and some embassies now provide a range of services to migrant workers.

In addition, the UN Working Group on Arbitrary Detention (WGAD) has adopted Deliberation No 5 concerning the situation of immigrants and asylum seekers, recommending that a maximum period of detention should be set by law and that custody may “in no case” be prolonged or indefinite. (WGAD Deliberation No. 5 concerning the situation regarding immigrants and asylum-seekers E/CN.4/2000/4, 28 December 1999)

6. Concluding Remarks

Most of the human rights norms protect migrants’ rights after they have entered a country and while they are in the country of destination but are not articulated in a clear and accessible way when referring to actual migration and deportation. The articulation of the rights of migrants during arrest, detention and deportation is dispersed across a number of treaties, customary law provisions and non-binding agreements. This results in a lack of consistency in the implementation of the provisions, with the result that migrants’ rights are afforded less respect. This is particularly worrying when states are increasingly managing migration by defining ever more specific categories of admissible and non-admissible non-citizens, by removing non-citizens whom they decide they do not want, and by making certain benefits and opportunities only available to citizens. States are expanding the categories of non-desirable non-citizens and have increasing support to do this in the name of “the war on terror”. Post 9/11 the UN Security Council adopted resolution 1373 calling on States to prevent the movement of terrorists or terrorists groups by effective border controls and controls of issuance of identity papers and travel documents. It is therefore crucial that migrants’ rights during arrest, detention and deportation be more clearly articulated and, most importantly, more systematically applied.

Endnotes

¹International Covenant on Civil and Political Rights (ICCPR) Article 12(2) and (4), the Migrant Workers Convention Article 8 (1) and (2) and the Convention on the Rights of Child (CRC) Article 10 (2) Article 12(2) of the International Covenant on Civil and Political Rights contains a similar provision, while article 12(4) guarantees that “no one shall be arbitrarily deprived of the right to enter his own country”.

²This should include the right to return to one’s country of origin, one’s country of nationality and one’s country of habitual residence. (“Living in the Shadows, A Primer on the Human Rights of Migrants”, Amnesty International 2006.)

³General Comment No. 27: Freedom of movement (Art.12), 02/11/99. CCPR/C/21/Rev.1/Add.9, General Comment No. 27. (General Comments)

⁴ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers was signed on 13 January 2007 in Cebu, the Philippines, by the heads of state and governments of ASEAN including five of the GMS countries i.e. Thailand, Burma, Lao PDR, Cambodia and Vietnam.

⁵This decision could thus be applied to migrant workers who are injured or contract diseases through negligence on the part of the State to enforce proper occupational health and safety standards.

⁶Report of the Special Rapporteur on the human rights of migrants, Ms. Gabriela Rodríguez Pizarro, E/CN.4/2005/85, 27 December 2004, para.75.

⁷Council of Europe Recommendation 1547 (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, and Council of Europe: Twenty Guidelines on Forced Return, September 2005. Last accessed at: <http://www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Foreigners_and_citizens/Asylum%2C_refugees_and_stateless_persons/Texts_and_documents/Comments%20on%20twenty%20guidelines%20forced%20return%202005.pdf>.

⁸The Berne Initiative, International Agenda for Migration Management: common understandings and effective practices for a planned, balanced, and comprehensive approach to the management of migration, Berne, 16-17 December 2004, pp.55-56.

⁹This section draws on information from: International migration and human rights, A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, by Stefanie Grant Harrison Grant Solicitors, Global Commission on International Migration, September 2005.

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