

ANNEX III: Abduction & Detention – Clarification

Illegal/arbitrary detention vs. abduction

Some definitions in the MRM context

Detention

- **Detention** – The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN General Assembly Resolution A/RES/43/173, 1988) defines detention as follows:
 - ‘Detained person’ means any person deprived of personal liberty except as a result of conviction for an offense;
 - ‘Detention’ means the condition of detained persons as defined above.

The term should therefore normally be used for pre-sentence detention (‘imprisonment’ being used post-sentence).

- **Deprivation of liberty** -- The UN Rules for the Protection of Juveniles deprived of their Liberty (Article 11) (1990) define deprivation of liberty as: "any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority."
- Detention refers to acts that in principle come within the lawful functions of a public servant. We therefore suggest using this term (detention) when referring to the holding of a child by a state authority as part of its legitimate law enforcement functions.
- Detention is not illegal per se, and must conform to both nationally and internationally binding legal instruments. In the case of children, detention should always be a measure of last resort and for the shortest appropriate period of time as per Article 37 b) of the CRC.¹
- **Last resort** means "deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response" (Rule 17(c), UN Rules on the Administration of Juvenile Justice).

Illegal detention

Normally, determining whether detention is ‘legal’ or ‘illegal’ requires an analysis of conduct in the light of **national law** in force in that given country (e.g., legal basis for detention, guarantees of fair trial, etc.). In addition, it is worth remembering that acts that are legal under national law may be human rights violations or even international crimes under international law.

Arbitrary detention

- The Human Rights Committee has found that: “[a]rbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.” The Human Rights Committee provides that any measure of administrative detention must be based on objective grounds and necessity and proportionality criteria, and shall be a reasonable measure. If the criteria which make the administrative detention necessary and reasonable cease to exist, the detention becomes arbitrary and therefore unlawful in international law.²
- Therefore, the term ‘arbitrary’ can be understood as that reserved for acts that superficially appear authorized by law, but are illegitimate in the circumstances because they are disproportionate, violate the ‘last resort’ principle, are done in bad faith, based on insufficient

¹ CRC Article 37(b): No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

² *A v Australia*, HRC Case No. 560/1993.

evidence, etc. From a strictly logical point of view, an act can be both arbitrary and illegal, or an act that is prima facie legal becomes illegal if it is arbitrary.

Abduction

Abducting means seizing and taking away a person by force or fraud. Abduction is always illegal and, in essence, criminal conduct. Article 35 of the CRC requires States Parties to take all appropriate measures “to prevent the abduction of [...] children for any purpose or in any form.”

Unlike detention, abduction generally implies that the act is done by an ordinary citizen, or eventually a public servant whose acts are far removed from any plausible legal authority with due legal process.

Enforced disappearance

Article 2 of the International Convention on the Protection of All Persons against Enforced Disappearance (2006) supports the argument that detention and abduction are different kinds of deprivation of liberty: *“for the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”*

If the detention or the abduction is *“followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law,”* we could speak of enforced disappearance.