



# Legal Frameworks And Accountability Mechanisms For Preventing Arbitrary Detention In Immigration Enforcement

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## Abstract

Arbitrary detention in immigration enforcement has remained one of the primary concerns that collide with human rights, characterizing a violation of the right to liberty and freedom, hence, challenging the principles of due process, fairness, and the rule of law. Therefore, the current study has explored the topic from an international outlook by inspecting the existing legal frameworks and accountability mechanisms for preventing arbitrary detention in immigration enforcement. It was noted that international policies/frameworks like the “Universal Declaration of Human Rights” (UDHR), the “International Covenant on Civil and Political Rights” (ICCPR), and the “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (CAT) all advocate for the prevention of arbitrary detention, clearly defining it as a violation of human rights which is subject to legal procedures. Besides, multiple other international conventions for the rights of migrants have also dictated that the migrants should not be subjected to arbitrary arrest or detention that goes against the law or violate human rights by challenging their freedom and liberty. Overall, the present work has outlined distinct facets of arbitrary detention in immigration enforcement expanding on the international legal dialogues and accountability mechanisms for preventing such arrests. The study suggests that by embracing alternatives to detention, strengthening oversight mechanisms, and promoting dialogue and cooperation at the national, regional, and international levels, stakeholders can work together to ensure that immigration enforcement upholds fundamental principles of fairness, justice, and respect for human rights, thereby fostering a more inclusive and humane approach to managing migration.

**Received: 08/08/2025**

**Accepted: 15/02/2026**

**Published: 04/04/2026**

## Introduction

In contemporary societies, the management of immigration is a complex and multifaceted challenge (D. Flynn, 2005). In this regard, one of the foremost issues is immigration enforcement (Hernandez-Truyol & Johns, 1997), which although is indeed crucial for maintaining national security and upholding sovereignty, often intersects with fundamental human rights principles, particularly concerning the detention of individuals (Brouwer & Kumin, 2002). The case of arbitrary detention in immigration enforcement has remained one of the primary concerns of human rights which collides with its basic principles (Mazzeinghy, 2020). At its core, arbitrary detention characterizes a violation of the right to liberty and freedom, challenging the principles of due process, fairness, and the rule of law (Bast et al., 2020; OHCHR, 2024a).

The legal frameworks and accountability mechanisms surrounding immigration enforcement have a decisive role in safeguarding against arbitrary detention (Cornelisse, 2010). Thus, to ensure respecting the rights and dignity of migrants, governments are required to balance the imperative to control borders and regulate immigration (M. Flynn, 2012). This necessitates robust legal frameworks that provide clear guidelines for immigration authorities while ensuring accountability for any breaches of rights or abuses of power (Gammeltoft-Hansen, 2013).

One of the foundational principles underpinning the prevention of arbitrary detention is the rule of law (Asta, 2020). The rule of law dictates that governmental actions must be based on clear and transparent laws, applied impartially and consistently to all individuals within a jurisdiction (Costa & Zolo, 2007; O'Donnell, 2004). In the context of immigration enforcement, adherence to the rule of law is critical for ensuring that detention decisions are made according to established legal criteria rather than arbitrary or discriminatory

factors (Motomura, 2007).

International human rights laws offer an inclusive framework to address arbitrary detention in immigration enforcement (Costello, 2012). Instruments such as the Universal Declaration of Human Rights (UDHR) (UN, 1948), the International Covenant on Civil and Political Rights (ICCPR) (UN, 1967), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (UN, 1984) establish fundamental rights and freedoms pertinent to all individuals, irrespective of their immigration status. These rights include the security of persons and their right to liberty, the prohibition of arbitrary detention, and the principle of “*non-refoulement*”, prohibiting the return of individuals to countries where they are expected to encounter torture or persecution.

Apart from the above, regional human rights bodies, such as the Inter-American Court of Human Rights (IACtHR) or the European Court of Human Rights (ECtHR) performs a central part in interpreting and applying human rights norms within their respective jurisdictions. These bodies have issued numerous rulings and judgments concerning immigration detention, clarifying the legal standards and procedural safeguards that ought to be observed for preventing arbitrary detention and protecting migrants’ rights. In this regard, accountability mechanisms are integral to ensuring compliance with legal standards and safeguarding against abuses of power in immigration enforcement (Costello & Mann, 2020). In accordance with Johansen (2020), effective accountability requires transparency and mechanisms for redress and remedy for individuals who have been subjected to arbitrary detention or other human rights violations. Governmental bodies, such as ombudsman institutions (Reif, 2004) and human rights commissions (Carrera & Stefan, 2018), play a critical role in monitoring immigration enforcement practices, investigating complaints, and making recommendations for reform. Furthermore, multiple international organizations collaboratively and independently work to safeguard and advocate for migrants’ rights and fair immigration enforcement protocols. For instance, distinct organizations or agencies of the United Nations (UN) partook in the management of migration practices, such as the International Organization for Migration (IOM) works for ensuring “*orderly and humane*” management of migration and its related issues to seek practical solutions (IOM-UN Migration, 2024b). Another example is the United Nations High Commissioner for Refugees (UNHCR) (2024) which engages in protecting refugees, displaced and stateless people by standing up for their rights. Besides, the Human Rights Council has also developed Universal Periodic Review (UPR) mechanisms that obligates UN member states to peer review their human rights records to assist in warranting adherence to the accepted protocols (OHCHR, 2024b).

In addition to governmental oversight mechanisms, civil society organizations and non-governmental organizations (NGOs) play a vital role in holding authorities accountable for their actions and advocating for the rights of migrants (Ambrosini & Van der Leun, 2015; DeBono, 2018; Taran, 2001). With consistent efforts and research, these organizations advocate for the misuse of power, challenge discriminatory practices, and push for systemic reforms to ensure that immigration enforcement is conducted as per human rights principles and the rule of law.

All in all, the prevention of arbitrary detention in immigration enforcement requires a robust legal framework supported by effective accountability mechanisms at the international, regional, and national levels. By upholding the rule of law, respecting human rights norms, and promoting transparency and accountability, governments can fulfill their obligations to regulate immigration while safeguarding the rights and dignity of all individuals, regardless of their immigration status. In this paradigm, the present study offers an overview of the existing legal frameworks and accounting mechanisms for preventing arbitrary detention in immigration enforcement from an international outlook to assess the current standing of the legal aspects of this topic.

### **Overview of International Legal Frameworks**

The international legal landscape concerning the prevention of arbitrary detention in immigration enforcement is shaped by a complex interplay of treaties, conventions, jurisprudence, and state practice (Have, 2018). The Universal Declaration of Human Rights (UDHR) offered by the UN (1948) serves as a foundational document in the protection of human rights, including the right to liberty and security of people. Article 9 of the UDHR explicitly prohibits arbitrary detention, stating that “*No one shall be subjected to arbitrary arrest, detention or exile.*” This provision establishes a clear normative standard applicable to all states, regardless of their specific legal systems or immigration policies.

Building upon the principles established in the UDHR, the International Covenant on Civil and Political Rights (ICCPR) provides further elaboration on the right to liberty and the prohibition of arbitrary detention (UN, 1967). Article 9(1) of the ICCPR dictates that:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Hence, this point and the entire article 9 reaffirm the right to liberty and security of a person, specifying that detention must not be arbitrary and outlining procedural safeguards, such as the right to be promptly informed of the reasons for arrest and the right to challenge the lawfulness of detention before a court.

Additionally, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (UN, 1984), also known as the UNCAT treaty, contains provisions relevant to immigration detention. Article 3(1) of the CAT states:

“No State Party shall 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.”

This point clearly prohibits the expulsion, return (“refoulement”), or extradition of individuals to countries where they face a real risk of torture. This principle of non-refoulement has been recognized as a fundamental norm of customary international law and is considered binding on all states, irrespective of their ratification status of the CAT.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN, 1990) also poses that migrants must be given the same rights as nationals. Article 16(4) states that:

“Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.”

The above point and Article 16 as a whole, clearly communicate on the issue of arbitrary arrest or detention of migrants and their rights in certain scenarios that must be respected by national and international bodies while immigration management. Multiple other international policies, laws, or frameworks have also advocated the prevention of arbitrary detention under international human rights that involve the “*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*” (UN, 1988), “*Convention relating to the Status of Refugees*” (UN, 1951), “*Protocol relating to the Status of Refugees*” (UN, 1966), and the “*United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court - Report of the Working Group on Arbitrary Detention (A/HRC/30/37)*” (UN, 1988). Most recently, the IOM-UN Migration (2024) has developed an “*IOM Strategic Plan 2024-2028*” which has the prime incentive to deliver “safe, orderly, and regular migration” to support vulnerable populations. Developed with the joint consultation of United Nations (UN) agencies, the International Organization for Migration (IOM), its member states, and migrants themselves, this plan is aimed at guiding the Organization’s activities through 2028. To put it succinctly, all these policies advocate for unjust arbitrary detention, clearly characterizing it as a violation of human rights subject to legal action.

Apart from these international treaties, regional human rights instruments also contribute to the international legal framework governing immigration detention. For example, the European Convention on Human Rights (ECHR) establishes the right to liberty and security of person in Article 5, with the European Court of Human Rights (ECtHR) interpreting and applying these provisions in the context of immigration detention cases. Similarly, the American Convention on Human Rights (ACHR) protects the right to personal liberty and due process in Article 7, with the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) providing oversight and jurisprudence on matters related to immigration detention in the Americas. Besides, Article 14(1) from the Arab Charter on Human Rights (2004) declares it in plain wording that:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.”

Article 14(7) further enforces it by stating:

“Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.”

This signifies the critical value of preventive arbitrary detention practices and compensatory measures as stressed in almost every document or policy. Thus, it can be asserted that internationally and nationally, there

are multiple legal frameworks that directly discuss the issue of arbitrary detention and what protocols should be adopted during immigration enforcement so as not to violate anyone's right to liberty and freedom or follow any other unjust approach that results in non-adherence to any basic human right for migrants.

### **Accountability Mechanisms**

As per Reichersdorfer et al., (2013), accountability can be conceptualized as institutionalized mechanisms that obligate actors to explicate their conduct to different forums, posing questions and imposing sanctions. Effective accountability mechanisms are essential for ensuring compliance with international legal standards and safeguarding against abuses of power in immigration enforcement (Karamanidou & Kasperek, 2020). At the international level, treaty monitoring bodies, such as the Human Rights Committee (HRC) and the Committee against Torture (CAT Committee), play a critical role in reviewing states' compliance with their obligations under the ICCPR and CAT, respectively. These bodies examine states' reports, conduct country visits, and issue recommendations for improving immigration detention practices and ensuring respect for migrants' rights.

Regional human rights bodies also contribute to accountability efforts by adjudicating individual complaints and issuing binding judgments on immigration detention cases. For example, the European Court of Human Rights (ECtHR) has issued landmark rulings establishing minimum standards for immigration detention, such as the requirement for individualized assessments of detention necessity and the prohibition of indefinite detention. Similarly, the Inter-American Court of Human Rights (IACtHR) has affirmed the principle of non-refoulement and the right to due process in immigration proceedings through its jurisprudence.

Finally, national legal systems further have a crucial role in ensuring accountability for immigration enforcement practices (Margulies, 2010). Judicial review mechanisms allow individuals to challenge the lawfulness of their detention and seek remedies for violations of their rights (Johnson, 2019). In some jurisdictions, specialized immigration tribunals or administrative review bodies oversee detention decisions and provide independent oversight of immigration enforcement activities (Chacón, 2017). Additionally, national human rights institutions, ombudsman offices, and parliamentary committees may conduct investigations into allegations of abuse or misconduct by immigration authorities, contributing to transparency and accountability in immigration enforcement.

### **Existing Trends and Challenges**

Despite significant progress in developing international legal frameworks and accountability mechanisms for preventing arbitrary detention in immigration enforcement, several challenges persist. One challenge relates to the lack of uniformity and consistency in states' implementation of international legal standards (Aust & Nolte, 2016; Oxman, 1991). Variations in national laws, policies, and practices regarding immigration detention (Bauer & Johnston, 2020; Moinester, 2018) can lead to disparities in the protection of migrants' rights and undermine efforts to ensure accountability for abuses.

Another challenge concerns the treatment of vulnerable groups, such as asylum seekers, refugees, children, and victims of trafficking, in immigration detention (Acer & Goodman, 2009). These individuals may face heightened risks of harm, including psychological trauma (Steel et al., 2006), physical violence (Cleveland et al., 2018), and exploitation (Brunovskis & Surtees, 2019), due to their unique circumstances and vulnerabilities. States have a duty to provide special protection and assistance to these groups in accordance with international human rights and refugee law. However, despite this, gaps in protection persist, particularly in cases of prolonged or indefinite migration detention, especially in countries suffering from conflicts, security or political instability, or the absence of the rule of law, suggesting a lack of regulation in migration detention (IOM, 2017).

Additionally, the securitization of migration (Scheel, 2022) and the proliferation of restrictive immigration policies (Ivarsflaten, 2005) have contributed to a climate of fear, xenophobia, and hostility toward migrants in many countries (Crush & Ramachandran, 2010). Heightened border security measures, such as border walls, detention centers, and increased surveillance, have been accompanied by rhetoric demonizing migrants as threats to national security and economic stability (Beare, 2012; Wyszynski et al., 2020). These trends and stereotypical portrayals can potentially fuel discriminatory attitudes and practices, exacerbating the risk of arbitrary detention and other human rights violations against migrants that ought to be effectively tackled.

### **Conclusion**

In drawing things to a close, the current study has underscored the importance of robust legal frameworks

and effective accountability mechanisms in preventing arbitrary detention in immigration enforcement from an international perspective. Through an examination of international legal instruments, regional jurisprudence, and state practices, it becomes evident that adherence to the rule of law and respect for human rights principles are indispensable in safeguarding the rights and dignity of migrants. On this horizon, although significant progress has been made in developing norms and standards for immigration detention, challenges still persist, including variations in implementation, the treatment of vulnerable groups, and the securitization of migration. However, by embracing alternatives to detention, strengthening oversight mechanisms, and promoting dialogue and cooperation at the national, regional, and international levels, stakeholders can work together to ensure that immigration enforcement upholds fundamental principles of fairness, justice, and respect for human rights, thereby fostering a more inclusive and humane approach to managing migration.

### ***Recommendations for Improvement***

To address the existing challenges and strengthen the protection of migrants' rights in immigration enforcement, the current study recommends that:

- i. States should ensure that their immigration laws, policies, and practices are consistent with international human rights standards, including the prohibition of arbitrary detention and the principle of non-refoulement.
- ii. States should prioritize alternatives to detention for migrants, such as community-based support programs, case management services, and regular reporting requirements, to minimize the use of detention and mitigate its harmful effects on individuals and families.
- iii. Governments ought to establish effective oversight mechanisms to monitor immigration detention facilities, investigate allegations of abuse or misconduct, and hold accountable those responsible for violations of migrants' rights.
- iv. Civil society organizations, human rights defenders, and migrant rights advocates should continue to raise awareness about the human rights implications of immigration detention, document abuses, and mobilize support for policy reforms aimed at ensuring dignity, equality, and justice for all migrants.
- v. Finally, the international community should provide support and assistance to countries facing significant migratory pressures, including through capacity-building, technical assistance, and financial resources, to enhance their ability to manage migration in a rights-respecting manner.

By implementing these recommendations and reaffirming their commitment to upholding international human rights principles, states can enhance the protection of migrants' rights and prevent arbitrary detention in immigration enforcement, advancing the goal of a more just and equitable migration system.

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