



UNHCR

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Haut Commissariat des Nations Unies pour les réfugiés

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RE: Submission of policy guidance in relation to Proposal “A New Framework for Alternatives to Detention and Detention”

Dear Sir/Madam,

The UNHCR Representation for the Nordic and Baltic Countries is pleased to submit to the Ministry of Justice of Sweden the following policy guidance in relation to the legislative proposal in the inquiry “A New Framework for Alternatives to Detention and Detention”:

- UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, <https://www.refworld.org/policy/legalguidance/unhcr/2012/en/87776>.
- UN High Commissioner for Refugees (UNHCR), *Unlocking rights: towards ending immigration detention for asylum-seekers and refugees*, September 2024, <https://www.refworld.org/policy/polrec/unhcr/2024/en/148655>.
- UN High Commissioner for Refugees (UNHCR), *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, <https://www.refworld.org/policy/legalguidance/unhcr/2017/en/115250>.

UNHCR appreciates the constructive dialogue with the Swedish Government, and hope that the attached policy guidance be taken into consideration as the legislative proposal is finalised. We thank you for your consideration of this important matter and remain at your disposal for any clarification required.

Yours sincerely,

Annika Sandlund
Representative

UNHCR's position regarding the detention of refugee and migrant children in the migration context.

The purpose of this note is to provide clarification about UNHCR's position regarding the detention of children, unaccompanied, separated or in families for immigration related purposes. The scope of this note includes refugee and asylum-seeking children as well as migrant children.

UNHCR's position on the detention of children in the immigration context is developed in the 2012 *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Detention Guidelines)¹ it has been reiterated and expanded in other recent policy papers on the issue; in particular, in UNHCR's *Global Strategy Beyond Detention 2014-2019* (Global Strategy)², and was clearly framed by the High Commissioner on occasion of the celebration of CRC's 25th Anniversary in 2014: "The practice of putting children in immigration detention is in violation of the CRC in many respects and it should be stopped," he said.³

As affirmed by Art. 3 of the CRC, the best interest of the child shall be a primary consideration in all the measures affecting the child,⁴ overall an ethic of care, and not an enforcement, needs to govern the actions taken, since the extreme vulnerability of minors.⁵ A best interests' assessment procedure should be conducted, which may be in the context of the existing child protection system of the States, where applicable. The principles of minimal intervention and the best interest of the child should govern any measures taken by States. Consequently, unaccompanied or separated children should not be detained; instead, appropriate care arrangements remain the best measure, as liberty and freedom of movement of children should be always the preferred solution.⁶

Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.⁷ Furthermore, children should never be criminalised or subject to punitive measures because of their parents' migration status.⁸ Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements as determined by the competent childcare authorities.

¹ Available at: <http://www.refworld.org/docid/503489533b8.html>. The Detention Guidelines further restate, in paragraph 51 and successive, the provisions of the Convention on the Rights of the Child (CRC) regarding international obligations in relation to children and the guiding principles for their protection.

² All detention related documents, policies and tools developed by UNHCR (and jointly with partners) under the framework of the Global Strategy can be found in: <http://www.unhcr.org/detention.html>. Further documents on UNHCR's position in relation to the Detention of persons of concern can be found in: <http://www.refworld.org/detention.html>. For UNHCR staff only, please refer for further guidance to UNHCR's Protection Manual, sections B9 and B10.

³ UN Refugee Agency calls on States to end the immigration detention of children on the 25th anniversary of the Convention on the Rights of the Child, November 2014, available at <http://www.unhcr.org/news/press/2014/11/546de88d9/un-refugee-agency-calls-states-end-immigration-detention-children-25th.html>

⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para 51 available at: <http://www.refworld.org/docid/503489533b8.html>

⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para 52 available at: <http://www.refworld.org/docid/503489533b8.html>

⁶ Executive Committee of the High Commissioner's Programme Standing Committee, para F, EC/66/SC/CRP.12, 3 June 2015

⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para 54-57 available at: <http://www.refworld.org/docid/503489533b8.html>

⁸ See, *A home away from home for refugee and migrant children*, Advocacy Brief, UNICEF, August 2016, available at: http://www.unicef.org/ceecis/A_home_away_from_home_29_08_2016.pdf

This is particularly critical as recent studies⁹ have indicated that detention of children can undermine their psychological and physical well-being and compromise their cognitive development. Furthermore, children held in detention are at risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder such as insomnia, nightmares and bedwetting.¹⁰ There is indeed strong evidence that detention has a profound and negative impact on children's health and development, regardless of the conditions in which children are held, and even when detained for short periods of time or with their families. The risk of exposure to others forms of harm, including sexual and gender-based violence, are also significant in many detention contexts. Furthermore, there is no evidence that detention of children serves the aim of deterring refugee or asylum-seeker movements or irregular migration.

In this context, UNHCR's position is that *children should not be detained*¹¹ for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and *detention is never in their best interests*. *Appropriate care arrangements* and *community-based programmes* need to be in place to ensure adequate reception of children and their families.

Therefore, UNHCR acknowledges and welcomes the varied State practice in providing care arrangements and alternatives to detention for children and families and has compiled a number of examples in its Options Paper 1: *Options for governments on care arrangements and alternatives to detention for children and families*.¹² In particular, placement options within the community, with proper case management support, can further strengthen compliance with asylum and migration processes and foster integration prospects, where relevant.¹³

UNHCR's position is in accordance with international standards¹⁴ as stated in, for example:

- UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005 (CRC/GC/2005/6) – paragraph 61 “Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.”¹⁵
- UN Committee on the Rights of the Child (CRC), *Report on the 2012 Day of General Discussion: The rights of all children in the context of international migration* – paragraph 78 “Children should not be criminalized or subject to punitive measures because of their or their parents’ migration status. The detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best

⁹ Human Rights Watch (HRW) has documented, over more than 10 years in Europe and beyond, serious violations of children's rights arising from immigration detention of children; highlighting that children may be arbitrarily detained, held in cells with unrelated adults, and subjected to brutal treatment by police, guards and other authorities and are often held in poor conditions that fall far short of international standards governing appropriate settings for children deprived of their liberty. See: <https://www.hrw.org/topic/childrens-rights/refugees-and-migrants>.

¹⁰ For more information on the negatives effects of detention on children, see: <http://endchilddetention.org/impact/> and also <http://www.fmreview.org/detention/farmer.html>.

¹¹ See Detention Guidelines, paragraph 51. Please note that no other qualifications should be added to the baseline position of non-detention of children for immigration related purposes. References to the application of Art.37(b), “exceptional circumstances / measure of last resort”, are not appropriate for cases of detention of any child for immigration related purposes. It is understood from the commentaries of the CRC (see below), that while Art. 37 (b) may apply in other contexts (such as in cases of children in conflict with the law – see CRC/C/GC/10 from 2007), its application to detention in the immigration context would be in conflict with the principle of best interests of the child.

¹² Available at: <http://www.refworld.org/docid/5523e8d94.html>

¹³ For further reference please see Summary of Deliberations, Second Global Roundtable on Reception and Alternatives to Detention, April 2015, Toronto, Canada, at: <http://www.unhcr.org/55df05769.html>

¹⁴ At regional level, this position has been recently reaffirmed by the Inter-American Court of Human Rights (IACtHR) in its Advisory Opinion (OC-21/14) on the “Rights and guarantees of children in the context of migration and/or in need of international protection”, see paragraph 6, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf

¹⁵ Available at: <http://www.refworld.org/docid/42dd174b4.html>

interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.”¹⁶

- UN Special Rapporteur on Torture, *Thematic Report on torture and ill-treatment of children deprived of their liberty*, 5 March 2015 (A/HRC/28/68) – paragraph 80 “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 [...] The Special Rapporteur shares the view of the Inter-American Court of Human Rights that, when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family.”¹⁷

UNHCR will continue to advocate for the ending of child detention as reflected in the first goal of its Global Strategy and to support governments in developing care arrangements and alternatives to detention for children and families in the asylum and migration context.

UNHCR
Division of International Protection
January 2017

¹⁶ Available at:

<http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>

¹⁷ Available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>

THE RIGHTS TO LIBERTY AND SECURITY
OF PERSON AND TO FREEDOM OF
MOVEMENT APPLY TO
ASYLUM-SEEKERS

DETENTION
MUST BE IN
ACCORDANCE
WITH AND
AUTHORISED
BY LAW

INDEFINITE
DETENTION IS
ARBITRARY AND
MAXIMUM LIMITS
ON DETENTION
SHOULD BE
ESTABLISHED IN
LAW

DECISIONS TO
DETAIN OR TO
EXTEND
DETENTION
MUST BE
SUBJECT
TO MINIMUM
PROCEDURAL
SAFEGUARDS

THE SPECIAL CIRCUMSTANCES AND NEEDS OF
PARTICULAR ASYLUM-SEEKERS MUST BE TAKEN
INTO ACCOUNT

CONDITIONS OF
DETENTION MUST
BE HUMANE AND
DIGNIFIED

DETENTION SHOULD BE SUBJECT
TO INDEPENDENT MONITORING
AND INSPECTION

Detention Guidelines

Guidelines on the Applicable Criteria and Standards
relating to the Detention of Asylum-Seekers
and Alternatives to Detention



DETENTION
MUST NOT BE
DISCRIMINATORY

DETENTION MUST NOT BE ARBITRARY,
AND ANY DECISION TO DETAIN MUST BE
BASED ON AN ASSESSMENT OF THE
INDIVIDUAL'S PARTICULAR CIRCUMSTANCES

THE RIGHT
TO SEEK
ASYLUM MUST
BE RESPECTED



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UNHCR issues the *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines replace UNHCR, *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, February 1999.

These Guidelines are intended to provide guidance to governments, parliamentarians, legal practitioners, decision-makers, including the judiciary, as well as other international and national bodies working on detention and asylum matters, including non-governmental organisations, national human rights institutions and UNHCR staff.



The Guidelines are available online at:
<http://www.unhcr.org/refworld/docid/503489533b8.html>

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Introduction

1. The rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement. While acknowledging the array of contemporary challenges to national asylum systems caused by irregular migration as well as the right of States to control the entry and stay of non-nationals on their territory, subject to refugee and human rights standards,¹ these Guidelines reflect the current state of international law relating to the detention of asylum-seekers and are intended to guide:
 - (a) governments in their elaboration and implementation of asylum and migration policies which involve an element of detention; and
 - (b) decision-makers, including judges, in making assessments about the necessity of detention in individual cases.
2. In view of the hardship which it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should normally be avoided and be a measure of last resort. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review. Detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. Respecting the right to seek asylum entails instituting open and humane reception arrangements for asylum-seekers, including safe, dignified and human rights-compatible treatment.²

3. There are various ways for governments to address irregular migration – other than through detention – that take due account of the concerns of governments as well as the particular circumstances of the individual concerned.³ In fact, there is no evidence that detention has any deterrent effect on irregular migration.⁴ Regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain. Apart from ensuring compliance with human rights standards, governments are encouraged to review their detention policies and practices in light of the latest research in relation to alternatives to detention (some of which is documented in these Guidelines). UNHCR stands ready to assist governments in devising alternative to detention programmes.

Scope

4. These Guidelines reflect the state of international law relating to detention – on immigration-related grounds – of asylum-seekers and other persons seeking international protection. They equally apply to refugees and other persons found to be in need of international protection should they exceptionally be detained for immigration-related reasons. They also apply to stateless persons who are seeking asylum, although they do not specifically cover the situation of non-asylum-seeking stateless persons,⁵ persons found not to be in need of international protection⁶ or other migrants, although many of the standards detailed herein may apply to them *mutatis mutandis*. This is particularly true with regard to non-refugee stateless persons in the migratory context who face a heightened risk of arbitrary detention. The Guidelines do not cover asylum-seekers or refugees imprisoned on the basis of criminal offences.

Terminology



DETENTION

5. For the purposes of these Guidelines, “**detention**” refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.
6. The place of detention may be administered either by public authorities or private contractors; the confinement may be authorised by an administrative or judicial procedure, or the person may have been confined with or without “lawful” authority. Detention or full confinement is at the extreme end of a spectrum of deprivations of liberty (see Figure 1). Other restrictions on freedom of movement in the immigration context are likewise subject to international standards.⁷ Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of “*degree or intensity and not one of nature or substance*”.⁸ While these Guidelines focus more closely on detention (or total confinement), they also address in part measures short of full confinement.
7. Detention can take place in a range of locations, including at land and sea borders, in the “international zones” at airports,⁹ on islands,¹⁰ on boats,¹¹ as well as in closed refugee camps, in one’s own home (house arrest) and even extraterritorially.¹² Regardless of the name given to a particular place of detention, the important questions are whether an asylum-seeker is being deprived of his or her liberty *de facto* and whether this deprivation is lawful according to international law.



Figure 1¹³



ALTERNATIVES TO DETENTION

8. **“Alternatives to detention”** is not a legal term but is used in these Guidelines as short-hand to refer to any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement. As some alternatives to detention also involve various restrictions on movement or liberty (and some can be classified as forms of detention), they are also subject to human rights standards (see Figure 2).



ASYLUM-SEEKER

9. The term **“asylum-seeker”** in these Guidelines refers to persons applying for refugee status pursuant to the definition of a “refugee” in the 1951 Convention and 1967 Protocol relating to the Status of Refugees (“1951 Convention”)¹⁴ or any regional refugee instrument,¹⁵ as well as other persons seeking complementary, subsidiary or temporary forms of protection.¹⁶ The Guidelines cover those whose claims are being considered within status determination procedures, as well as admissibility, pre-screening or other similar procedures. They also apply to those exercising their right to seek judicial review of their request for international protection.



STATELESS PERSON

10. A **“stateless person”** is defined under international law as a person *“who is not considered as a national by any State under the operation of its law.”*¹⁷ An **asylum-seeking stateless person** refers to a stateless person who seeks to obtain refugee status under the 1951 Convention,¹⁸ or another form of international protection.

UNHCR Detention Guidelines

GUIDELINE 1.	The right to seek asylum must be respected		
GUIDELINE 2.	The rights to liberty and security of person and to freedom of movement apply to asylum-seekers		
GUIDELINE 3.	Detention must be in accordance with and authorised by law		
GUIDELINE 4.	Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual's particular circumstances, according to the following:		
	GUIDELINE 4.1 Detention is an exceptional measure and can only be justified for a legitimate purpose	GUIDELINE 4.2 Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose	GUIDELINE 4.3 Alternatives to detention need to be considered
GUIDELINE 5.	Detention must not be discriminatory		
GUIDELINE 6.	Indefinite detention is arbitrary and maximum limits on detention should be established in law		
GUIDELINE 7.	Decisions to detain or to extend detention must be subject to minimum procedural safeguards		
GUIDELINE 8.	Conditions of detention must be humane and dignified		
GUIDELINE 9.	The special circumstances and needs of particular asylum-seekers must be taken into account		
GUIDELINE 10.	Detention should be subject to independent monitoring and inspection		

GUIDELINE 1:

The right to seek asylum must be respected

11. Every person has the right to seek and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm. Seeking asylum is not, therefore, an unlawful act.¹⁹ Furthermore, the 1951 Convention provides that asylum-seekers shall not be penalised for their illegal entry or stay, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence.²⁰ In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. The position of asylum-seekers may thus differ fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry. They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. These factors, as well as the fact that asylum-seekers have often experienced traumatic events, need to be taken into account in determining any restrictions on freedom of movement based on irregular entry or presence.

GUIDELINE 2:

The rights to liberty and security of person and to freedom of movement apply to asylum-seekers

12. The fundamental rights to liberty and security of person²¹ and freedom of movement²² are expressed in all the major international and regional human rights instruments, and are essential components of legal systems built on the rule of law. The Executive Committee of the High Commissioner's Programme (ExCom) has addressed on a number of occasions the detention of asylum-seekers.²³ These rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.²⁴
13. Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees (and asylum-seekers) having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country.²⁵ Article 26 of the 1951 Convention further provides for the freedom of movement and choice of residence for refugees lawfully in the territory.²⁶ Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision.²⁷
14. These rights taken together – the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.

GUIDELINE 3:

Detention must be in accordance with and authorised by law

15. Any detention or deprivation of liberty must be in accordance with and authorised by national law.²⁸ Any deprivation of liberty that is not in conformity with national law would be unlawful, both as a matter of national as well as international law. At the same time, although national legislation is the primary consideration for determining the lawfulness of detention, it is *“not always the decisive element in assessing the justification of deprivation of liberty.”*²⁹ In particular, a specific factor that needs to be considered is the underlying purpose of preventing persons being deprived of their liberty arbitrarily.³⁰
16. Detention laws must conform to the principle of legal certainty. This requires, *inter alia*, that the law and its legal consequences be foreseeable and predictable.³¹ The law permitting detention must not, for example, have retroactive effect.³² Explicitly identifying the grounds for detention in national legislation would meet the requirement of legal certainty.³³
17. Insufficient guarantees in law to protect against arbitrary detention, such as no limits on the maximum period of detention or no access to an effective remedy to contest it, could also call into question the legal validity of any detention.³⁴

GUIDELINE 4:

Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual's particular circumstances

18. Detention in the migration context is neither prohibited under international law *per se*, nor is the right to liberty of person absolute.³⁵ However, international law provides substantive safeguards against *unlawful* (see Guideline 3) as well as *arbitrary* detention. “Arbitrariness” is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability.³⁶ To guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose (see Guidelines 4.1 and 4.2).³⁷ Further, failure to consider less coercive or intrusive means could also render detention arbitrary (Guideline 4.3).
19. As a fundamental right, decisions to detain are to be based on a detailed and individualised assessment of the necessity to detain in line with a legitimate purpose. Appropriate screening or assessment tools can guide decision-makers in this regard, and should take into account the special circumstances or needs of particular categories of asylum-seekers (see Guideline 9). Factors to guide such decisions can include the stage of the asylum process, the intended final destination, family and/or community ties, past behaviour of compliance and character, and risk of absconding or articulation of a willingness and understanding of the need to comply.
20. In relation to alternatives to detention (Guideline 4.3 and Annex A), the level and appropriateness of placement in the community need to balance the circumstances of the individual with any risks to the community. Matching an individual and/or his/her family to the appropriate community should also be part of any assessment, including the level of support services needed and available.

Mandatory or automatic detention is arbitrary as it is not based on an examination of the necessity of the detention in the individual case.³⁸

GUIDELINE 4.1:

Detention is an exceptional measure and can only be justified for a legitimate purpose

21. Detention can only be exceptionally resorted to for a legitimate purpose. Without such a purpose, detention will be considered arbitrary, even if entry was illegal.³⁹ The purposes of detention ought to be clearly defined in legislation and/or regulations (see Guideline 3).⁴⁰ In the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely **public order, public health or national security**.

4.1.1 To protect public order

To prevent absconding and/or in cases of likelihood of non-cooperation

22. Where there are strong grounds for believing that the specific asylum-seeker is likely to abscond or otherwise to refuse to cooperate with the authorities, detention may be necessary in an individual case.⁴¹ Factors to balance in an overall assessment of the necessity of such detention could include, for example, a past history of cooperation or non-cooperation, past compliance or non-compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, the willingness or refusal to provide information about the basic elements of their claim, or whether the claim is considered manifestly unfounded or abusive.⁴² Appropriate screening and assessment methods need to be in place in order to ensure that persons who are *bona fide* asylum-seekers are not wrongly detained in this way.⁴³

In connection with accelerated procedures for manifestly unfounded or clearly abusive claims

23. Detention associated with accelerated procedures for manifestly unfounded or clearly abusive cases must be regulated by law and, as required by proportionality considerations, must weigh the various interests at play.⁴⁴ Any detention in connection with accelerated procedures should only be applied to cases that are determined to be “manifestly unfounded” or “clearly abusive”;⁴⁵ and those detained are entitled to the protections outlined in these Guidelines.

For initial identity and/or security verification

24. Minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks.⁴⁶ At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law (see below).
25. Mindful that asylum-seekers often have justifiable reasons for illegal entry or irregular movement,⁴⁷ including travelling without identity documentation, it is important to ensure that their immigration provisions do not impose unrealistic demands regarding the quantity and quality of identification documents asylum-seekers can reasonably be expected to produce. Also in the absence of documentation, identity can be established through other information as well. The inability to produce documentation should not automatically be interpreted as an unwillingness to cooperate, or lead to an adverse security assessment. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason. Rather, what needs to be assessed is whether the asylum-seeker has a plausible explanation for the absence or destruction of documentation or the possession of false documentation, whether he or she had an intention to mislead the authorities, or whether he or she refuses to cooperate with the identity verification process.

26. Strict time limits need to be imposed on detention for the purposes of identity verification, as lack of documentation can lead to, and is one of the main causes of, indefinite or prolonged detention.
27. While nationality is usually part of someone's identity, it is a complicated assessment and as far as it relates to stateless asylum-seekers, it should be undertaken in a proper procedure.⁴⁸

In order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention

28. It is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection.⁴⁹ However, such detention can only be justified where that information could not be obtained in the absence of detention. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought but would not ordinarily extend to a determination of the full merits of the claim. This exception to the general principle – that detention of asylum-seekers is a measure of last resort – cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

4.1.2 To protect public health

29. Carrying out health checks on individual asylum-seekers may be a legitimate basis for a period of confinement, provided it is justified in the individual case or, alternatively, as a preventive measure in the event of specific communicable diseases or epidemics. In the immigration context, such health checks may be carried out upon entry to the country or as soon as possible thereafter. Any extension of their confinement or restriction on movement on this basis should only occur if it can be justified for the purposes of treatment, authorised by qualified medical personnel, and in such circumstances, only until the treatment has been completed. Such confinement needs to be carried out in suitable facilities, such as health clinics, hospitals, or in specially designated medical centres in airports/borders. Only qualified medical personnel, subject to judicial oversight, can order the further confinement on health grounds beyond an initial medical check.

4.1.3 To protect national security

30. Governments may need to detain a particular individual who presents a threat to national security.⁵⁰ Even though determining what constitutes a national security threat lies primarily within the domain of the government, the measures taken (such as detention) need to comply with the standards in these Guidelines, in particular that the detention is necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight.⁵¹

4.1.4 Purposes not justifying detention

31. Detention that is not pursued for a legitimate purpose would be arbitrary.⁵² Some examples are outlined below.

Detention as a penalty for illegal entry and/or as a deterrent to seeking asylum

32. As noted in Guidelines 1 and 2, detention for the sole reason that the person is seeking asylum is not lawful under international law.⁵³ Illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement. Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms. Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country.⁵⁴ Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.⁵⁵

Detention of asylum-seekers on grounds of expulsion

33. As a general rule, it is unlawful to detain asylum-seekers in on-going asylum proceedings on **grounds of expulsion** as they are not available for removal until a final decision on their claim has been made. Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected.⁵⁶ However, where there are grounds for believing that the specific asylum-seeker has lodged an appeal or introduced an asylum claim merely in order to delay or frustrate an expulsion or deportation decision which would result in his or her removal, the authorities may consider detention – as determined to be necessary and proportionate in the individual case – in order to prevent their absconding, while the claim is being assessed.

GUIDELINE 4.2:

Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose

34. The necessity, reasonableness and proportionality of detention are to be judged in each individual case, initially as well as over time (see Guideline 6). The need to detain the individual is to be assessed in light of the purpose of the detention (see Guideline 4.1), as well as the overall reasonableness of that detention in all the circumstances, the latter requiring an assessment of any special needs or considerations in the individual's case (see Guideline 9). The general principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights.⁵⁷ The authorities must not take any action exceeding that which is strictly necessary to achieve the pursued purpose in the individual case. The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case (see Guidelines 4.3 and Annex A).

GUIDELINE 4.3:

Alternatives to detention need to be considered

35. The consideration of **alternatives to detention** – from reporting requirements to structured community supervision and/or case management programmes (see Annex A) – is part of an overall assessment of the necessity, reasonableness and proportionality of detention (see Guideline 4.2). Such consideration ensures that detention of asylum-seekers is a measure of last, rather than first, resort. It must be shown that in light of the asylum-seeker's particular circumstances, there were not less invasive or coercive means of achieving the same ends.⁵⁸ Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken.⁵⁹
36. Like detention, alternatives to detention equally need to be governed by **laws and regulations** in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement.⁶⁰ The principle of legal certainty calls for proper regulation of these alternatives (see Guideline 3). Legal regulations ought to specify and explain the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement.⁶¹
37. Alternatives to detention that restrict the liberty of asylum-seekers may impact on their human rights and are **subject to human rights standards**, including periodic review in individual cases by an independent body.⁶² Individuals subject to alternatives need to have timely access to effective complaints mechanisms as well as remedies, as applicable.⁶³ Alternatives to detention need to be available not only on paper, but they need to be accessible in practice.

38. Notably, alternatives to detention **should not be used as alternative forms of detention**; nor should alternatives to detention become alternatives to release. Furthermore, they should not become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers.⁶⁴
39. In designing alternatives to detention, it is important that States observe the principle of **minimum intervention** and pay close attention to the specific situation of particular vulnerable groups such as children, pregnant women, the elderly, or persons with disabilities or experiencing trauma (see Guideline 9).⁶⁵

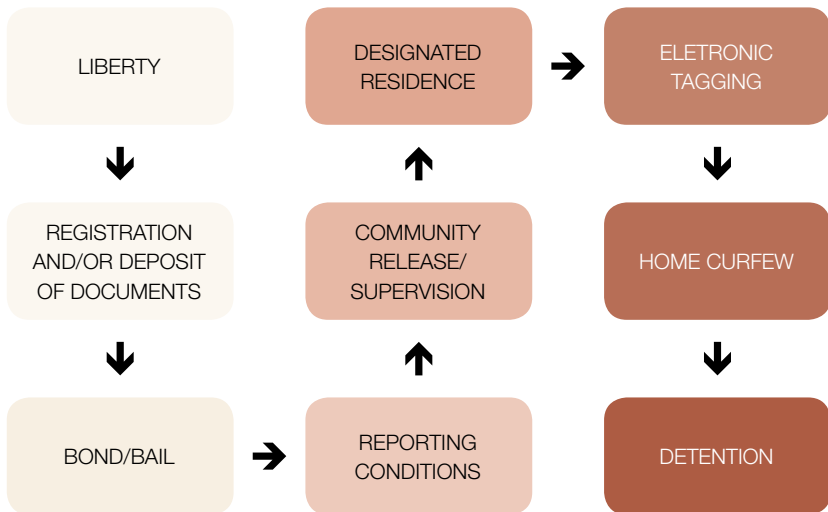


Figure 2⁶⁶

40. Alternatives to detention may take **various forms**, depending on the particular circumstances of the individual, including registration and/or deposit/ surrender of documents, bond/bail/sureties, reporting conditions, community release and supervision, designated residence, electronic monitoring, or home curfew (for explanations of some of these alternatives, see Annex A). They may involve more or less restrictions on freedom of movement or liberty, and are not equal in this regard (see Figure 2). While phone reporting and the use of other modern technologies can be seen as good practice, especially for individuals with mobility difficulties,⁶⁷ other forms of electronic monitoring – such as wrist or ankle bracelets – are considered harsh, not least because of the criminal stigma attached to their use;⁶⁸ and should as far as possible be avoided.
41. Best practice indicates that alternatives are most effective when asylum-seekers are:
- treated with dignity, humanity and respect throughout the asylum procedure;
 - informed clearly and concisely at an early stage about their rights and duties associated with the alternative to detention as well as the consequences of non-compliance;
 - given access to legal advice throughout the asylum procedure;
 - provided with adequate material support, accommodation and other reception conditions, or access to means of self-sufficiency (including the right to work); and
 - able to benefit from individualised case management services in relation to their asylum claim (explained further in Annex A).⁶⁹
42. **Documentation** is a necessary feature of alternative to detention programmes in order to ensure that asylum-seekers (and all members of their families) possess evidence of their right to reside in the community. Documents also serve as a safeguard against (re-)detention; and can facilitate their ability to rent accommodation, and to access employment, health care, education and/ or other services, as applicable.⁷⁰ Additional information about various types of alternative to detention and other complementary measures can be found at Annex A.

GUIDELINE 5:

Detention must not be discriminatory

43. International law prohibits detention or restrictions on the movement of a person on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, such as asylum-seeker or refugee status.⁷¹ This applies even when derogations in states of emergency are in place.⁷² States may also be liable to charges of racial discrimination if they impose detention on persons of a “particular nationality”.⁷³ At a minimum, an individual has the right to challenge his or her detention on such grounds; and the State will need to show that there was an objective and reasonable basis for distinguishing between nationals and non-nationals, or between non-nationals, in this regard.⁷⁴

GUIDELINE 6:

Indefinite detention is arbitrary and maximum limits on detention should be established in law

44. As indicated in Guideline 4.2, the test of proportionality applies in relation to both the initial order of detention as well as any extensions. The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary. Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law.⁷⁵
45. Asylum-seekers should not be held in detention for any longer than necessary; and where the justification is no longer valid, the asylum-seeker should be released immediately (Guideline 4.1).⁷⁶
46. To guard against arbitrariness, maximum periods of detention should be set in national legislation. Without maximum periods, detention can become prolonged, and in some cases indefinite, including particularly for stateless asylum-seekers.⁷⁷ Maximum periods in detention cannot be circumvented by ordering the release of an asylum-seeker only to re-detain them on the same grounds shortly afterwards.

GUIDELINE 7:

Decisions to detain or to extend detention must be subject to minimum procedural safeguards

47. If faced with the prospect of being detained, as well as during detention, asylum-seekers are entitled to the following minimum procedural guarantees:
- (i) to be informed at the time of arrest or detention of the reasons for their detention,⁷⁸ and their rights in connection with the order, including review procedures, in a language and in terms which they understand.⁷⁹
 - (ii) to be informed of the right to legal counsel. Free legal assistance should be provided where it is also available to nationals similarly situated,⁸⁰ and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights. Communication between legal counsel and the asylum-seeker must be subject to lawyer-client confidentiality principles. Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting.
 - (iii) to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release.⁸¹
 - (iv) following the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place, which the asylum-seeker and his/her representative would have the right to attend. Good practice indicates

that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached.

- (v) irrespective of the reviews in (iii) and (iv), either personally or through a representative, the right to challenge the lawfulness of detention before a court of law at any time needs to be respected.⁸² The burden of proof to establish the lawfulness of the detention rests on the authorities in question. As highlighted in Guideline 4, the authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case.
- (vi) persons in detention must be given access to asylum procedures, and detention should not constitute an obstacle to an asylum-seeker's possibilities to pursue their asylum application.⁸³ Access to asylum procedures must be realistic and effective, including that timeframes for lodging supporting materials are appropriate for someone in detention, and access to legal and linguistic assistance should be made available.⁸⁴ It is also important that asylum-seekers in detention are provided with accurate legal information about the asylum process and their rights.
- (vii) to contact and be contacted by UNHCR.⁸⁵ Access to other bodies, such as an available national refugee body or other agencies, including ombudsman offices, human rights commissions or NGOs, should be available as appropriate. The right to communicate with these representatives in private, and the means to make such contact, should be made available.
- (viii) general data protection and confidentiality principles must be respected in relation to information about the asylum-seeker, including health matters.
- (ix) illiteracy should be identified as early as possible and a mechanism that allows illiterate asylum-seekers to make "submissions" should be in place, such as requests to meet with a lawyer, doctor, visitor, or to make complaints.⁸⁶

GUIDELINE 8:

Conditions of detention must be humane and dignified

48. If detained, asylum-seekers are entitled to the following minimum conditions of detention:

- (i) Detention can only lawfully be in places officially recognised as places of detention. Detention in police cells is not appropriate.⁸⁷
- (ii) Asylum-seekers should be treated with dignity and in accordance with international standards.⁸⁸
- (iii) Detention of asylum-seekers for immigration-related reasons should **not be punitive** in nature.⁸⁹ The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. If asylum-seekers are held in such facilities, they should be separated from the general prison population.⁹⁰ Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate.
- (iv) Detainees' names and the location of their detention, as well as the names of persons responsible for their detention, need to be kept in **registers** readily available and accessible to those concerned, including relatives and legal counsel. Access to this information, however, needs to be balanced with issues of confidentiality.
- (v) In co-sex facilities, men and women should be **segregated** unless they are within the same family unit. Children should also be separated from adults unless these are relatives.⁹¹ Where possible, accommodation for families ought to be provided. Family accommodation can also prevent some families (particularly fathers travelling alone with their children) from being put in solitary confinement in the absence of any alternative.

- (vi) **Appropriate medical treatment must be provided where needed**, including psychological counselling. Detainees needing medical attention should be transferred to appropriate facilities or treated on site where such facilities exist. A medical and mental health examination should be offered to detainees as promptly as possible after arrival, and conducted by competent medical professionals. While in detention, detainees should receive periodic assessments of their physical and mental well-being. Many detainees suffer psychological and physical effects as a result of their detention, and thus periodic assessments should also be undertaken even where they presented no such symptoms upon arrival. Where medical or mental health concerns are presented or develop in detention, those affected need to be provided with appropriate care and treatment, including consideration for release.
- (vii) Asylum-seekers in detention should be able to make **regular contact** (including through telephone or internet, where possible) and receive visits from **relatives, friends, as well as religious, international and/or non-governmental organisations**, if they so desire. Access to and by UNHCR must be assured. Facilities should be made available to enable such visits. Such visits should normally take place in private unless there are compelling reasons relevant to safety and security to warrant otherwise.
- (viii) The opportunity to conduct some form of **physical exercise** through daily indoor and outdoor recreational activities needs to be available; as well as access to suitable outside space, including fresh air and natural light. Activities tailored to women and children, and which take account of cultural factors, are also needed.⁹²
- (ix) The right to **practice one's religion** needs to be observed.
- (x) **Basic necessities** such as beds, climate-appropriate bedding, shower facilities, basic toiletries, and clean clothing, are to be provided to asylum-seekers in detention. They should have the right to wear their own clothes, and to enjoy privacy in showers and toilets, consistent with safe management of the facility.

- (xi) **Food of nutritional value** suitable to age, health, and cultural/religious background, is to be provided. Special diets for pregnant or breastfeeding women should be available.⁹³ Facilities in which the food is prepared and eaten need to respect basic rules on sanitation and cleanliness.
- (xii) Asylum-seekers should have **access to reading materials and timely information** where possible (for example through newspapers, the internet, and television).
- (xiii) Asylum-seekers should have access to **education and/or vocational training, as appropriate to the length of their stay**. Children, regardless of their status or length of stay, have a right to access at least primary education.⁹⁴ Preferably children should be educated off-site in local schools.
- (xiv) The frequent transfer of asylum-seekers from one detention facility to another should be avoided, not least because they can hinder access to and contact with legal representatives.
- (xv) Non-discriminatory **complaints mechanism** (or grievance procedure) needs to be in place,⁹⁵ where complaints may be submitted either directly or confidentially to the detaining authority, as well as to an independent or oversight authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.
- (xvi) All staff working with detainees should receive **proper training**, including in relation to asylum, sexual and gender-based violence,⁹⁶ the identification of the symptoms of trauma and/or stress, and refugee and human rights standards relating to detention. Staff-detainee ratios need to meet international standards;⁹⁷ and codes of conduct should be signed and respected.
- (xvii) With regard to private contractors, subjecting them to a statutory duty to take account of the welfare of detainees has been identified as good practice. However, it is also clear that responsible national authorities cannot contract out of their obligations under international refugee or

human rights law and remain accountable as a matter of international law. Accordingly, States need to ensure that they can effectively oversee the activities of private contractors, including through the provision of adequate independent monitoring and accountability mechanisms, including termination of contracts or other work agreements where duty of care is not fulfilled.⁹⁸

- (xviii) Children born in detention need to be registered immediately after birth in line with international standards and issued with birth certificates.⁹⁹

GUIDELINE 9:

The special circumstances and needs of particular asylum-seekers must be taken into account

GUIDELINE 9.1

Victims of trauma or torture

49. Because of the experience of seeking asylum, and the often traumatic events precipitating flight, asylum-seekers may present with psychological illness, trauma, depression, anxiety, aggression, and other physical, psychological and emotional consequences. Such factors need to be weighed in the assessment of the necessity to detain (see Guideline 4). Victims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained.
50. Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms.¹⁰⁰ This can be the case even if individuals present no symptoms at the time of detention.¹⁰¹ Because of the serious consequences of detention, initial and periodic assessments of detainees' physical and mental state are required, carried out by qualified medical practitioners. Appropriate treatment needs to be provided to such persons, and medical reports presented at periodic reviews of their detention.

GUIDELINE 9.2

Children

51. General principles relating to detention outlined in these Guidelines apply *a fortiori* to children,¹⁰² who should in principle not be detained at all. The United Nations Convention on the Rights of the Child (CRC) provides specific international legal obligations in relation to children and sets out a number of guiding principles regarding the protection of children:

- The **best interests of the child** shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3 in conjunction with Article 22, CRC).
- There shall be **no discrimination** on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, or on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members (Article 2, CRC).
- Each child has a **fundamental right to life, survival and development** to the maximum extent possible (Article 6, CRC).
- Children should be assured the **right to express their views freely** and their views should be given "due weight" in accordance with the child's age and level of maturity (Article 12, CRC).¹⁰³
- Children have the right to **family unity** (*inter alia*, Articles 5, 8 and 16, CRC) and the right not to be separated from their parents against their will (Article 9, CRC). Article 20(1) of the CRC establishes that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to **special protection and assistance** provided by the State.

- Article 20(2) and (3) of the CRC require that States Parties shall, in accordance with their national laws, ensure **alternative care for such a child**. Such care could include, *inter alia*, foster placement or, if necessary, placement in suitable institutions for the care of children. When considering options, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.
- Article 22 of the CRC requires that States Parties take appropriate measures to ensure that children who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive **appropriate protection and assistance**.
- Article 37 of the CRC requires States Parties to ensure that the **detention of children be used only as a measure of last resort** and for the **shortest appropriate period of time**.
- Where separation of a child or children from their parents is unavoidable in the context of detention, both parents and child are entitled to essential information from the State on the whereabouts of the other unless such information would be detrimental to the child (Article 9(4), CRC).

52. Overall an **ethic of care** – and not enforcement – needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the status of an “illegal alien”.¹⁰⁴ States should *“utilize, within the framework of the respective child protection systems, appropriate procedures for the determination of the child’s best interests, which facilitate adequate child participation without discrimination, where the views of the child are given due weight in accordance with age and maturity, where decision makers with relevant areas of expertise are involved, and where there is a balancing of all relevant factors in order to assess the best option.”*¹⁰⁵

53. All appropriate alternative care arrangements should be considered in the case of **children accompanying their parents**, not least because of the well-documented deleterious effects of detention on children's well-being, including on their physical and mental development. The detention of children with their parents or primary caregivers needs to balance, *inter alia*, the right

to family and private life of the family as a whole, the appropriateness of the detention facilities for children,¹⁰⁶ and the best interests of the child.

54. As a general rule, **unaccompanied or separated children** should not be detained. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.¹⁰⁷ Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision. Residential homes or foster care placements need to cater for the child's proper development (both physical and mental) while longer term solutions are being considered.¹⁰⁸ A primary objective must be the best interests of the child.
55. Ensuring accurate age assessments of asylum-seeking children is a specific challenge in many circumstances, which requires the use of appropriate assessment methods that respect human rights standards.¹⁰⁹ Inadequate age assessments can lead to the arbitrary detention of children.¹¹⁰ It can also lead to the housing of adults with children. Age- and gender-appropriate accommodation needs to be made available.
56. Children who are detained benefit from the same **minimum procedural guarantees** as adults, but these should be tailored to their particular needs (see Guideline 9). An independent and qualified **guardian as well as a legal adviser** should be appointed for unaccompanied or separated children.¹¹¹ During detention, children have a **right to education** which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their **recreation and play, including with other children**, which is essential to a child's mental development and will alleviate stress and trauma (see also Guideline 8).
57. All efforts, including prioritisation of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.¹¹²

GUIDELINE 9.3

Women

58. As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained.¹¹³ Alternative arrangements should also take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation.¹¹⁴ Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available.
59. Where detention is unavoidable for women asylum-seekers, facilities and materials are required to meet women's specific hygiene needs.¹¹⁵ The use of female guards and warders should be promoted.¹¹⁶ All staff assigned to work with women detainees should receive training relating to the gender-specific needs and human rights of women.¹¹⁷
60. Women asylum-seekers in detention who report abuse are to be provided immediate protection, support and counselling, and their claims must be investigated by competent and independent authorities, with full respect for the principle of confidentiality, including where women are detained together with their husbands/partners/other relatives. Protection measures should take into account specifically the risks of retaliation.¹¹⁸
61. Women asylum-seekers in detention who have been subjected to sexual abuse need to receive appropriate medical advice and counselling, including where pregnancy results, and are to be provided with the requisite physical and mental health care, support and legal aid.¹¹⁹

GUIDELINE 9.4

Victims or potential victims of trafficking

62. The prevention of trafficking or re-trafficking cannot be used as a blanket ground for detention, unless it can be justified in the individual case (see Guideline 4.1). Alternatives to detention, including safe houses and other care arrangements, are sometimes necessary for such victims or potential victims, including in particular children.¹²⁰

GUIDELINE 9.5

Asylum-seekers with disabilities

63. Asylum-seekers with disabilities must enjoy the rights included in these Guidelines without discrimination. This may require States to make “reasonable accommodations” or changes to detention policy and practices to match their specific requirements and needs.¹²¹ A swift and systematic identification and registration of such persons is needed to avoid arbitrary detention;¹²² and any alternative arrangements may need to be tailored to their specific needs, such as telephone reporting for persons with physical constraints. As a general rule, asylum-seekers with long-term physical, mental, intellectual and sensory impairments¹²³ should not be detained. In addition, immigration proceedings need to be accessible to persons with disabilities, including where this is needed to facilitate their rights to freedom of movement.¹²⁴

GUIDELINE 9.6

Older asylum-seekers

64. Older asylum-seekers may require special care and assistance owing to their age, vulnerability, lessened mobility, psychological or physical health, or other conditions. Without such care and assistance, their detention may become unlawful. Alternative arrangements would need to take into account their particular circumstances, including physical and mental well-being.¹²⁵

GUIDELINE 9.7

Lesbian, gay, bisexual, transgender or intersex asylum-seekers

65. Measures may need to be taken to ensure that any placement in detention of lesbian, gay, bisexual, transgender or intersex asylum-seekers avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse; that they have access to appropriate medical care and counselling, where applicable; and that detention personnel and all other officials in the public and private sector who are engaged in detention facilities are trained and qualified, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation or gender identity.¹²⁶ Where their security cannot be assured in detention, release or referral to alternatives to detention would need to be considered. In this regard, solitary confinement is not an appropriate way to manage or ensure the protection of such individuals.

GUIDELINE 10:

Detention should be subject to independent monitoring and inspection

66. To ensure systems of immigration detention comply with international legal principles, it is important that immigration detention centres are open to scrutiny and monitoring by independent national and international institutions and bodies.¹²⁷ This could include regular visits to detainees, respecting principles of confidentiality and privacy, or unannounced inspection visits. In line with treaty obligations, and relevant international protection standards, access by UNHCR¹²⁸ and other relevant international and regional bodies with mandates related to detention or humane treatment¹²⁹ needs to be made possible. Access to civil society actors and NGOs for monitoring purposes should also be facilitated, as appropriate. Independent and transparent evaluation and monitoring are likewise important facets of any alternative programme.¹³⁰
67. In respect of monitoring the conditions of detention and treatment of women detainees, any monitoring body would need to include women members.¹³¹

Alternatives to Detention

There are a range of alternatives to detention, which are outlined below. Some are used in combination, and as indicated in the main text, some impose greater restrictions on liberty or freedom of movement than others. The list is non-exhaustive.

- (i) **Deposit or surrender of documentation:** Asylum-seekers may be required to deposit or surrender identity and/or travel documentation (such as passports). In such cases, individuals need to be issued with substitute documentation that authorises their stay in the territory and/or release into the community.¹³²
- (ii) **Reporting conditions:** Periodic reporting to immigration or other authorities (for example, the police) may be a condition imposed on particular asylum-seekers during the status determination procedure. Such reporting could be periodic, or scheduled around asylum hearings and/or other official appointments. Reporting could also be to an NGO or private contractor within community supervision arrangements (see vii).

However, overly onerous reporting conditions can lead to non-cooperation, and can set up individuals willing to comply to instead fail. Reporting, for example, that requires an individual and/or his or her family to travel long distances and/or at their own expense can lead to non-cooperation through inability to fulfil the conditions, and can unfairly discriminate on the basis of economic position.¹³³

The frequency of reporting obligations would be reduced over time – either automatically or upon request – so as to ensure that any conditions imposed continue to meet the necessity, reasonableness and proportionality tests. Any increase in reporting conditions or other additional restrictions would need to be proportionate to the objective pursued, and be based on an objective and individual assessment of a heightened risk of absconding, for examplee.

- (iii) **Directed residence:** Asylum-seekers may be released on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum-seekers may also be required to obtain prior approval if they wish to move out of the designated administrative region; or to inform the authorities if they change address within the same administrative region. Efforts should be made to approve residency that facilitates family reunification or closeness to relatives,¹³⁴ and/or other support networks. Residency conditions might also involve residence at a designated open reception or asylum facility, subject to the rules of those centres (see iv).
- (iv) **Residence at open or semi-open reception or asylum centres:** Release to open or semi-open reception or asylum centres with the condition to reside at that address is another form of directed residence (see above iii). Semi-open centres may impose some rules and regulations for the good administration of the centre, such as curfews and/or signing in or out of the centre. General freedom of movement within and outside the centre should, however, be observed to ensure that it does not become a form of detention.
- (v) **Provision of a guarantor/surety:** Another alternative arrangement is for asylum-seekers to provide a guarantor/surety who would be responsible for ensuring their attendance at official appointments and hearings, or to otherwise report as specified in any conditions of release. Failure to appear could lead to a penalty – most likely the forfeiture of a sum of money – being levied against the guarantor/surety. A guarantor, for example, could be a family member, NGO or community group.

- (vi) **Release on bail/bond:** This alternative allows for asylum-seekers already in detention to apply for release on bail. Any of the above-mentioned conditions (ii)-(v) may be imposed. For bail to be genuinely available to asylum-seekers, bail hearings would preferably be automatic. Alternatively, asylum-seekers must be informed of their availability and they need to be accessible and effective. Access to legal counsel is an important component in making bail accessible. The bond amount set must be reasonable given the particular situation of asylum-seekers, and should not be so high as to render bail systems merely theoretical.

Bail/bond and guarantor/surety systems tend to discriminate against persons with limited funds, or those who do not have previous connections in the community. As a consequence, where bail/bond and guarantor/surety systems exist, governments are encouraged to explore options that do not require asylum-seekers to hand over any funds. They could, for example, be “bailed” to an NGO – either upon the NGO acting as guarantor (see v above) – or under agreement with the government.¹³⁵ Safeguards against abuse and/or exploitation, such as inspection and oversight, also need to be in place in these systems involving NGOs and others. In all cases, what needs to be assessed is whether payment of a bond or the designation of a guarantor/surety is necessary to ensure compliance in the individual case. Systematically requiring asylum-seekers to pay a bond and/or to designate a guarantor/surety, with any failure to be able to do so resulting in detention (or its continuation), would suggest that the system is arbitrary and not tailored to individual circumstances.

- (vii) **Community supervision arrangements:** Community supervision arrangements refer to a wide range of practices in which individuals and families are released into the community, with a degree of support and guidance (that is, “supervision”). Support arrangements can include support in finding local accommodation, schools, or work; or, in other cases, the direct provision of goods, social security payments, or other services. The “supervision” aspect may take place within open or semi-open reception or asylum facilities, or at the offices of the relevant service provider while the individual lives freely in the community. Supervision may be a condition of the asylum-seeker’s release and may

thus involve direct reporting to the service provider, or alternatively, to the immigration or other relevant authorities separately (see ii).

Supervision may also be optional, such that individuals are informed about the services available to them without any obligation to participate in them. Community supervision may also involve case management (see next).

Complementary measures and other considerations

Case management

Case management has been identified as an important component in several successful alternative to detention policies and programmes, and also as an aspect of good asylum systems. Case management is a strategy for supporting and managing individuals and their asylum claims whilst their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals.¹³⁶ Such policies have led to constructive engagement with the asylum process, and improvements in compliance/cooperation rates.

Case management is part of an integrated process, starting at an early stage in the asylum process and continuing until refugee status or other legal stay is granted, or deportation is carried out. The concept is that each asylum-seeker is assigned a “case manager” who is responsible for their entire case, including providing clear and consistent information and advice about the asylum process (as well as other migration and/or return processes, as applicable), as well as about any conditions on their release and the consequences of non-cooperation. It is a stand-alone process, but it has been identified as an element of successful alternative to detention programmes. Transparency, active information-sharing and good cooperation between all actors involved have also been shown to develop trust among the individuals concerned and to improve compliance rates.¹³⁷

Skill sets and personalities of staff

Skill sets and personalities of staff can contribute to the success or failure of alternatives. Recruitment and training of staff need to be well managed, including through tailored training, courses and/or certification.¹³⁸ Codes of conduct or other regulations relating to staff behaviour can be important aspects of detention measures and alternatives to detention.

Alternatives operated by NGOs or private contractors

Where alternatives are operated by **non-governmental or private organisations**, a legally binding agreement would need to be entered into with the relevant governmental authority, and be subject to regular compliance monitoring by the government, independent national inspectorates and/or international organisations or bodies (such as UNHCR). The agreement would set out the roles and responsibilities of each body as well as complaints and inspection arrangements, and provide for termination of the agreement if terms are not met. It is important that agreements do not provide incentives to use more restrictive measures than are strictly necessary. Despite the role of non-governmental or private organisations in the management and/or implementation of alternatives, and while good practice might impose a statutory duty on such entities to take account of the welfare of detainees, the State remains responsible as a matter of international law for ensuring human rights and refugee law standards are met. It is important to keep in mind that the decision to impose restrictions on liberty or freedom of movement can never be taken by a non-State body.¹³⁹

The role of non-governmental or private organisations in the process of **enforcement of non-compliance orders** (such as by reporting on absences or absconding to the authorities for their follow-up) varies. It is, however, not necessary that these organisations participate in the enforcement process.

Endnotes

- ¹ United Nations Human Rights Committee (HRC), CCPR General Comment No. 15: *The Position of Aliens under the Covenant*, 11 April 1986, para. 5, available at: <http://www.unhcr.org/refworld/docid/45139acfc.html>. See, also, *Moustaquim v. Belgium*, (1991), Council of Europe: European Court of Human Rights (ECtHR), App. No. 26/1989/186/246, para. 43, available at: <http://www.unhcr.org/refworld/docid/3ae6b7018.html> and *Vilvarajah and Others v. the United Kingdom*, (1991), ECtHR, App. No. 45/1990/236/302-306, para. 103, available at: <http://www.unhcr.org/refworld/docid/3ae6b7008.html>.
- ² See, in particular, UN High Commissioner for Refugees (UNHCR), Executive Committee of the High Commissioner's Programme (ExCom), *Conclusion on Reception of Asylum-seekers in the Context of Individual Asylum Systems*, No. 93 (LIII) – 2002, available at: <http://www.unhcr.org/refworld/docid/3dafdd344.html>. All ExCom Conclusions are also available by subject in UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 6th edition, June 2011, <http://www.unhcr.org/refworld/docid/3dafdd344.html>.
- ³ UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in Action*, February 2011, available at: <http://www.unhcr.org/refworld/docid/4d9430ea2.html>.
- ⁴ A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, page 1 ("There is no empirical evidence that the prospect of being detained deters irregular migration, or discourages persons from seeking asylum.") (Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention"*), available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>; as restated in United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012, para. 8, available at: <http://www.unhcr.org/refworld/docid/502e0bb62.html>

- ⁵ A clear distinction is required between stateless persons who are seeking asylum in other countries and stateless persons who are residing in their “own” country in the sense envisaged by Article 12(4) of the *International Covenant on Civil and Political Rights*, 1966 (ICCPR). The latter include individuals who are long-term, habitual residents of a State which is often their country of birth. Being in their “own country” they have a right to enter and remain there with significant implications for their status under national law. Rules governing the acceptable grounds for detention will vary between these two groups (Guideline 4.1). In relation to the former, the grounds outlined in these Guidelines apply; however, such justifications for the detention of stateless persons residing in their “own” country will in many instances lead to arbitrary and unlawful (including indefinite) detention. For more on detention and stateless persons, see UNHCR, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, paras. 59-62, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html>.
- ⁶ The term “*persons found not to be in need of international protection*” is understood to mean persons who have sought international protection and who after due consideration of their claims in fair procedures, are found neither to qualify for refugee status on the basis of criteria laid down in the 1951 Convention, nor to be in need of international protection in accordance with other international obligations or national law”, see UNHCR, ExCom, *Conclusion on the Return of Persons Found Not to be in Need of International Protection*, No. 96 (LIV) – 2003, preambular para. 6, available at: <http://www.unhcr.org/3f93b1ca4.html>.
- ⁷ See, below note 22.
- ⁸ *Guzzardi v. Italy*, (1980), ECtHR, App. No. 7367/76, para. 93, available at: <http://www.unhcr.org/refworld/docid/502d42952.html>
- ⁹ *Amuur v. France*, (1996), ECtHR, App. No. 19776/92, available at: <http://www.unhcr.org/refworld/docid/3ae6b76710.html>.
- ¹⁰ See, for example, *Guzzardi v. Italy*, above note 8.
- ¹¹ See, for example, *Medvedyev v. France*, (2010), ECtHR, App. No. 3394/03, available at: <http://www.unhcr.org/refworld/docid/502d45dc2.html> and *J.H.A. v. Spain*, UN Committee against Torture (CAT), CAT/C/41/D/323/2007, 21 November 2008, available at <http://www.unhcr.org/refworld/docid/4a939d542.html>.
- ¹² “Extraterritorial” detention refers to, inter alia, the transfer and detention of asylum-seekers in another country’s territory, including under agreement with that State. The responsibility of the sending State for the human rights standards in that place of detention will depend on a range of factors, see, for example, UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf>.

- ¹³ Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention"*, above note 4, Figure 1.
- ¹⁴ Article 1(A)(2), *Convention relating to the Status of Refugees*, 1951 (1951 Convention) as amended by the *Protocol relating to the Status of Refugees*, 1967.
- ¹⁵ See, in particular, Article I(2), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969 (OAU Convention); Conclusion No. 3, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 1984 (1984 Cartagena Declaration).
- ¹⁶ See, in particular, European Union, *Council Directive 2011/95/EU of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast)*, 20 December 2011, available at: <http://www.unhcr.org/refworld/docid/4f197df02.html>; European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, 7 August 2001, available at: <http://www.unhcr.org/refworld/docid/3ddcee2e4.html>.
- ¹⁷ Article 1 of the *Convention relating to the Status of Stateless Persons*, 1954 (1954 Statelessness Convention). See, further, UNHCR, *Guidelines on Statelessness No. 1: The Definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, 20 February 2012, HCR/GS/12/01, available at: <http://www.unhcr.org/refworld/docid/4f4371b82.html>.
- ¹⁸ Article 1(A)(2), second paragraph, 1951 Convention.
- ¹⁹ Article 14, *Universal Declaration of Human Rights*, 1948 (UDHR); Article 22 (7) ACHR; Article 12(3), ACHPR; Article 27, *American Declaration of the Rights and Duties of Man*, 1948 (ADRDM); Article 18, *Charter of Fundamental Rights of the European Union*, 2000, (CFREU).
- ²⁰ Article 31, 1951 Convention.
- ²¹ See, for example, Articles 3 and 9, UDHR; Article 9, ICCPR; Articles 1 and 25, ADRDM; Article 6, ACHPR; Article 7 ACHR; Article 5, ECHR; Article 6, CFREU.

- ²² See, for example, Article 12, ICCPR, covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one's own. See, also, Article 12, *African Charter on Human and Peoples' Rights*, 1981 (ACHPR); Article 22, American Convention on Human Rights, 1969 (ACHR); Article 2, *Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended), 1950 (ECHR); Article 2, Protocol No. 4 to the ECHR, *Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and the First Protocol Thereto*, 1963; Article 45, CFREU.
- ²³ See, UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII) –1986, para. (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>. See also in particular, UNHCR ExCom, Nos. 55 (XL) – 1989, para (g); 85 (XLIX) –1998, paras. (cc), (dd) and (ee); and 89 (LI) –2000, third paragraph, all available at: <http://www.unhcr.org/3d4ab3ff2.html>.
- ²⁴ UN Human Rights Committee (HRC), General Comment No. 18: *Non-discrimination*, 10 November 1989, para. 1, available at: <http://www.unhcr.org/refworld/docid/453883fa8.html>; HRC, General Comment No. 15: *The Position of Aliens under the Covenant*, above note 1.
- ²⁵ Article 31(2) of the 1951 Convention provides: “*The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country*”. See UNHCR, *Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention – Revised*, Geneva Expert Roundtable, 8-9 November 2001 (UNHCR Global Consultations Summary Conclusions: Article 31 of the 1951 Convention), para. 3, available at: <http://www.unhcr.org/419c783f4.pdf>. See, also, UNHCR, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17 (UNHCR Global Consultations: Reception of Asylum-Seekers), available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.
- ²⁶ Article 26 of the 1951 Convention provides: “*Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.*” Article 26 of the 1954 Convention relating to the Status of Stateless Persons provides an identical provision.

- ²⁷ UNHCR, “*Lawfully Staying*” – *A Note on Interpretation*, 1988, <http://www.unhcr.org/refworld/pdfid/42ad93304.pdf>; UNHCR Global Consultations: Reception of Asylum-Seekers, above note 25, para. 3, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.
- ²⁸ For example, Article 9(1) of the ICCPR provides explicitly that: “*No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*”
- ²⁹ *Lokpo and Touré v. Hungary*, (2011), ECtHR, App. No. 10816/10, para. 21 (final decision), available at: <http://www.unhcr.org/refworld/docid/4e8ac6652.html>.
- ³⁰ *Ibid.* The ECtHR stated: “*It must in addition be satisfied that detention during the period under consideration was compatible with the purpose of the relevant provision, which is to prevent persons from being deprived of their liberty in an arbitrary fashion.*”
- ³¹ *Bozano v. France*, (1986), ECtHR, App. No. 9990/82, para. 54, available at: <http://www.unhcr.org/refworld/docid/4029fa4f4.html>; *H.L. v. United Kingdom*, (2004), ECtHR, App. No. 45508/99, para. 114, available at: <http://www.unhcr.org/refworld/docid/502d48822.html>.
See, also, *Dougoz v. Greece*, (2001), ECtHR, App. No. 40907/98, para 55: the law must be “*sufficiently accessible and precise, in order to avoid all risk of arbitrariness*”, available at: <http://www.unhcr.org/refworld/docid/3deb8d884.html>.
- ³² The general principle that laws ought not to have retroactive effect is well-established in most legal jurisdictions, especially as regards criminal prosecution, arrest or detention: see, for example, Article 25 of the ADRDM, which provides in part that “*[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.*”
See, also, *Amuur v. France*, above note 9, para. 53.
- ³³ This is the recommendation of the UN Working Group on Arbitrary Detention (WGAD), *Report to the Fifty-sixth session of the Commission on Human Rights*, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5, available at: <http://www.unhcr.org/refworld/pdfid/3b00f25a6.pdf>.
- ³⁴ *Louled Massoud v. Malta*, (2010), ECtHR, App. No. 24340/08, available at: <http://www.unhcr.org/refworld/docid/4c6ba1232.html>.

- ³⁵ Article 9 of the ICCPR may be derogated from in a public emergency subject to being “*strictly required by the exigencies of the situation*” and “*provided such measures are not inconsistent with their other obligations under international law and do not involve discrimination ...*” (Article 4, ICCPR). Also, *A v. Australia*, HRC, Comm. No. 560/1993, 3 April 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b71a0.html>, which found no basis to suggest that detention of asylum-seekers was prohibited as a matter of customary international law (para. 9.3).
- ³⁶ *Van Alphen v. The Netherlands*, HRC, Comm. No. 305/1988, 23 July 1990, para. 5.8, available at: <http://www.ohchr.org/Documents/Publications/SDecisionsVol3en.pdf>.
- ³⁷ *Ibid.* and *A v. Australia*, above note 35, paras. 9.2-9.4 (on proportionality).
- ³⁸ See, for example, *A v. Australia*, above note 35; *C v. Australia*, HRC, Comm. No. 900/1999, 28 October 2002, available at: <http://www.unhcr.org/refworld/docid/3f588ef00.html>.
- ³⁹ *A v. Australia*, above note 35, para. 9.
- ⁴⁰ WGAD, *Report to the Tenth Session of the Human Rights Council*, 16 February 2009, A/HRC/10/21, para. 67, available at: <http://www.unhcr.org/refworld/docid/502e0de72.html>. Some regional instruments explicitly limit the grounds of immigration detention: for example, Article 5(f) of the ECHR: “*No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*”
- ⁴¹ *A v. Australia*, above note 35, para. 9.4.
- ⁴² UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, above note 23, para. (b).
- ⁴³ International Detention Coalition (IDC), *There are Alternatives*, 2011, Introducing the Community Assessment and Placement Model, available at: <http://idcoalition.org/cap/handbook>.
- ⁴⁴ *R (on the application of Suckrajh) v. (1) Asylum and Immigration Tribunal and (2) The Secretary of State for the Home Department*, EWCA Civ 938, United Kingdom: Court of Appeal (England and Wales), 29 July 2011, available at: <http://www.unhcr.org/refworld/docid/4e38024f2.html>.
- ⁴⁵ UNHCR ExCom, *Conclusion on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) -1983, para. (d), available at: <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

- ⁴⁶ UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, above note 23, para. (b).
- ⁴⁷ See, for example, UNHCR ExCom Conclusions No. 58 (XL) – 1989, *Problem of Refugees and Asylum-Seekers who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*, available at: <http://www.unhcr.org/3ae68c4380.html>. See, also, UNHCR Global Consultations Summary Conclusions: Article 31 of the 1951 Convention, above note 25.
- ⁴⁸ UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, May 2011 (Global Roundtable Summary Conclusions), para 6, available at: <http://www.unhcr.org/refworld/docid/4e315b882.html>. See also, UNHCR, *Guidelines on Statelessness No.2: Procedures for Determining Whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html>.
- ⁴⁹ UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, above note 23, para. (b)
- ⁵⁰ On the meaning of national security, see UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, paragraphs 29-32, available at: <http://www.unhcr.org/refworld/docid/4672bc122.html>.
- ⁵¹ See, for example, *A. and others v. the United Kingdom*, (2009), ECtHR, App. No. 3455/05, available at: <http://www.unhcr.org/refworld/docid/499d4a1b2.html>.
- ⁵² See, *Bozano v. France*, above note 31; *Shamsa v. Poland*, (2003), ECtHR, App. Nos. 45355/99 and 45357/99, available at: <http://www.unhcr.org/refworld/docid/402b584e4.html>; *Gonzalez v. Spain*, (2008), ECtHR, App. No. 30643/04, available at: <http://www.unhcr.org/refworld/docid/502e31e42.html>, and *Amuur v. France*, above note 9.
- ⁵³ Article 31, 1951 Convention; Article 18(1), *European Union Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, available at: <http://www.unhcr.org/refworld/docid/4394203c4.html>.
- ⁵⁴ WGAD *Report to the Seventh Session of the Human Rights Council, A/HRC/7/4*, 10 January 2008, para. 53: “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.” Available at: <http://www.unhcr.org/refworld/docid/502e0eb02.html>

- ⁵⁵ Article 5 (3), ACHR; Article 7(2) ACHPR; Article 5(3) CFREU.
- ⁵⁶ See *Lokpo and Touré v. Hungary*, above note 29; *R.U. v. Greece*, (2011), ECtHR, App. No. 2237/08, para. 94, available at: <http://www.unhcr.org/refworld/docid/4f2aafc42.html>. See, also, *S.D. v. Greece*, (2009), ECtHR, App. No. 53541/07, para. 62, available at: <http://www.unhcr.org/refworld/docid/4a37735f2.html>. The ECtHR has held that detention for the purposes of expulsion can only occur after an asylum claim has been finally determined. See, also, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Alaa Al-Tayyar Abdelhakim v. Hungary*, 30 March 2012, App. No. 13058/11, available at: <http://www.unhcr.org/refworld/docid/4f75d5212.html>; UN High Commissioner for Refugees, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Said v. Hungary*, 30 March 2012, App. No. 13457/11, available at: <http://www.unhcr.org/refworld/docid/4f75d5e72.html>.
- ⁵⁷ *Vasileva v. Denmark*, (2003), ECtHR, App. No. 52792/99, para. 37, available at: <http://www.unhcr.org/refworld/docid/502d4ae62.html> and *Lokpo and Touré v. Hungary*, above note 29.
- ⁵⁸ *C v. Australia*, above note 38, para. 8.2.
- ⁵⁹ See, for example, *Sahin v. Canada, (Minister of Citizenship and Immigration)* [1995] 1 FC 214 available at: <http://www.unhcr.org/refworld/docid/3ae6b6e610.html>. See, also, WGAD, *Opinion No. 45/2006*, UN Doc. A/HRC/7/4/Add.1, 16 January 2008, para. 25, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.htm> and WGAD, *Legal Opinion on the Situation regarding Immigrants and Asylum-seekers*, UN Doc. E/CN.4/1999/63, para. 69: “Possibility for the alien to benefit from alternatives to administrative custody.” available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=1520 and WGAD, *Report to the Thirteenth Session of the Human Rights Council*, A/HRC/13/30, 15 January 2010, para. 65, available at: <http://www.unhcr.org/refworld/docid/502e0fa62.html>
- ⁶⁰ Global Roundtable Summary Conclusions, above note 48, para 2.
- ⁶¹ Global Roundtable Summary Conclusions, above note 48, para 20.

- ⁶² These other rights could include: the right to privacy (Article 12, UDHR; Article 17(1), ICCPR; Article 16(1), CRC; Article 11 ACHR; Article 5 ADRDM; Article 8 ECHR; Article 7 CFREU), the right to family life (Articles 12 and 16(3), UDHR; Article 23(1), ICCPR; Article 10(1) ICESCR; Article 12(2), 1951 Convention and Recommendation B of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.unhcr.org/refworld/docid/40a8a7394.html>; Article 18, ACHPR; Article 17(1), ACHR; Article 6, ADPDM; Article 2 and 8 ECHR; Article 9, CFREU), the prohibition on inhuman or degrading treatment (Article 7, ICCPR; Article 1, CAT; Article 3, ECHR; Article 25 ADRDM; Article 4 CFREU; Article 5 ACHR; Article 5 ACHPR).
- ⁶³ Global Roundtable Summary Conclusions, above note 48, para 31.
- ⁶⁴ Global Roundtable Summary Conclusions, above note 48, para. 19.
- ⁶⁵ Global Roundtable Summary Conclusions, above note 48, para. 21.
- ⁶⁶ Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention"*, above note 4, page 1.
- ⁶⁷ Global Roundtable Summary Conclusions, above note 48, para. 21.
- ⁶⁸ Global Roundtable Summary Conclusions, above note 48, para. 21.
- ⁶⁹ Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention'*, above note 4; International Detention Coalition, *There are Alternatives, A Handbook for Preventing Unnecessary Immigration Detention*, 2011, available at: <http://idcoalition.org/cap/handbook/>.
- ⁷⁰ Global Roundtable Summary Conclusions, above note 48, para. 24.
- ⁷¹ Article 3, 1951 Refugee Convention; Article 2, UDHR; Article 2, ICCPR; Article 2(2), ICESCR; Article 2, CRC; Article 7, CMW and Article 5, CRPD as well as in regional instruments such as Article 2, ADRDM; Article 24, ACHR; Art. 14 ECHR; Article 21, CFREU and Articles 2 and 3, ACHPR.
- ⁷² No derogations may be based on discriminatory grounds: Article 4, ICCPR. A like provision is found in Article 15, ECHR and in Article 27, ACHR. See, also, Article 8, 1951 Convention.

- ⁷³ CERD, General Recommendation No. 30: *Discrimination against Non-Citizens*, UN Doc. A/59/18, 10 January 2004, para. 19: The CERD Committee has called in particular for States to respect the security of non-citizens, in particular in the context of arbitrary detention, and to ensure that conditions in centres for refugees and asylum-seekers meet international standards, available at: <http://www.unhcr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d>.
- ⁷⁴ For example, in deportation proceedings there may be a justified distinction drawn between nationals and non-nationals, in the sense that the national has a right of abode in their own country and cannot be expelled from it: *Moustaquim v Belgium* (1991) 13 EHRR 802, available at: <http://www.unhcr.org/refworld/docid/3ae6b7018.html>. See, also, *Agee v. UK* (1976) 7 DR 164 (European Commission on Human Rights decision), available at: <http://www.unhcr.org/refworld/docid/4721af792.html>.
- ⁷⁵ See, *A v. Australia*, above note 35, para. 9.2; *Mukong v. Cameroon*, HRC Comm. No. 458/1991, 21 July 1994, para. 9.8, available at: <http://www.unhcr.org/refworld/docid/4ae9acc1d.html>.
- ⁷⁶ *A v. Australia*, above note 35, para. 9.4; WGAD, *Report to the Thirteenth Session of the Human Rights Council*, above note 59, para. 61; WGAD, *Report to Fifty-sixth Session of the Commission on Human Rights*, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5, Principle 7, available at: <http://www.unhcr.org/refworld/docid/502e10612.html>. See, too, *Massoud v. Malta*, above note 34.
- ⁷⁷ WGAD *Report to the Thirteenth Session of the Human Rights Council*, above note 59, para. 62. See also, UNHCR, *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level*, 17 July 2012, HCR/GS/12/03, available at: <http://www.unhcr.org/refworld/docid/5005520f2.html>.
- ⁷⁸ Article 9 (2), ICCPR; Article 7 (4), ACHR; Article 5 (2) ECHR and Article 6, ACHPR.
- ⁷⁹ See, further WGAD, *Report to the Fifty-sixth session of the Commission on Human Rights*, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 available at: <http://www.unhcr.org/refworld/pdfid/3b00f25a6.pdf>.
- ⁸⁰ Article 16(2), 1951 Convention.
- ⁸¹ *A. v. Australia*, above note 35 and *C. v. Australia*, above note 38.
- ⁸² Article 9(4), ICCPR; Article 7(6), ACHR; Article 5(4), ECHR; Article 25, paragraph 3, ADRDM; Article 7(6), ACHR; Article 6 read in conjunction with Article 7, ACHPR; Article 5, ECHR. See, for example, Article 2(3), ICCPR; Article 25, ACHR; Article 13, ECHR.

- ⁸³ UNHCR ExCom Standing Committee Conference Room Paper, *Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, June 1999, EC/49/SC/CRP.13, Figure 2, available at: <http://www.unhcr.org/refworld/pdfid/47fdfaf33b5.pdf>.
- ⁸⁴ UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, above note 23, para. (c). See, further, UNHCR Global Consultations: Summary Conclusions on Article 31 of the 1951 Convention, above note 25; and *I.M. v. France*, ECtHR, App. no. 9152/09, 2 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f2932442.html>.
- ⁸⁵ UNHCR ExCom Conclusion, No. 85 (XLIX) – 1998, available at: <http://www.unhcr.org/refworld/docid/3ae68c6e30.html>. See, also, WGAD, *Report to the Fifty-sixth session to the Commission on Human Rights*, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5; WGAD, *Report to the Fifty-fifth Session of the Commission on Human Rights*, E/CN.4/1999/63, 18 December 1998, paras. 69 and 70, referring to principles 3, 6, 7, 8, 9 and 10.
- ⁸⁶ For further information refer to UNHCR, *Age, Gender and Diversity Mainstreaming*, 31 May 2010, EC/61/SC/CRP.14, available at: <http://www.unhcr.org/refworld/docid/4cc96e1d2.html>.
- ⁸⁷ *Abdolkhani and Karimnia v. Turkey* (No.2), (2010), ECtHR App. No.50213/08, available at: <http://www.unhcr.org/refworld/docid/4c5149cf2.html>, which found a violation of Article 3 of the ECHR on account of the detention of refugees for three months in the basement of police headquarters.
- ⁸⁸ A number of human rights provisions are specifically relevant to conditions in detention, such as Articles 7 (prohibition against torture and cruel, inhuman or degrading treatment), 10 (right to humane conditions in detention) and 17 (right to family life and privacy) of the ICCPR. See, also, *UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, General Assembly resolution 43/173 of 9 December 1988, available at: <http://www.unhcr.org/refworld/docid/3b00f219c.html>; *UN Standard Minimum Rules for the Treatment of Prisoners*, 1955, available at: <http://www.unhcr.org/refworld/docid/3ae6b36e8.html>; *UN Rules for the Protection of Juveniles Deprived of their Liberty*, 1990, A/RES/45/113, 14 December 1990, available at: <http://www.unhcr.org/refworld/docid/3b00f18628.html>.
- ⁸⁹ Inter-American Commission on Human Rights, *Human Rights of Migrants, International Standards and the Return Directive of the EU*, resolution 03/08, 25 July 2008, available at: <http://www.unhcr.org/refworld/docid/488ed6522.html>; *Abdolkhani and Karimnia v. Turkey*, above note 87.
- ⁹⁰ WGAD, *Report to the Seventh Session of the Human Rights Council*, above note 54.

- ⁹¹ *Muskhadzhieva and others v. Belgium*, (2010), ECtHR, App. No. 41442/07, available at: <http://www.unhcr.org/refworld/docid/4bd55f202.html>, in which it was held *inter alia* that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful.
- ⁹² UN, *Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* (the Bangkok Rules), A/C.3/65/L.5, 6 October 2010, Rule 42, available at: <http://www.unhcr.org/refworld/docid/4dcbb0ae2.html>.
- ⁹³ Rule 48, Bangkok Rules, *ibid*.
- ⁹⁴ Article 22, 1951 Convention; Art. 26, UDHR; Art. 13 and 14, ICESCR; Art. 28, CRC; Art.10, CEDAW.
- ⁹⁵ See, UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, 29 November 1985, A/RES/40/43 available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>.
- ⁹⁶ UNHCR ExCom, *Conclusion on Refugee Women and International Protection*, No. 39 (XXXVI) – 1985, available at: <http://www.unhcr.org/3ae68c43a8.html> and UNHCR ExCom, *Conclusion on Women and Girls at Risk*, No. 105 (LVII) –2005, available at: <http://www.unhcr.org/refworld/docid/45339d922.html>.
- ⁹⁷ Council of Europe Committee on Prevention of Torture Standards, December 2010, available at: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.
- ⁹⁸ UN, *Guiding Principles on Business and Human Rights*, A/HRC/17/31, 21 March 2011, para. 5; Global Roundtable Summary Conclusions, above note 48, para. 14.
- ⁹⁹ Article 7(1), CRC and Article 24(2), ICCPR. See, also, UNHCR ExCom, *Conclusion on Refugee Children*, No. 47 (XXXVIII) – 1987, para. (f) and (g), available at: <http://www.unhcr.org/refworld/docid/3ae68c432c.html>; UN Human Rights Council, *Resolution on Rights of the Child*, 20 March 2012, A/HRC/19/L.31, paras. 16(c) and 29-31, available at: <http://www.unhcr.org/refworld/docid/502e10f42.html>; UN Human Rights Council, *Resolution on Action on Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law*, 15 March 2012, A/HRC/19/L.24, available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/19/L.24.
- ¹⁰⁰ Global Roundtable Summary Conclusions, above note 48, para. 10.
- ¹⁰¹ See, Jesuit Refugee Service - Europe (JRS-E), *Becoming Vulnerable in Detention*, June 2010, available at: <http://www.unhcr.org/refworld/docid/4ec269f62.html>.

- ¹⁰² For the purposes of these Guidelines, a child is defined as “a human being below the age of 18 years”, Article 1, United Nations Convention on the Rights of the Child (CRC), 1990. See also *UN Rules for the Protection of Juveniles Deprived of their Liberty*, above note 88.
- ¹⁰³ UNHCR, *Best Interests Determination Children – Protection and Care Information Sheet*, June 2008, available at: <http://www.unhcr.org/refworld/docid/49103ece2.html>. UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008, para. 20, available at: <http://www.unhcr.org/refworld/docid/48480c342.html>. UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines*, November 2011, available at: <http://www.unhcr.org/refworld/docid/4e4a57d02.html>. UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08 (UNHCR Guidelines on International Protection on Child Asylum Claims) para. 5, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>. CRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>.
- ¹⁰⁴ *Muskhadzhiyeva and others v. Belgium*, above note 91.
- ¹⁰⁵ UNHCR ExCom Conclusion No. 107 (LVIII) – 2007, on *Children at Risk*, para. G (i), available at: <http://www.unhcr.org/refworld/docid/471897232.html>. UNHCR Guidelines on International Protection on Child Asylum Claims, above note 103. See, also, International Detention Coalition, *Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum-Seeking and Irregular Migrant Children Affected by Immigration Detention*, 2012, <http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>; IDC, *Child Sensitive Community Assessment and Placement Model*, available at: <http://idcoalition.org/ccap-5step-model/>.
- ¹⁰⁶ *Popov v. France*, (2012), ECtHR, App. No. 39472/07 and 39474/07, available at: <http://www.unhcr.org/refworld/docid/4f1990b22.html>.
- ¹⁰⁷ *Ibid.*
- ¹⁰⁸ On reception conditions for children, see UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, para. 92, available at: <http://www.unhcr.org/refworld/docid/3ae6b3470.html>. WGAD Report to the Thirteenth Session of the Human Rights Council, above note 59, para. 60: “Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of unaccompanied minors would comply with the requirements of article 37(b), clause 2, of the [CRC], according to which detention can only be used as a last resort.” *Mitunga v. Belgium*, (2006), ECtHR, App. No.13178/03, para. 103, available at: <http://www.unhcr.org/refworld/docid/45d5cef72.html>.

- ¹⁰⁹ Global Roundtable Summary Conclusions, above note 48, para. 7. UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>. UNHCR Guidelines on International Protection on Child Asylum Claims, above note 103.
- ¹¹⁰ UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, *ibid.*
- ¹¹¹ An adult who is familiar with the child's language and culture may also alleviate the stress and trauma of being alone in unfamiliar surroundings.
- ¹¹² See CRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, above note 103, para. 61.
- ¹¹³ See, also, the Bangkok Rules, above note 92.
- ¹¹⁴ Special measures, for example, would need to be in place to protect the right to live in dignity of women who have been trafficked into the country.
- ¹¹⁵ Rule 5, Bangkok Rules, above note 92.
- ¹¹⁶ Rule 19, Bangkok Rules, above note 92.
- ¹¹⁷ Rule 33(1), Bangkok Rules, above note 92.
- ¹¹⁸ Rule 25(1), Bangkok Rules, above note 92.
- ¹¹⁹ Rule 25(2), Bangkok Rules, above note 92.
- ¹²⁰ See OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add. 1, available at: <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>.
- ¹²¹ Article 14, *International Convention on the Rights of Persons with Disabilities*, 2008 (ICRPD).
- ¹²² UNHCR ExCom, *Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR*, No. 110 (LXI) –2010, paras. (c), (f), (h), (j), available at: <http://www.unhcr.org/refworld/docid/4cbeaf8c2.html>.
- ¹²³ Language taken from ExCom Conclusion, *ibid.*, preambular para. 3.
- ¹²⁴ Article 18(1)(b), ICRPD.
- ¹²⁵ See, for example, Article 17(1), *European Union: Council of the European Union, Council Directive 2003/9/EC of 27 January 2003, Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, available at: <http://www.unhcr.org/refworld/docid/3ddcfda14.html>.

- ¹²⁶ *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, 2006, Principle 9: The right to treatment with humanity while in detention, available at: <http://www.yogyakartaprinciples.org/index.html>.
- ¹²⁷ OHCHR, Chapter V, (pp. 87-93) of the *Training Manual on Human Rights Monitoring*, Professional Training Series n°7, 2001, available at: <http://www.ohchr.org/Documents/Publications/training7Introen.pdf>; OHCHR, *Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series no. 8, 2001, available at: <http://www.unhcr.org/refworld/docid/4638aca62.html>; Association for the Prevention of Torture, *Monitoring Places of Detention: A Practical Guide*, 2004, available at: <http://www.ap.t.ch>.
- ¹²⁸ Relevant treaty provisions include paragraph 8 of the UNHCR Statute in conjunction with States' obligations to cooperate with UNHCR in the exercise of its international protection mandate, found in Articles 35 and 36 of the 1951 Convention and Article 2 of the 1967 Protocol; Article 45, ACHPR; European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, Article 35, available at: <http://www.unhcr.org/refworld/pdfid/4157e75e4.pdf>.
- ¹²⁹ A range of international, regional and national bodies exist which have a monitoring or inspection function, such as the Sub-Committee on the Prevention of Torture and national preventive mechanisms set up pursuant to the *Optional Protocol to the Convention Against Torture*, 2002 (OPCAT). National mechanisms would include National Preventive Mechanisms, National Human Rights Institutions, Ombudsmans, and/or NGOs.
- ¹³⁰ Global Roundtable Summary Conclusions, above note 48, para. 25.
- ¹³¹ Rule 25(3), Bangkok Rules, above note 92.
- ¹³² Article 27, 1951 Convention. Global Roundtable Summary Conclusions, above note 48, para. 24.
- ¹³³ Global Roundtable Summary Conclusions, above note 48, para. 22.
- ¹³⁴ On the right to family and personal life, see above note 62.
- ¹³⁵ Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention"*, above note 4, page 1.
- ¹³⁶ Global Roundtable Summary Conclusions, above note 48, para. 29.

¹³⁷ Global Roundtable Summary Conclusions, above note 48, para. 30.

¹³⁸ Global Roundtable Summary Conclusions, above note 48, para. 31.

¹³⁹ Global Roundtable Summary Conclusions, above note 48, para. 14.

Useful links



The Guidelines are available online at:

<http://www.unhcr.org/refworld/docid/503489533b8.html>



Refworld special features page on Detention:

<http://www.unhcr.org/refworld/detention.html>



A Compilation of Summary Conclusions from UNHCR's Expert Meetings: Commemorating the Refugee and Statelessness Conventions, 2010-2011:

<http://www.unhcr.org/4fe31cff9.html>



UNHCR Website:

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Unlocking rights: towards ending
immigration detention for asylum-
seekers and refugees



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Cover Photograph *Libya. UNHCR facilitates release of detained refugees and asylum-seekers* © UNHCR/Mohamed Alalem

Division of International Protection

<https://www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration>

<https://www.refworld.org/thematic-area/detention>

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Introduction: the detention trap

Around the world, people who cross borders to seek asylum are at risk of becoming trapped in arbitrary detention imposed in the interests of immigration control, without the means to challenge their situation, or exercise their right to seek international protection. For people who have been forced to flee their homes due to conflict, violence or persecution, such detention can have particularly harmful and lasting consequences for their physical and mental health.¹ It can damage family relationships and undermine the best interests and the development of children.² For the State, the financial burden of immigration detention is significant and often unnecessary.³

International law constrains the use of immigration detention, requiring that it be applied only when prescribed by law, and when necessary and proportionate for a legitimate purpose as an exceptional measure of last resort, for the shortest possible period of time.⁴ It absolutely prohibits the detention of children for immigration-related purposes.⁵ In practice however, despite some promising developments, detention of asylum-seekers and refugees is a persistent and growing challenge.⁶ Asylum-seekers are sometimes mandatorily detained upon entering a country irregularly or are detained for long periods or indefinitely.⁷ They are often held in inadequate or degrading conditions, including sometimes in criminal justice facilities.⁸ “De facto detention” – the deprivation of liberty in practice for immigration-related purposes, although the situation is not qualified as one of detention in national law – is a growing concern, in particular in border facilities where the cumulative effect of restrictions on rights, including freedom of movement, of asylum-seekers and refugees, may in practice amount to deprivation of liberty.⁹ In many such contexts, asylum-seekers and refugees are unable to prevent or challenge arbitrary detention, including because they lack access to information, to a lawyer or to judicial review of their detention.¹⁰ Independent monitoring of immigration detention is too often subject to limitations or obstacles.¹¹

As States strive to manage arrivals at borders and to process asylum claims fairly and efficiently, how can immigration detention be restricted so that it truly becomes a measure of last resort? Effective systems of alternatives to detention (“ATDs”) and alternative forms of care for children at risk of immigration detention, based on clear national laws and reflecting human rights standards, are essential. Greater efforts are needed to implement these alternatives,¹² which have been found to be more cost-effective than detention in many countries and can ensure high rates of compliance with asylum and immigration procedures.¹³

UNHCR works around the world to uphold the rights of asylum-seekers and refugees, including those who are detained.¹⁴ In 2012, it published the UNHCR Detention Guidelines on the applicable standards regarding the detention of asylum-seekers and refugees.¹⁵ In this paper, drawing on the Detention Guidelines and its experience in a range of national systems, **UNHCR calls on States to implement legal and policy reforms and mobilize resources towards ending detention of asylum-seekers and refugees for immigration-related reasons and implementing alternatives to detention in practice.**

This paper focuses on four of the most pressing issues: situations of de facto detention; immigration detention of children; procedural rights in detention; and alternatives to detention. It sets out recommendations, based on international refugee and human rights law, on the key measures that States need to take to prevent the arbitrary immigration detention of asylum-seekers and refugee.

International law: turning legal guarantees into a reality for asylum-seekers and refugees

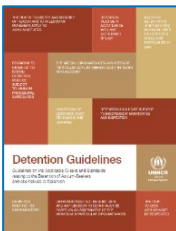
The detention of asylum-seekers and refugees for entering or staying irregularly in the territory of a country is limited by Article 31 of the 1951 Convention on the Status of Refugees (“1951 Convention”) which provides that asylum-seekers and refugees¹⁶ shall not be penalized for irregular entry or stay, subject to certain conditions,¹⁷ and that the movement of asylum-seekers and refugees is not restricted other than when necessary and only until their status is regularized or they gain admission into another country.¹⁸ More recently, under the Global Compact on Refugees (GCR), several States committed to developing non-custodial and community-based alternatives to detention, particularly for children.¹⁹

Under international human rights law, asylum-seekers and refugees have the right to liberty and security of the person.²⁰ The right to liberty requires that any deprivation of liberty must be in accordance with law and must not be arbitrary. To guard against arbitrariness, any detention must be necessary in the individual case, reasonable in all the circumstances, and proportionate to a legitimate purpose. It must be imposed only as a measure of last resort following consideration of less coercive alternatives, based on a detailed, individualised assessment of the need to detain, and it must be subject to independent, prompt and regular judicial review.²¹ **Mandatory detention of asylum-seekers and refugees for the sole reason of their status is inherently arbitrary,²² as is indefinite detention.²³**

Judicial scrutiny imposing limits on detention

In the **Republic of Korea**, in March 2023, the Constitutional Court ruled unconstitutional the provision in the Immigration law providing for the detention of asylum-seekers, refugees and migrants, due to the lack of a maximum time limit on detention and the absence of any legal basis for judicial review of detention in the law. The Constitutional Court also provided guidance on permissible upper time limits on detention and on the use of alternatives to detention. Legislation to implement the ruling is currently under discussion.²⁴

Resources



UNHCR DETENTION GUIDELINES

Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention.



UNHCR'S POSITION REGARDING THE DETENTION OF REFUGEE AND MIGRANT CHILDREN IN THE MIGRATION CONTEXT

A note about UNHCR's position regarding the detention of children, unaccompanied, separated or in families for immigration related purposes.²⁵



UNHCR POLICY ON DETENTION MONITORING

UNHCR/HCP/2015/7²⁶



BEYOND DETENTION: A GLOBAL STRATEGY TO SUPPORT GOVERNMENTS TO END THE DETENTION OF ASYLUM-SEEKER AND REFUGEES

A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019.²⁷



OPTIONS PAPERS, TOOLKITS, CHECKLISTS AND TRAINING MATERIALS

UNHCR resources related to immigration detention can be found on Refworld, Thematic Area Detention.²⁸

1. Recognizing and addressing detention in practice: de facto detention

De facto detention leaves asylum-seekers and refugees unprotected

In many national systems, there is an increasing risk that, while asylum-seekers and refugees are not detained under national law, the restrictions on rights and liberties imposed on them do, in practice, amount to detention.²⁹ Such “de facto” immigration detention may occur on arrival, where asylum-seekers and refugees are held in border zones, at airports or in other reception centres for registration, identity checks or case processing purposes, and are subject to significant restrictions on their freedom of movement and other rights. In situations of mass arrivals, asylum-seekers and refugees may be held in improvised facilities, at borders or in other, often remote areas.³⁰ Even where these arrangements are designed for short stays, delays in processing cases can mean that the length of stay in border or reception facilities ranges from several days to many months. These situations are likely to lead to arbitrary detention. They may also impede access to asylum, as asylum-seekers held in such facilities may lack access to information on their rights, to lawyers, as well as to judicial review that would apply under national law in situations acknowledged as detention. They may have difficulty in communicating with UNHCR or with NGOs which could assist them in accessing the asylum process.

Responding to the reality of de facto detention

In accordance with international law, **whether a particular situation amounts to a deprivation of liberty must be assessed on the facts**, rather than on the qualification of the situation in national law.³¹ “Detention” refers to deprivation of liberty or confinement in a closed place which an asylum-seeker or refugee is not permitted to leave at will, irrespective of the name or classification of the facility or place concerned.³² Therefore, accommodation in facilities or restricted or remote areas in a designated border or transit zone may in principle amount to detention, where the restrictions on rights in the location in question are sufficiently severe,³³ or “if the ability to leave such a place, facility or setting would be somehow limited or expose a person to serious human rights violations.”³⁴

There is no single factor which determines that a situation restricting liberty amounts to detention: it is a question of the degree or intensity of restrictions, rather than their nature or substance.³⁵

The cumulative effect of a series of restrictions, each of which might in themselves fall short of deprivation of liberty, can lead to a person being de facto detained.³⁶

In numerous cases before international human rights courts and tribunals, people held at airports, at borders or in reception centres have been found to be de facto detained, through an assessment of the cumulative impact of the restrictions imposed.³⁷ In such cases, the possibility to

leave the area of confinement by leaving the jurisdiction – either by crossing a border, or by taking a flight to another State – may be a factor in assessing whether the situation amounts to detention. However, such a situation may still amount to detention where an asylum-seeker can only leave an area of confinement by crossing a border in circumstances where doing so would put them at risk of refoulement³⁸ or jeopardize an asylum claim.³⁹



Afghanistan. UNHCR with partners has scaled up its work and presence at official border crossings as tens of thousands of Afghans arrive from Pakistan. Many have faced arrest, evictions, detention. © UNHCR/Oxygen Empire Media Production

Where, on entry to the territory, asylum-seekers and refugees are confined to a facility or similar restricted area for identification or processing of their cases, this should be considered as detention if they cannot leave the facility and if the time for which they are confined exceeds what is reasonably necessary for determining identity, documenting their entry and recording their claims.

The poorer the conditions in which the person is held, and the greater the restrictions on movement, communication and privacy, the more likely it is that the situation may amount to detention. The impact on the individual, having regard to their particular circumstances or specific needs should also be taken into account in assessing whether the confinement amounts to detention.

De facto detention?

Based on international human rights standards and case law, elements to consider in assessing whether there is a de facto deprivation of liberty under international law include:

- ✓ The situation of the individual, including whether they entered the area or facility by choice;
- ✓ If individuals may only leave a situation of confinement by agreeing to leave to another country, notably where this would put them at risk of refoulement or jeopardize their claim of asylum;
- ✓ The nature of the restrictions on liberty in practice, including physical barriers, security measures and rules controlling movement, or the remoteness or inaccessibility of the area or location of confinement;
- ✓ The nature and extent of any surveillance, monitoring or other restrictions on privacy, visits and communication with the outside world;
- ✓ The duration of stay and whether there are any limits to it;
- ✓ Whether there are any procedural rights or recourse to judicial review of the restrictions on movement;
- ✓ The adequacy of living conditions; and
- ✓ The impact on the individual in light of their particular circumstances or characteristics, including the impact on their physical or mental health.

Given the many situations, including at borders, where it is unclear or contested whether asylum-seekers and refugees are detained, **independent monitoring of facilities where conditions may amount to de facto detention is crucial to ensuring respect for the right to liberty, as well as other human rights for those held there.**

Furthermore, as a safeguard against arbitrary detention and to ensure access to the asylum process, **asylum-seekers and refugees accommodated in such facilities must have access to information in a language and manner they understand, as well as access to a lawyer.**

De facto detention: case examples

In ***J.A. and others v Italy***, the European Court of Human Rights considered the case of four Tunisian nationals, who were rescued at sea and brought to the Italian “hotspot” facility on the island of Lampedusa. The applicants did not have the opportunity to apply for asylum prior to their summary removal from the State. They were placed in the hotspot for 10 days, during which time they were not permitted to leave the centre. National legislation on hotspots did not make clear whether they were considered to be places of detention. However, the Court noted numerous reports which described the Italian hotspots as closed areas surrounded by bars, gates and fences, and not permitting people to leave. The applicants’ stay in the hotspot was found by the Court to amount to detention, especially considering that no maximum period of stay was defined by law and conditions there were inhuman and degrading. Given the lack of a clear legal basis for detention or any detention order in their cases, the Court found that their deprivation of liberty was arbitrary in violation of Article 5.1.f of the European Convention on Human Rights.⁴⁰

In its **Opinion concerning Saman Ahmed Hamad (Hungary)**, the Working Group on Arbitrary Detention addressed the case of an Iraqi asylum-seeker’s stay in the Hungarian transit zone for two years, during which period his movements were severely restricted. The Government claimed that since Mr. Hamad had freely entered the area and was free to leave it by crossing back into Serbia, he was not detained. However, the Working Group noted that the physical structure of the compound where he was held resembled a detention facility, there were large numbers of police and security personnel present, and visitors to the compound required prior authorization. Asylum-seekers staying there were subject to constant surveillance and restrictions on their contacts with the outside world. Moreover, the Working Group did not accept that an individual who must either agree to remain in the transit zones or lose the possibility of lodging an asylum application could be described as freely consenting to stay in the transit zones. The situation of Mr. Hamad was therefore found to amount to detention and on the facts of the case, his detention was found to be arbitrary.⁴¹

2. Ending immigration detention of children



A group of young girls takes part in a drawing class in a shelter in the southern Mexican city of Tapachula. The shelter is run by Mexico's family welfare agency DIF, which houses minors and also assists refugees. © UNHCR/Jeoffrey Guillemard

Children continue to be detained for immigration-related purposes

Increased resort to immigration detention of asylum-seekers and refugees brings risks of increased detention of children. Despite progress towards ending immigration detention of children in law and practice in some States,⁴² at least 77 countries have laws or policies that permit the detention of children based on their legal or migratory status, and in practice at least 330,000 children are detained each year on this basis.⁴³ In addition, in some countries where immigration detention of children is not permitted by law, it continues to be used in practice.⁴⁴

Legal reform is therefore needed in many States, not only to ban the detention of children for purposes of immigration control, but equally importantly, to provide for adequate alternative care arrangements, both for unaccompanied and separated children through national child protection systems, and for children with their families, in line with the rights of the child and the principle of the best interests of the child.⁴⁵ Provisions for accompanied children and their families must also be consistent with the right to family life.⁴⁶

The implementation of appropriate alternative care arrangements for children, irrespective of their status or that of their parents, presents the greatest challenge in ending their detention. Where alternative arrangements for children are in place, they are sometimes insufficiently resourced or not practically accessible to children.⁴⁷ Lack of effective procedures, including for assessment of the best interests of the child or delays in such procedures, can also prevent children's referral to alternative care.⁴⁸

The prohibition on children's immigration detention must be made a reality

It is clearly established in international human rights law and reflected in UNHCR's 2017 Position regarding the detention of children, that children should not be detained for the purposes of immigration control. In particular, this has been affirmed by the UN Committee on the Rights of the Child (CRC),⁴⁹ drawing on the requirement that the best interests of the child shall be a primary consideration in all actions concerning the child⁵⁰ and that the right to liberty of the child is guaranteed by the Convention.⁵¹ The CRC, together with the Committee on Migrant Workers (CMW), has established that "children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children."⁵² The prohibition on detention of children for immigration-related purposes has also been affirmed by other global human rights bodies,⁵³ as well as by the Inter-American Court of Human Rights and the African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum-Seekers.⁵⁴ It is reflected in the restrictive approach to immigration detention of children in other regional standards⁵⁵ and in States' commitments under the New York Declaration for Refugees and Migrants and the Global Compact on Refugees, to support non-custodial and community-based alternatives to detention for children.⁵⁶

Ending immigration detention of children: promising developments

In 2020, **Mexico** enacted legislation to prohibit the detention of children based on their legal or migratory status, whether they are accompanied or unaccompanied. Responsibility for care of such children was allocated to the National System for the Protection of Children. These legislative changes are complemented by a Comprehensive Protection Protocol for Migrant Children, covering screening, evaluation, referral and community placement of children, and implemented with the support of civil society and IGOs.⁵⁷

In 2015, **Ireland** adopted the International Protection Act, prohibiting the detention of any applicant for international protection under the age of 18.⁵⁸

In **Thailand**, progress has been made in developing community-based alternatives for some asylum-seeking, refugee and migrant children who are already detained. In 2019, a number of relevant ministries and agencies agreed upon and signed a Memorandum of Understanding on the Determination of Measures and Approaches, Alternatives to Detention for Children in Immigration Detention Centres (ATD-MOU). Progress under the MoU is being monitored and evaluated by the Government.⁵⁹

To guard against immigration detention of children, **appropriate and safe care arrangements and community-based programmes should be available both to unaccompanied asylum-seeking and refugee children, and to accompanied children and their families**, alongside strong procedures for referral to alternatives, and assessment of the child's best interests. Such arrangements should respect the human rights of children, and ensure adequate reception conditions, including recreation, learning opportunities, and maternal and child health services.⁶⁰ Notably, these arrangements should be practically and financially accessible to children and their families without discrimination.

Unaccompanied and separated children should be swiftly identified, referred to child protection case management and best interests procedures and provided with family-based alternative care.⁶¹ Care should be provided through national child protection systems within communities⁶² and should ensure that asylum-seeking and refugee children are not discriminated against within that system. Where children are accompanied by family members, the family members should be accommodated outside of immigration detention, together with their children.⁶³



El Salvador. Support Spaces "A tu Lado" © UNHCR/Markel Redondo

3. Strengthening vital procedural rights



*Greece. Protection team on Lesbos island provides crucial aid to refugees and asylum-seekers.
© UNHCR/Socrates Baltagiannis*

Procedural safeguards are key to preventing arbitrary detention

Procedural rights for detained asylum-seekers and refugees – rights to receive information about the legal basis for their detention in a language that they understand, to have prompt and confidential access to a lawyer, and to bring judicial proceedings challenging the lawfulness of their detention – are essential to preventing or ending unlawful or unnecessary immigration detention.⁶⁴ While in many national systems, procedural rights for persons in immigration detention are guaranteed in law, their practical implementation often remains challenging. In some States, new or improvised systems of border detention in response to mass arrivals have further reduced procedural protection.⁶⁵

Asylum-seekers and refugees in immigration detention may receive inadequate information on the legal basis for their detention or the procedure for challenging it, or receive information only in a language or a format which they do not understand.⁶⁶

Access to lawyers is inadequate in some systems due to a variety of practical reasons, including insufficient numbers of qualified lawyers being available in the location of detention facilities, in particular where they are located in rural or remote areas, or where there are large numbers of arrivals beyond the capacity of lawyers to deal with or insufficient numbers of competent lawyers practicing in the immigration and asylum field.⁶⁷ High costs of legal representation and limitations on free legal assistance represent significant barriers to access to courts to challenge detention.⁶⁸ Also of concern are restrictions on lawyers' access to their clients in immigration detention, or restrictions on confidential lawyer-client consultations with them in detention facilities.⁶⁹

Judicial review of immigration detention is not always provided for by law, but where it is, its scope is sometimes too limited, for example where it is confined to review of compliance with national procedures and does not also address the substantive basis for the detention order.⁷⁰

A further crucial safeguard which is too often subject to obstacles or restrictions is independent monitoring of places of immigration detention, including by UNHCR, other international organisations or human rights bodies,⁷¹ national structures such as National Human Rights Institutions (NHRIs) and National Preventive Mechanisms (NPMs), or by NGOs. Such monitoring is critical to the identification of persons with international protection needs as well as to protecting the rights of asylum-seekers and refugees in detention, and for the prevention and correction of systemic problems, leading to violations of human rights in immigration detention.⁷²

States must increase efforts to implement procedural rights in practice

In accordance with UNHCR's Detention Guidelines as well as the right to liberty under international human rights law, detained asylum-seekers and refugees need to have access to procedural rights, in particular the right to information regarding their detention in a language they understand; access to a lawyer; and independent, prompt and regular judicial review.⁷³ International standards also provide for unhindered access of independent monitors to detention facilities.⁷⁴

The right to information

Every detained person, including those detained for purposes of immigration control, has the right to be provided promptly with information on the reasons for their detention, in a language that they understand,⁷⁵ with the assistance of an interpreter if necessary.⁷⁶ They must also be provided with accurate legal information about the asylum procedure and their rights concerning it.⁷⁷

The right to information is a crucial one, since **without clear and accessible information on the reasons for detention, the right to seek judicial review of detention is deprived of all effective substance.**⁷⁸ Access to interpretation may also be necessary to enable communication with the authorities, including staff in detention facilities and lawyers.

The right of access to a lawyer

Access to a qualified lawyer is a necessary condition for effective judicial review of detention.⁷⁹ Where necessary to ensure effective judicial review, the right of access to a lawyer may require in certain cases that free legal assistance is provided to a detainee.⁸⁰ It also includes the right to communicate with and to consult legal counsel, to have adequate time and facilities to do so, and to communicate in confidence.⁸¹

In all circumstances, therefore, asylum-seekers and refugees held in immigration detention should have prompt, regular and confidential access to a lawyer. It is the state's responsibility to ensure the availability and accessibility of legal advice to detainees, in the face of practical barriers including lack of capacity or geographical remoteness.



Ecuador. UNHCR staff provides information to refugees and migrants © UNHCR/Diana Diaz

The right to judicial review

Immigration detention must be subject to prompt and periodic review by a judicial or other independent body,⁸² and detainees must also have the right to take proceedings before a court to challenge the lawfulness of their detention.⁸³ **Judicial review of detention must be substantive and not merely formal, both in law and in practice:** it must extend beyond mere review of compliance with national law and include analysis of the compliance of the detention with the human rights of the individual detained, including the right to liberty, and the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment. In all such judicial reviews, the court must be capable of ordering release if the detention is incompatible with the right to liberty or with other human rights of the detainee.⁸⁴

Monitoring by independent bodies

The obligation to permit unrestricted access to places of immigration detention by independent monitoring organisations has been affirmed in international standards.⁸⁵ In the case of refugees and asylum-seekers, it is underpinned by the duty of States to cooperate with UNHCR under Article 35 of the 1951 Convention.⁸⁶ **Independent monitors, including UNHCR, should have unhindered access to all places where asylum-seekers and refugees are deprived of liberty, including places of de facto detention.**⁸⁷ In places of detention, they should be permitted to meet with any detained person or staff member, in private, and should have access to all areas of the facility.⁸⁸



Libya. UNHCR facilitates release of detained refugees and asylum-seekers © UNHCR/Mohamed Alalem

4. Implementing alternatives to detention

Alternatives to detention are gaining support, but are still insufficient

Globally, there is increasing awareness of the need to provide for Alternatives to Detention (“ATDs”) in order to ensure that immigration detention is only applied as a measure of last resort. ATDs are also recognized as bringing practical benefits, as they are generally more cost-efficient than detention⁸⁹ (see table below on costs) and are effective at ensuring compliance with immigration and asylum procedures.⁹⁰ Nevertheless, many states still make no or insufficient provision for and use of ATDs.⁹¹

Comparison of costs of immigration detention vs. ATDs

Note: The table below provides a general sense of the relative costs of immigration detention and ATDs; however, the available data is not comprehensive and is drawn from multiple studies concerning varied forms of ATDs.

State	Date of data collection	Cost of Detention (per person per day)	Cost of ATD (per person per day)
Australia ⁹²	2015	AU\$ 655	AU\$ 8.80 to AU\$ 38
Austria ⁹³	2015	€ 120	€ 17-24
Belgium ⁹⁴	2014	€ 180 - 190	€ 90 in a family unit
Canada ⁹⁵	2019-2020	CA\$ 200 - 400	CA\$ 10-12
Hong Kong ⁹⁶	2015		HK\$ 108
Indonesia ⁹⁷	2015		US\$ 8
United States ⁹⁸	2018	US\$ 208	US\$ 5.89
Slovenia ⁹⁹	2014	€ 15.10	€ 0 - 9.29
United Kingdom ¹⁰⁰	2022	£107	

Even where ATDs are provided for under national law or policy, they may not be sufficiently applied to ensure that detention is a last resort.¹⁰¹ In States where some forms of ATDs are available, there are often shortcomings in their implementation, including insufficient capacity or lack of accessibility. Asylum-seekers and refugees in immigration detention may face barriers to accessing ATDs as a result of excessive costs to the individual, such as in some bail arrangements, or due to lack of information necessary to access the measures.¹⁰² There are particular challenges in implementing ATDs at borders, given that border areas may be remote and may lack adequate administrative structures, capacities and services.

The type of ATD made available is also limited in some countries: for example, where ATDs are mainly based on electronic tagging (such as wrist or ankle bracelets),¹⁰³ they may be inappropriately reminiscent of the criminal justice system. ATDs in the form of electronic tagging are punitive in nature and are unlikely to comply with the principles of necessity and proportionality, including application of the least restrictive measure appropriate for the individual case.

One difficulty in ensuring sufficient implementation of ATDs is the lack of adequate procedures to apply them as appropriate in individual cases. In some countries, the absence of adequate screening processes, or delays in such processes, is a barrier to application of ATDs. Ineffective judicial review of detention, or the reluctance or lack of capacity of courts or tribunals to order ATD measures, present further barriers.¹⁰⁴

Standards related to ATD: accessibility in practice and compliance with human rights

Alternatives to detention can be an effective means of ensuring that that immigration detention is a measure of last resort, as required under international refugee law and international human rights law.¹⁰⁵ ATDs reflect States' obligations under the right to liberty to ensure that any decision to detain takes into account less invasive means of achieving the same ends.¹⁰⁶ In light of this, States have undertaken international commitments to develop ATDs,¹⁰⁷ including under the Global Compact on Refugees and the Global Compact on Migration.¹⁰⁸ Meeting these commitments requires investment of resources and development of strong systems of ATDs and referral processes, that uphold human rights while ensuring compliance with immigration and asylum proceedings. Peer-to-peer exchange of expertise and good practice examples between States can support progress in implementation of ATDs.¹⁰⁹

Effective provision of ATDs requires that they are available and accessible to all asylum-seekers and refugees in immigration detention or at risk of immigration detention, on an equal basis.¹¹⁰ They must be economically accessible, and there must be sufficient advice and information to enable access to ATDs without discrimination. There must be adequate resources to ensure that ATDs are accessible at a sufficient scale to address demand.

Alternatives to detention must themselves comply with human rights. ATDs must be adequately prescribed by law; must be of sufficient quality and precision, such that they are

reasonably foreseeable in their application;¹¹¹ and the least restrictive ATD appropriate in any individual case should be applied.¹¹² In addition, those subject to ATDs should have access to information about the measures in a language they understand, as well as access to legal advice.¹¹³ ATDs should be time-limited, and ATDs should be continuously monitored in each case to assess their impact on the human rights of the individual concerned and to ensure that the measures do not become unnecessary or disproportionate when applied for an extended period.

Asylum-seekers and refugees subject to ATDs must enjoy the right to liberty and should be subject to the minimal possible restrictions on their freedom of movement. If ATDs are not to become alternative forms of detention, they must never impose restrictions on movement sufficient to amount to de facto detention.

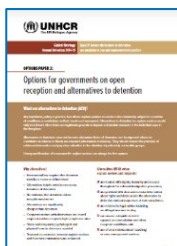
Furthermore, **ATDs must respect the principle that asylum-seekers and refugees should not be penalised for seeking international protection, or, subject to limited exceptions, for irregular entry or stay.**¹¹⁴

There is an especially strong obligation to consider ATDs in cases of vulnerability, given the heightened risk that the detention of vulnerable persons may violate the right to liberty or other human rights.¹¹⁵ To comply with principles of necessity and proportionality, and ensure referral to ATDs where necessary, there should be an **initial vulnerability screening of asylum-seekers on arrival, followed by a more detailed or specialist assessment in appropriate cases, as well as regular follow-up monitoring and screening for vulnerabilities.**¹¹⁶ Vulnerability screening requires dedicated services and trained and qualified staff for the identification and immediate referral to appropriate care of vulnerable individuals, including survivors of torture, gender-based violence and trafficking in persons. There should also be effective procedures in place for the identification of stateless persons and those at risk of statelessness, and referral to stateless determination procedures where applicable.¹¹⁷

Priority should be given to developing community-based models of ATDs in partnership with civil society organizations; these ATDs should be integrated with case management systems and support asylum-seekers in engaging with the asylum process.

ATDs should be applied only in circumstances where asylum-seekers or refugees would otherwise have been detained. ATDs should not become substitutes for open reception arrangements.¹¹⁸

Resources



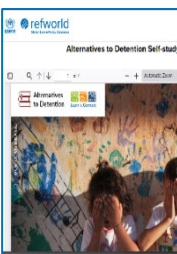
UNHCR OPTIONS PAPER 2: OPTIONS FOR GOVERNMENTS ON OPEN RECEPTION AND ALTERNATIVES TO DETENTION

The paper presents examples of open reception and alternatives to detention.¹¹⁹



UNHCR, BEYOND DETENTION TOOLKIT: GUIDING QUESTIONS FOR THE ASSESSMENT OF ALTERNATIVES TO DETENTION

UNHCR, Beyond Detention Toolkit¹²⁰



UNHCR ALTERNATIVE TO DETENTION SELF-STUDY MODULES

UNHCR training materials on alternatives to detention are available on Refworld, Thematic Area – Detention.¹²¹

Promising developments to prevent or reduce immigration detention

Services and case management in the community

In **Ecuador**¹²² and **Uruguay**¹²³ there is no immigration detention of refugees or asylum-seekers. They have the right to work and have access to services while their case is processed.

In **Colombia**, in response to mass arrivals of Venezuelan refugees and migrants, the Government responded by establishing a programme of temporary regularization rather than a regime of immigration detention. The temporary protection status offered to Venezuelan nationals arriving in Colombia includes work permits and access to essential services for up to ten years.¹²⁴

Screening for vulnerabilities and increased ATD facilities

Zambia established a National Referral Mechanism in 2014 as a framework for the identification of vulnerable asylum-seekers, refugees and migrants and their referral to appropriate services. This has helped to avoid the use of immigration detention through diversion to accommodation in the community. In practice, Zambian authorities do not encourage the detaining of children for immigration-related offences. Instead, they promote non-custodial-based ATD, such as community-based support and supervision.¹²⁵ Challenges remain in practice, including misidentification of cases, and lack of adequate funding and infrastructure for ATDs and foster-care arrangements.

ATD civil society pilot projects

In **Bulgaria**, a pilot ATD project implemented by NGOs¹²⁶ demonstrates the value of community-based ATDs. The project applied a screening and assessment process to identify those suitable for ATD and then provided case management support to asylum-seekers with the close involvement of local communities. It achieved a high rate of compliance and engagement in asylum and immigration processes, with a rate of absconding or disengagement of 18%, compared to a national rate estimated at 75%.¹²⁷

In November 2023, the highest court in **Australia** overturned almost twenty years of legal precedent when it found that powers to detain people in immigration detention, as applied to a stateless refugee, were unconstitutional. The Court ruled that such detention was not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose in circumstances where there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future.¹²⁸ The impact of this ruling is still being examined in the courts, as the government continues to expand alternatives to detention with access to appropriate community support services for those in need.

5. Making immigration detention a true exception: recommendations to States

States' national law and policy on immigration detention must be guided by the principle that claiming asylum is not an unlawful act and should not in itself lead to punitive measures. It must uphold the rights to liberty and security of the person and to freedom of movement, in accordance with global and regional standards. Asylum-seekers and refugees should never be detained for immigration-related purposes where the detention is unnecessary or disproportionate, or where other less restrictive measures could be applied.

Implementing these standards in practice requires concerted and collaborative efforts by governments, IGOs, civil society and refugee-led organizations. UNHCR encourages governments to cooperate to ensure full implementation of international law and standards on immigration detention, including through exchanges of good practice and in the framework of reviews of international human rights mechanisms as well as commitments under the Global Compact on Refugees and the Global Compact for Migration.

In particular, States should take the following measures to address problems of law and practice, in consultation with UNHCR, NHRIs and civil society, including refugee-led organizations.

Overarching measures

- Take measures to ensure that in law and in practice, immigration detention of asylum-seekers and refugees is an exceptional measure of last resort and subject to clear time limits.¹²⁹
- Ensure that immigration detention of asylum-seekers and refugees is resorted to only when it is clearly authorized by law, determined to be necessary, reasonable in all the circumstances, and proportionate to a legitimate purpose in the individual case.¹³⁰
- Ensure that where asylum-seekers and refugees are detained, they have access to legal advice, that conditions are humane and dignified and prevent their detention in inappropriate facilities, including in prisons or other facilities designed for criminal justice purposes.¹³¹
- Ensure that all places of immigration detention are subject to independent monitoring and inspection by independent national and international institutions and bodies.¹³²

De facto detention

- Ensure that any facilities accommodating asylum-seekers or refugees that are not officially designated places of detention under national law, including reception facilities at borders, are designed and managed in compliance with the right to liberty – and do not become places of detention. Such facilities should impose minimal restrictions on movement, communication and privacy, and should provide adequate living conditions appropriate to the non-punitive nature of the facility.
- Where facilities accommodating asylum-seekers or refugees do entail deprivation of liberty in practice, States must ensure that detention is adequately provided for in national law, is necessary and proportionate for a legitimate purpose, and is subject to adequate procedural safeguards and time limits to ensure respect of rights of refugees and asylum-seekers.
- Independent monitoring of all de facto detention facilities, including those not recognized as detention facilities in national law, must be ensured. In situations of ambiguity where restrictions on freedom of movement and other rights may approach a deprivation of liberty, national authorities should provide for unhindered access by independent monitoring bodies, including UNHCR.

Detention of children

- The international legal prohibition on detention of children for immigration-related purposes should be reflected in national laws. Where necessary, States, in consultation with civil society and including children, should amend national law to prohibit such detention. In order to uphold the best interests of children and their right to family life, national law should also provide that accompanied children should be accommodated together with their family members outside of detention.
- Alternative care arrangements for unaccompanied and separated children should prioritize family-based care and should ensure their equal treatment within national child protection systems. States should implement alternative care arrangements that are financially and practically accessible for all children and their families at risk of immigration detention. Such arrangements should respect the human rights of children and their families, and provide adequate reception conditions, including recreation, learning opportunities and maternal and child health services. These alternatives should be implemented alongside effective child-friendly procedures for referral to alternatives, and assessment of the child's best interests.

Procedural safeguards

- States must take steps to ensure that all asylum-seekers and refugees detained for immigration-related purposes are promptly provided with adequate information about their detention, including through provisions of interpretation and/or translation into a language and in a manner that they understand.
- States must provide resources and implement systems to ensure that asylum-seekers and refugees in immigration detention have prompt, regular and confidential access to a lawyer, both in law and in practice, and that lawyers representing asylum-seekers or refugees in detention do not face obstruction in their work. Where confidential in-person consultations are not available, confidential online or telephone consultations should be facilitated.
- National laws should be amended where necessary to provide for precise limits to the duration of immigration detention and allow for judicial review of such detention that is substantive and not merely procedural, which examines compliance with national law and the human rights of refugees and asylum-seekers, and with the power to order release.

Detention monitoring

- States should permit and facilitate unhindered access by UNHCR and other independent monitoring organisations to all places where asylum-seekers and refugees are detained for immigration-related purposes. They should consider agreeing to memoranda of understanding to facilitate and guide such access. National independent monitoring mechanisms with mandates to monitor immigration detention should be established where they are not already in place.

Alternatives to detention

- States should step up provision and resourcing of ATDs to ensure that they are available, accessible, and affordable to all refugees and asylum-seekers in, or at risk of, immigration detention. Any discriminatory limitations on eligibility for referral to ATDs should be eliminated in law and in practice.
- States should ensure that there are prompt and effective procedures for vulnerability screening and referral to ATDs without undue delays.
- A range of ATDs should be put in place to ensure that appropriate and proportionate measures can be applied in each individual case. Application of ATDs should be time-limited and continuously monitored individually to ensure that any restrictions on rights do not become disproportionate over time.

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- Priority should be given to developing community-based models of ATDs that are integrated with case management systems and that support the asylum-seeker in accessing and engaging with the asylum process.
 - States should end the use of practices which may be referred to as “ATDs” that in practice amount to de facto detention, as well as those that are punitive in nature and based on criminal law models, such as bail arrangements or electronic tagging.
 - ATDs should never be applied as an alternative to liberty.

Data, information and capacity building

- States should collect and publish comprehensive disaggregated data on immigration detention, to inform policy and law reform.
- States should ensure that officials involved in reception and detention of asylum-seekers and refugees have an understanding of international refugee and human rights law and standards on immigration detention. They should work cooperatively with UNHCR and other relevant inter-governmental organizations, as well as NHRIs and civil society, including refugee-led organizations, to provide information and training on these issues.

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⁴ See for example, UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para. 12, www.refworld.org/docid/553e0f984.html. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4,

www.refworld.org/policy/legalguidance/unhcr/2012/en/87776 (Detention Guidelines).

⁵ See below, section 3.

⁶ See UNHCR, *Global Report 2023, Outcome Area 6, Safety and Access to Justice*, reporting.unhcr.org/global-report-2023/outcome-areas/safety-and-access-justice#:~:text=OUTCOME%20AREA%206,only%20as%20a%20last%20resort. International Detention Coalition, *Gaining ground: promising practice to reduce and end immigration detention*, May 2022, idcoalition.org/wp-content/uploads/2024/01/Gaining-Ground-Report-2022.pdf. UN Task Force on Children Deprived of their Liberty, *End Immigration Detention of Children, Advocacy Brief*, February 2024, p. 5, www.refworld.org/reference/themreport/ia/2024/en/147364 (UN Task Force on Children Deprived of their Liberty, *End Immigration Detention of Children*). UN General Assembly, *Ending immigration detention of children and providing adequate care and reception for them: Report of the Special Rapporteur on the human rights of migrants*, note 2 above, para. 12; UN General Assembly, *Report of the Independent Expert leading the UN global study on children deprived of liberty (UN Global Study on Children deprived of Liberty)*, Chapter 11, 11 July 2019, paras. 3.1 and 3.4, www.ohchr.org/en/treaty-bodies/crc/united-nations-global-study-children-deprived-liberty.

⁷ Global Detention Project, *Annual Report 2023*, 30 May 2024, p. 4, www.globaldetentionproject.org/annual-report-important-victories-amidst-inexorable-expansion.

⁸ Ibid.

⁹ See for example, IDC, *Immigration Detention and Alternatives to Detention in the Asia-Pacific Region*, 17 May 2022, p. 18, idcoalition.org/publications/immigration-detention-atd-in-the-asia-pacific-region/. European Council on Refugees and Exiles (ECRE), *Reception, Detention and restriction of movement at EU external borders*, July 2021, pp. 22-25, ecre.org/wp-content/uploads/2021/07/ECRE-Heinrich-Boll-Stiftung-Reception-Detention-and-Restriction-of-Movement-at-EU-External-Borders-July-2021.pdf. Hungarian Helsinki Committee, Global Detention Project, Greek Council for Refugees, Italian Council for Refugees and Foundation for access to Rights, *Crossing a Red Line: How EU countries undermine the right to liberty by expanding the use of detention of asylum-seekers upon entry*, February 2019, www.refworld.org/reference/themreport/hhc/2019/en/148500. European Parliamentary Research Service, *European Commission's New Pact on Migration and Asylum, Horizontal substitute impact assessment*, 12 August 2021, pp. 97, 116, 201, [www.europarl.europa.eu/thinktank/en/document/EPRS_STU\(2021\)694210](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2021)694210). Linklater, IDC, *International Detention Coalition: Alternatives to detention in the Proposed EU Migration Pact – Preliminary Scoping Paper*, 23 June 2023, ipscdn.linklaters.com/-/media/files/document-store/pdf/uk/2023/july/idc_-_preliminary_scoping_paper_23_june_2023.ashx?rev=99389def-30aa-4c9b-ace3-3135851132cf&extension=pdf.

¹⁰ European Parliamentary Research Service, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, November 2020, pp. 206-207, [www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU\(2020\)654201_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf). IDC, *Immigration Detention and Alternatives to Detention in the Asia-Pacific Region*, note 9 above, p. 20.

¹¹ See, UNHCR, Global Report 2023, note 6 above. See also, for example, Asylum Information Database (AIDA), *Country Report: Turkey*, 2017, p. 92-93, asylumineurope.org/wp-content/uploads/2018/03/report-download_aida_tr_2017update.pdf. UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of O.M. & D.S. v. Ukraine (Application No. 18603/12)*, 15 July 2013, para. 2.2.6, www.refworld.org/jurisprudence/amicus/unhcr/2013/en/94688.

¹² UNHCR, *Beyond 2014-2019: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers & Refugees - Final Progress Report*, August 2020, pp.18-19, www.refworld.org/policy/strategy/unhcr/2020/en/123321. International Detention Coalition, *Gaining Ground: Promising Practice to Reduce and End Immigration Detention*, May 2022, <https://idcoalition.org/wp-content/uploads/2022/05/Gaining-Ground-Report-2022.pdf>. See further IDC, *Immigration Detention and Alternatives to Detention in the Asia-Pacific Region*, note 9 above; IDC, *There are Alternatives: Africa*, 9 March 2017, idcoalition.org/publications/there-are-alternatives-africa/; IDC, PICUM, *Implementing Case Management ATD in Europe*, March 2020, picum.org/wp-content/uploads/2020/04/Concept-Paper-on-Case-Management_EN.pdf.

¹³ See supra endnote 3 on the costs of immigration detention. Regarding compliance, see IDC, *There are alternatives*, note 3 above, para.2.4.1; Council of Europe, *Alternatives to Immigration Detention*, note 3 above, para.1.8.2; See UNHCR Detention Guidelines, note 4 above, Annex 1, p.44, on the capacity of ATDs combined with case management to achieve compliance with asylum procedures.

¹⁴ UNHCR, *Beyond Detention: a global strategy to support governments to end the detention of asylum-seekers and refugees*, 2014-2019, www.unhcr.org/media/beyond-detention-global-strategy-support-governments-end-detention-asylum-seekers-and. See also UNHCR, *Global Strategy Beyond Detention Final Progress Report*, note 12 above.

¹⁵ UNHCR Detention Guidelines, note 4 above.

¹⁶ On the applicability of Article 31 to asylum-seekers, see UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of 2021GaDan5118704 before the Seoul Central District Court*, 17 October 2022, para.12, www.refworld.org/jurisprudence/amicus/unhcr/2022/en/124168.

¹⁷ *Convention relating to the Status of Refugees* (28 July 1951) 189 UNTS 137, Article 31 (1), www.refworld.org/docid/3be01b964.html (1951 Convention): "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." See further, UNHCR, *Legal Observations on the Illegal Migration Bill*, 22 March 2023, para.93, www.refworld.org/legal/natlegcomments/unhcr/2023/en/124244. See also UNHCR, *Guidelines on International Protection No. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees*, 16 September 2024, HCR/GIP/24/14.

¹⁸ 1951 Convention, note 17 above, Articles 26 and 31.2. Under Article 26 of the 1951 Convention, asylum-seekers and refugees lawfully in the territory of the State enjoy freedom of movement within the State's territory subject to any regulations applicable to foreign nationals "in the same circumstances."

¹⁹ UNHCR, *Global Compact on Refugees*, 2018, para. 60, www.refworld.org/docid/63b43eaa4.html. This commitment should be read and implemented in a complementary manner with the *Global Compact for Safe, Orderly and Regular Migration* (GCM), 10 December 2018, A/RES/73/195, Objective 13, undocs.org/A/RES/73/195 (GCM, objective 13), under which States are committed to using immigration detention only as a last resort and working towards alternatives to immigration detention.

²⁰ The right to liberty is guaranteed in the *Universal Declaration of Human Rights* (10 December 1948) 217 A (III), Article 9, www.refworld.org/docid/3ae6b3712c.html (UDHR). It is protected in the core UN human rights treaties, notably in Article 9 of the ICCPR, as well as Article 37.b of the Convention on the Rights of the Child, Article 14 of the Convention on the Rights of People with Disabilities and Article 16 of the Convention on the Rights of Migrant Workers and their Families. *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171, www.refworld.org/docid/3ae6b3aa0.html (ICCPR), *Convention on the Rights of the Child* (20 November 1989), www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child (CRC), *Convention on the Rights of Persons with Disabilities* (24 January 2007), A/RES/61/106, www.refworld.org/legal/resolution/unga/2007/en/49751, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (18 December 1990), A/RES/45/158, <https://www.refworld.org/legal/agreements/unga/1990/en/27627>. The right to liberty is also protected in regional human rights treaties, including Article 6 of the African Charter of Human and Peoples' Rights, Article 7 of the American Convention on Human Rights, Article 14 of the Arab Charter on Human Rights, Article 5 of the European Convention on Human Rights and Article 6 of the EU Charter of Fundamental Rights. *African Charter of Human and Peoples' Rights* (01 June 1981), au.int/sites/default/files/treaties/36390-treaty-0011-african_charter_on_human_and_peoples_rights_e.pdf, *American Convention on Human Rights* (22 November 1969), www.refworld.org/legal/agreements/oas/1969/en/20081, *Arab Charter on Human Rights* (15 September 1994), www.refworld.org/legal/agreements/las/1994/en/10672, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (4 November 1950) ETS 5, www.refworld.org/docid/3ae6b3b04.html (ECHR), European Union, *Charter of Fundamental Rights of the European Union* (26 October 2012) 2012/C 326/02, www.refworld.org/docid/3ae6b3b70.html (EU Charter of Fundamental Rights). The prohibition of arbitrary detention, a key element of the right to liberty, is acknowledged to be a norm of customary international law binding all states. See Working Group on Arbitrary Detention, *Deliberation No.9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, 24 December 2012, A/HRC/22/44, undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F22%2F44&Language=E&DeviceType=Desktop&LangRequested=False; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No.5 on migrants' right to liberty and freedom from arbitrary detention and their connection with other rights*, 21 July 2022, CMW/C/GC/5, para.16, www.refworld.org/reference/themreport/cmw/2022/en/147482; UNHCR, *UNHCR's views on the detention of asylum-seekers*:

Using international law to advocate against detention of individuals seeking protection in the U.S. September 2022, Part II, www.unhcr.org/us/sites/en-us/files/legacy-pdf/631f449d4.pdf. In regard to the status of the norm as a peremptory norm of international law, see UN Human Rights Committee (HRC), *General comment no. 29 on Article 4: derogations during a state of emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para.11, www.refworld.org/legal/general/hrc/2001/en/30676; in regard to the prohibition of arbitrary detention as customary international law in international and non-international armed conflicts, see ICRC, *Customary International Law Database*, Rule 99, ihl-databases.icrc.org/en/customary-ihl/v1/rule99. See further generally, Carla Ferstman, *Conceptualising Arbitrary Detention: Power, Punishment and Control*, May 2024, para. 2.5.1., <https://repository.essex.ac.uk/38482/1/Conceptualising%20Arbitrary%20Detention.pdf>.

²¹ HRC General Comment No. 35, note 4 above, para.18; *F.K.A.G. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, UN Human Rights Committee (HRC), 26 July 2013, para.9.3, www.refworld.org/jurisprudence/caselaw/hrc/2013/en/96126 *A.K. v Australia*, Communication No. 2365/2014, CCPR/C/132/D/2365/2014, Human Rights Committee (HRC), 8 July 2021, para.8.5, undocs.org/CCPR/C/132/D/2365/2014; *MMM v Australia*, Communication No. 2136/2012, CCPR/C/108/D/2136/2012, Human Rights Committee (HRC), 28 October 2013, para.10.3, tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/108/D/2136/2012&Lang=en.

²² HRC General Comment No. 35, note 4 above; UN Human Rights Council, *WGAD Opinion 1/2019 concerning Premakumar Subramaniam (Australia)*, 12 June 2019, A/HRC/WGAD/2019/1, www.ohchr.org/sites/default/files/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_1.pdf.

²³ UN Human Rights Council, *WGAD Opinion No. 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia)*, 6 June 2019, A/HRC/WGAD/2019/2, para.96, documents.un.org/doc/undoc/gen/q19/153/41/pdf/q1915341.pdf?OpenElement; UN Human Rights Council, *WGAD Opinion No 7/2019 Concerning Ibrahim Toure (Canada)*, 7 June 2019, A/HRC/WGAD/2019/7, para.64, www.ohchr.org/sites/default/files/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_7.pdf; UN Human Rights Council, *WGAD Opinion No. 35/2020 concerning Jamal Talib Abdul Hussein (Australia)*, 6 October 2020, A/HRC/WGAD/2020/35, para.91, documents.un.org/doc/undoc/gen/q20/254/89/pdf/q2025489.pdf.

²⁴ *2020 Hun-Ka1 & 2021 Hun-Ka10*, Republic of Korea: Constitutional Court, 23 March 2023, www.refworld.org/jurisprudence/caselaw/korccc/2023/en/60731.

²⁵ UNHCR, *Position regarding the detention of refugee and migrant children in the migration context*, January 2017, www.refworld.org/policy/legalguidance/unhcr/2017/en/115250 (2017 UNHCR Position regarding the detention of children).

²⁶ UNHCR, *Policy on Detention Monitoring*, 30 November 2015, UNHCR/HCP/2015/7, www.unhcr.org/sites/default/files/legacy-pdf/56de90b69.pdf.

²⁷ UNHCR, *Beyond Detention Strategy*, note 14 above.

²⁸ See UNHCR, *Refworld Thematic Areas – Detention*, www.refworld.org/thematic-area/detention#:~:text=UNHCR%20takes%20the%20position%20that,a%20measure%20of%20last%20resort.

²⁹ See e.g. ECRE, *Reception, detention and restriction of movement at EU external borders*, note 9 above.

³⁰ IDC, *Spotlight Report on Global Migration*, 2022, p.18, idcoalition.org/publications/spotlight-report-on-global-migration-2022/.

³¹ HRC General Comment No. 35, note 4 above, para.5; UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 19 July 2017, A/HRC/36/37, para.52, www.undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F36%2F37&Language=E&DeviceType=Desktop&LangRequested=False. *Ilias and Ahmed v Hungary*, (Application No. 47287/15), Council of Europe: European Court of Human Rights, 21 November 2019, para.212, www.refworld.org/jurisprudence/caselaw/echr/2019/en/89813. Sub-Committee on Prevention of Torture or other Cruel, Inhuman or Degrading Treatment or Punishment, *General Comment No. 1 (2024) on article 4 of the Optional Protocol (places of deprivation of liberty)*, CAT/OP/GC/1, 4 July 2024, para.43: “in some cases, an individual might be in a place that does not seem to constitute a place of deprivation of liberty but, when examined in the full context of an individual case, does indeed constitute such a place.” Further the SPT notes at para. 45 “whether a particular fact or circumstance may be taken to be a deprivation of liberty depends not only on whether the person in question has a de jure right to leave, but also on whether the person is able to exercise that right de facto and is able to do so without being exposed to serious human rights violations. Therefore, if the ability to leave such a place, facility or setting would be somehow limited or expose a person to serious human rights violations, that place, facility or setting should also be understood as a place of deprivation of liberty within the meaning of article 4 of the Optional Protocol,” <https://www.ohchr.org/en/documents/general-comments-and-recommendations/catopgc1-general-comment-no-1-2024-article-4>

³² UNHCR Detention Guidelines, note 4 above, para.5.

³³ UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Ilias and Ahmed v. Hungary (Application No. 47287/15) before the Grand Chamber of the European Court of Human Rights*, 8 January 2018, para.3.1.8, www.refworld.org/jurisprudence/amicus/unhcr/2018/en/123061. UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of S.A.A. and Others v. Greece (No. 22146/21) before the European Court of Human Rights*, July 2022, para.3.3.2, www.refworld.org/jurisprudence/amicus/unhcr/2022/en/120427.

³⁴ SPT General Comment No.1 on article 4 of the Optional Protocol, note 31 above.

³⁵ *Guzzardi v Italy*, (Application No.7367/76), Council of Europe: European Court of Human Rights, 6 November 1980, para.92, refworld.org/jurisprudence/caselaw/echr/1980/en/88144. ECtHR, *Ilias and Ahmed v Hungary*, note 31 above, para.212. *Nada v Switzerland*, (Application No.10593/08), Council of Europe: European Court of Human Rights, 12 September 2012, para.225, hudoc.echr.coe.int/fre?i=001-113118.

³⁶ ECtHR, *Guzzardi v Italy*, note 35 above, para.93-95. WGAD, *Opinion No. 22/2020 concerning Saman Ahmed Hamad (Hungary)*, 5 June 2020, A/HRC/WGAD/2020/22, www.ohchr.org/sites/default/files/Documents/Issues/Detention/Opinions/Session87/A_HRC_WGAD_2020_22_Advance_Edited_Versio

[n.pdf](#). HRC General Comment No. 35, note 4 above, para.6; *Amuur v France*, (Application No.19776/92), Council of Europe: European Court of Human Rights, 25 June 1996, para.42: In assessing whether someone is deprived of liberty “the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance,” hudoc.echr.coe.int/fre?i=001-57988.

³⁷ See for example, *ZA and others v Russia*, (Application Nos. 61411/15, 61420/15, 61427/15 and 3028/16), Council of Europe: European Court of Human Rights, 21 November 2019, www.refworld.org/jurisprudence/caselaw/echr/2019/en/123065. *JR v Greece*, (Application no. 22696/16), Council of Europe: European Court of Human Rights, 25 January 2018, www.refworld.org/jurisprudence/caselaw/echr/2018/fr/123318. *RR v Hungary*, (Application no.36037/17), Council of Europe: European Court of Human Rights, 2 March 2021, www.refworld.org/jurisprudence/caselaw/echr/2021/en/123982. *FMS and Others v. Főigazgatóság et al*, (joint cases C-924/19 and C-925/19), Court of Justice of the European Union (CJEU), 14 May 2020, paras 226 – 231, curia.europa.eu/juris/liste.jsf?num=C-924/19. See by contrast, ECtHR, *Ilias and Ahmed v Hungary*, note 31 above, paras 247-248.

³⁸ ECtHR, *Amuur v France*, note 36 above, para.48. WGAD, *Opinion No.22/2020 concerning Saman Ahmed Hamad*, note 36 above, para.15, noting that leaving the jurisdiction of Hungary would deprive Mr. Hamad of his right to seek asylum and put him at risk of refoulement.

³⁹ See WGAD, *Opinion No.22/2020 concerning Saman Ahmed Hamad*, note 36 above, para.69: the WGAD “cannot accept that an individual who must either agree to remain in the transit zones or lose the possibility of lodging an asylum application could be described as freely consenting to stay in the transit zones.” See also CJEU, *FMS and Others v. Főigazgatóság et al*, note 37 above, paras.227-230, finding that the possibility for the applicants to cross into Serbia did not prevent the situation from amounting to detention, since in doing so they could be exposed to penalties for illegal entry and could jeopardize their asylum claims in Hungary. However, before, the ECtHR in *Ilias and Ahmed v Hungary*, note 31 above, paras.236-243 the possibility for the applicants to enter Serbia, where they did not fear for their life or health, but had concerns about the reliability of the asylum system, was a factor in the ECtHR’s finding that the applicants were not de facto detained in Hungary.

⁴⁰ *J.A. and others v Italy*, (Application no.21329/18), Council of Europe: European Court of Human Rights, 30 March 2023, para.92-99, www.refworld.org/jurisprudence/caselaw/echr/2023/en/147486. The Court also found that the applicants’ removal from the country without examination of their individual situations amounted to a collective expulsion in violation of Article 4 of Protocol No.4 ECHR, note 20 above.

⁴¹ WGAD, *Opinion No.22/2020 concerning Saman Ahmed Hamad*, note 36 above, paras.59-87.

⁴² See UN General Assembly, *Ending immigration detention of children and providing adequate care and reception for them: Report of the Special Rapporteur on the human rights of migrants*, note 2 above, paras.33-44; See also IDC, UNICEF, *Promising Practices and Alternatives: Towards a Continuum of Protection and Care for Refugee and Migrant Children in the MENA region*, 20 December 2022, idcoalition.org/publications/mena-policy-brief-community-family-based-alternatives/. UNHCR, *Global Report 2023, Outcome Area 5: Child Protection*, 2023, reporting.unhcr.org/global-report-2023/outcome-areas/child-protection.

⁴³ United Nations Task Force on Children Deprived of their Liberty, *End Immigration Detention of Children*, note 6 above, p.5; UN General Assembly, *Ending immigration detention of children and providing adequate care and reception for them: Report of the Special Rapporteur on the human rights of migrants*, note 2 above, para.12; UN Global Study on Children Deprived of Liberty, note 6 above, Chapter 11 paras 3.1, 3.4.

⁴⁴ UN Task Force on Children Deprived of their Liberty, *End Immigration Detention of Children*, note 6 above, p.5.

⁴⁵ CRC, note 20 above, Article 3.1.

⁴⁶ ICCPR, note 20 above, Articles 17 and 23. CRC, note 20 above, Articles 9 and 16.

⁴⁷ IDC, *Immigration Detention and Alternatives to Detention in the Asia-Pacific Region*, note 9 above, p.22.

⁴⁸ UNHCR, *Global Strategy Beyond Detention Final Progress Report*, note 12 above, pp.16-17.

⁴⁹ See note 25 above. UN Committee on the Rights of the Child (CRC), *General Comment No.6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para.61, www.refworld.org/legal/general/crc/2005/en/38046. CRC, *Report of the 2012 day of general discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, para.78, www.refworld.org/reference/themreport/crc/2012/en/95889. UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child 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, www.refworld.org/reference/research/cmw/2017/en/119190. See also, WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para.11, www.ohchr.org/sites/default/files/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf. UN Human Rights Council, *Report of the Working Group on Arbitrary Detention: United Nations Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court*, 6 July 2015, A/HRC/30/37, para.46, documents.un.org/doc/undoc/gen/g15/149/09/pdf/g1514909.pdf.

⁵⁰ CRC, note 20 above, Article 3.1.

⁵¹ CRC, note 20 above, Article 37.1.

⁵² CMW General Comment No. 4 (2017), note 49 above, paras. 5-13.

- ⁵³ UN General Assembly, Ending immigration detention of children and providing adequate care and reception for them: Report of the Special Rapporteur on the human rights of migrants, note 2 above. UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 March 2015, A/HRC/28/68, para. 80, www.refworld.org/reference/themreport/unhrc/2015/en/104280. UN Global Study on Children Deprived of Liberty, note 6 above, Chapter 11, Recommendations 8, 10, 12 and 13. See also, UN OHCHR, *Child Immigration Detention must be prohibited following adoption of EU migration and asylum pact, UN experts say*, 2 May 2024, www.ohchr.org/en/press-releases/2024/05/child-immigration-detention-must-be-prohibited-following-adoption-eu.
- ⁵⁴ IACtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (interpretation of Articles 1(1), 2, 4(1), 5, 7, 8, 11, 17, 19, 22(7), 22(8), 25 and 29 of the American Convention on Human Rights; Articles 1, 6, 8, 25 and 27 of the American Declaration of the Rights and Duties of Man; and Article 13 of the Inter-American Convention to Prevent and Punish Torture)*, Advisory Opinion OC-21/14 of 19 August 2014, para.154, www.refworld.org/jurisprudence/caselaw/iacthr/2014/en/101667. African Commission on Human and People's Rights, *African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers*, 20 October 2023, principle 8.5, achpr.au.int/en/soft-law/african-guiding-principles-human-rights-all-migrants-refugees. See also, Inter-American Principles on the Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, 7 December 2019, Resolution 04/19, Principle 70, www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf.
- ⁵⁵ The European Court of Human Rights, while it has not absolutely prohibited the detention of children for immigration purposes, has considerably narrowed the permissible scope of such detention., see e.g. *G.B. and others v Turkey*, (Application no. 4633/15), Council of Europe: European Court of Human Rights, 17 October 2019, paras.150-151, www.refworld.org/jurisprudence/caselaw/echr/2019/en/122925; *A.B. and others v. France*, (Application No. 11593/12), Council of Europe: European Court of Human Rights, 12 July 2016, hudoc.echr.coe.int/eng?i=002-11264; *M.D. and A.D v France*, (Application no.57035/18), Council of Europe: European Court of Human Rights, 22 July 2021, hudoc.echr.coe.int/eng-press?i=003-7084431-9580687; *Bilalova and others v. Poland*, (Application No. 23685/14), Council of Europe: European Court of Human Rights, 26 March 2020, hudoc.echr.coe.int/eng?i=001-202246; *MH and others v Croatia*, (Applications nos. 15670/18 and 43115/18), Council of Europe: European Court of Human Rights, 18 November 2021, para.239, hudoc.echr.coe.int/fre?i=001-213213. The ASEAN Declaration on the Rights of Children in the Context of Migration, 2 November 2019, para.9, recommended “that in order to promote the best interests of the child, States should work to develop effective procedures and alternatives to child immigration detention to reduce its impact, and ensure that, where possible, children are kept together with their families in a non-custodial, and clean and safe environment,” asean.org/wp-content/uploads/2019/11/4-ASEAN-Declaration-on-the-Rights-of-Children-in-the-Context-of-Migration.pdf.
- ⁵⁶ UNHCR, Global Compact on Refugees, note 19 above. See also Global Compact for Safe, Orderly and Regular Migration (GCM), note 19 above, Objective 13; UN General Assembly, *New York Declaration for Refugees and Migrants*, 3 October 2016, A/RES/71/1, para.33, www.refworld.org/legal/resolution/unga/2016/en/112142 (adopted 19 September 2016).
- ⁵⁷ UN Task Force on Children Deprived of their Liberty, End Immigration Detention of Children, note 6 above, para.18; United Nations Network on Migration, *Promising Practices on Alternatives to Immigration Detention: Ending Child Immigration Detention*, migrationnetwork.un.org/system/files/resources_files/ATD_Ending%20child%20immigration%20detention.pdf; IDC, *Gaining Ground*, note 6 above, p.31. International Detention Coalition, *Alternatives to Immigration Detention in Contexts with Transit Migration*, July 2023, p.18, www.refworld.org/reference/themreport/idc/2023/en/148538.
- ⁵⁸ *Ireland: International Protection Act, 2015*, 30 December 2015, section 20(6), www.irishstatutebook.ie/eli/2015/act/66. If two relevant staff (immigration officers/national police etc) believe the minor is over 18 then they can be detained in accordance with section 20(7) of the International Protection Act 2015.
- ⁵⁹ UN Task Force on Children Deprived of their Liberty, End Immigration Detention of Children, note 6 above, p.8; UN Network on Migration, *Promising Practices on Alternatives to Immigration Detention, Whole of Government and Whole of Society Approaches*, migrationnetwork.un.org/system/files/resources_files/ATD_Whole-Of-Government%20and%20Who-of%20Society%20Approaches.pdf. The ATD-MOU evaluation process has sought input from relevant government agencies, and a revision of the ATD MOU Standard Operating Procedures (SOP) is scheduled for review in August 2024. This revision aims to address operational challenges related to the prolonged detention of children.
- ⁶⁰ UNHCR, *Technical Guidance: Child Friendly Procedures*, 2021, p.30, www.refworld.org/policy/opguidance/unhcr/2021/en/124121.
- ⁶¹ UNHCR, *UNHCR Policy on Child Protection*, 26 January 2024, UNHCR/HCP/2024/01, para.5.3.1 www.refworld.org/policy/strategy/unhcr/2024/en/147495.
- ⁶² Ibid., paras 47-48. UN Global Study on Children Deprived of Liberty, note 6 above, Chapter 11, recommendations 7 and 17.
- ⁶³ UNHCR Child Friendly Procedures, note 60 above, p. 29-30.
- ⁶⁴ UNHCR Detention Guidelines, note 4 above, paras 47-48.
- ⁶⁵ See, e.g. ECRE/ELENA, *Legal Note on Access to Legal Aid in Europe*, November 2017, pp.7-9, www.refworld.org/reference/regionalreport/ecre/2017/en/119185.
- ⁶⁶ UN Global Study on Children Deprived of Liberty, note 6 above, Chapter 11, recommendations 7 and 17. IDC, *Immigration Detention and Alternatives to Detention in the Asia-Pacific Region*, note 9 above, p.29.
- ⁶⁷ See, e.g. UNHCR, UNHCR's views on the detention of asylum-seekers, note 20 above, pp.6-7; ECRE/ELENA Legal Note on Access to Legal Aid in Europe, note 65 above, pp.7-9.
- ⁶⁸ See IDC, *Immigration Detention and Alternatives to Detention in the Asia-Pacific Region*, note 9 above, pp. 28-29; *Kaak and others v Greece*, (Application no.34215/16), Council of Europe: European Court of Human Rights, 3 October 2019, hudoc.echr.coe.int/eng?i=001-196150.

⁶⁹ See for example, *Feilazoo v Malta*, (Application No.6865/19), Council of Europe: European Court of Human Rights, 3 November 2023, hudoc.echr.coe.int/fre?i=001-208447; ACLU, *No Fighting Chance: ICE's Denial of Access to Counsel in US Immigration Detention Centers*, 9 June 2022, www.aclu.org/wp-content/uploads/publications/no_fighting_chance_aclu_research_report.pdf.

⁷⁰ See for example HRC, *A.K. v Australia*, note 21 above, para.8.7; HRC, *MMM v Australia*, note 21 above, para.10.6. See also *Suso Musa v Malta*, (Application No. 42337/12), Council of Europe: European Court of Human Rights, 23 July 2013, www.refworld.org/jurisprudence/caselaw/echr/2013/en/97759; *R.T. v. Greece*, (Application No. 5124/11), Council of Europe: European Court of Human Rights, February 11, 2016, www.refworld.org/jurisprudence/caselaw/echr/2016/fr/108932; *AM v France*, (Application No.56324/13), Council of Europe: European Court of Human Rights, 12 July 2016, hudoc.echr.coe.int/eng?i=001-165269.

⁷¹ Including ICRC, The Sub-Committee for the Prevention of Torture (SPT), UN Special Procedures including the Working Group on Arbitrary Detention, and regional human rights bodies. For a full list, see UNHCR, APT and IDC, *Monitoring Immigration Detention: Practical Manual*, 2014, section 1.2, www.unhcr.org/ip/wp-content/uploads/sites/34/protect/monitoring_immigration_detention_practical_manual.pdf. See also UNHCR Policy on Detention Monitoring, note 26 above, para.4.6.

⁷² UNHCR, Monitoring Immigration Detention, note 71 above, section 1.1. UNHCR Policy on Detention Monitoring, note 26 above, paras.1.4, 3.3, and 4.7-4.8. On the obstacles faced by UNHCR in accessing detention, see UNHCR Global Report 2023, Outcome Area 6, note 6 above, noting that in 30% of reporting country operations, UNHCR faced restrictions on access to places of detention.

⁷³ ICCPR, note 20 above, Articles 9.2 and 9.4. ECHR, note 20 above, Articles 5.2, 5.3, 5.4; American Convention on Human Rights, note 20 above, Article 7; UNHCR Detention Guidelines, note 4 above, Guideline 7.

⁷⁴ UNHCR Detention Guidelines, note 4 above, Guideline 10.

⁷⁵ HRC General Comment No. 35, note 4 above, paras 24-27; On the applicability of Article 9.2 to immigration detention, see UN Human Rights Committee (HRC), *General comment no. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, www.refworld.org/legal/general/hrc/1982/en/70483. See also *Khalifa and Others v. Italy*, (Application no. 16483/12), Council of Europe: European Court of Human Rights, 15 December 2016, paras.115, 132, www.refworld.org/jurisprudence/caselaw/echr/2016/en/114241; UNHCR Detention Guidelines, note 4 above, Guideline 7.

⁷⁶ UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 9 December 1988, General Assembly resolution 43/173, Principles 13 and 14, www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention. See also Council of Europe: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Factsheet on Immigration detention*, March 2017, CPT/Inf(2017)3, p. 3. CPT standards also specify that immigration detainees should receive information on their rights in writing, and that they should confirm in writing that they have received the information in a language that they understand, <https://www.refworld.org/reference/themreport/coecpt/2017/en/116109>; Report of the Special Rapporteur on the human rights of migrants, note 3 above, paras.15-16; ECtHR, *Khalifa and Others v. Italy*, note 75 above, para 115.

⁷⁷ UNHCR Detention Guidelines, note 4 above, Guideline 7, para.47(vi).

⁷⁸ ECtHR, *Khalifa and Others v. Italy*, note 75 above, para.132.

⁷⁹ HRC General Comment No. 35, note 4 above, para.46; WGAD, Revised deliberation No. 5, note 49 above, para.35. IACHR, Inter-American Principles on the Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, note 54 above, principle 50.g, 50.h and Principle 68; African Commission on Human Rights, African Guiding Principles on the Human Rights of Migrants, Refugees and Asylum-seekers, note 54 above, Principle 11.1.d and 11.1.e; Council of Europe: CPT Factsheet on Immigration detention, note 76 above, p.3. ECtHR, *Kaak and others v Greece*, note 68 above; UNHCR Detention Guidelines, note 4 above, Guideline 7.

⁸⁰ UNGA, Body of Principles for the Protection of all persons under any form of detention or imprisonment, note 76 above, principle 17.2; WGAD, Revised Deliberation No.5, note 49 above, para.35. ECtHR, *Suso Musa v Malta*, note 70 above, para.61. Free legal assistance should be provided where it is also available to nationals similarly situated: see 1951 Convention, note 17 above, Article 16(2).

⁸¹ UNGA, Body of Principles for the Protection of all persons under any form of detention or imprisonment, note 76 above, principle 18.

⁸² UNHCR Detention Guidelines, note 4 above, Guideline 7, para.47 (iii); *A. v. Australia*, Communication No.560/1993, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, para. 9.4, www.refworld.org/cases/HRC.3ae6b71a0.html; American Convention on Human Rights, note 20 above, Article 7.5; CPT Factsheet on Immigration detention, note 76 above, p.3.

⁸³ ICCPR, note 20 above, Article 9.4; ECHR, note 20 above, Article 5.4; American Convention on Human Rights, note 20 above, Article 7.6. WGAD, Revised Deliberation No. 5, note 49 above, para.29; HRC General Comment No. 35, note 4 above, para.45. UN Human Rights Council, WGAD Opinion No. 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia), note 23 above; UN Human Rights Council, WGAD, *Opinion No. 50/2018 concerning Edris Cheraghi (Australia)*, 1 October 2018, A/HRC/WGAD/2018/50, para.75-77, documents.un.org/doc/undoc/gen/g18/291/91/pdf/g1829191.pdf?OpenElement. 1951 Refugee Convention, note 17 above, Article 16.1, provides that refugees shall have access to courts of law of Contracting States. UN Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court, note 49 above, para.43.

⁸⁴ HRC, *A. v. Australia*, note 82 above, para.9.5; *C. v. Australia*, Communication No.900/1999, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 28 October 2002, para.8.3, www.ohchr.org/casedetails/1026/en-US; HRC, *A.K. v Australia*, note 21 above, para.8.7; HRC, *MMM v Australia*, note 21 above, para.10.6. See also ECtHR, *Suso Musa v Malta*, note 70 above.

⁸⁵ WGAD Revised Deliberation No.5, note 49 above, principle 70 provides: "The Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and other relevant organizations, including national human rights institutions,

national preventive mechanisms and international and national non-governmental organizations, must be allowed free access to the places of detention where those detained in the course of migration proceedings are held." The IACHR, Principles on the Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, note 54 above, Principle 70, provides that States must ensure autonomous and independent monitoring mechanisms and allow civil society organizations and international organizations access to detention centers as well as access to relevant information and documentation and "the possibility of private and confidential interviews with persons deprived of liberty and staff." See also CPT Factsheet on Immigration detention, note 76 above, page 7; UN OHCHR and Global Migration Group, *Principles and Guidelines on the Human Rights Protection of Migrants in Vulnerable Situations*, 03 April 2018, A/HRC/33/67, principle 8, <https://www.ohchr.org/sites/default/files/PrinciplesAndGuidelines.pdf>; UNHCR Detention Guidelines, note 4 above, Guideline 10.

⁸⁶ This should be read in conjunction with para.8. a of the UNHCR Statute. See UNHCR Policy on Detention Monitoring, note 26 above, paras. 1.2-1.3.

⁸⁷ UNHCR Detention Guidelines, note 4 above, Guideline 10.

⁸⁸ UNHCR Detention Monitoring Policy, note 18 above, para.4.8; OHCHR Principles and Guidelines on the Human Rights Protection of Migrants in Vulnerable Situations, note 85 above, principle 8. IACHR, Principles on the Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, note 54 above, principles 69-70.

⁸⁹ See, for example, EMN, Detention and Alternatives to Detention in international protection and return procedures, note 3 above; EMN, The use of detention and Alternatives to Detention in the context immigration policies, note 3 above; IDC, There are alternatives, note 3 above, paras. 2.4.1 and 2.4.2; UNHCR, Evaluation of the Refugee and Migrant Advisory Service's Alternative to Detention Pilot, note 3 above, pp.70-71; Council of Europe, Alternatives to Immigration Detention, note 3 above, paras. 1.8.2 and 1.8.3; Steering Committee for Human Rights, Legal and practical aspects of effective alternatives to detention in the context of migration, note 3 above, p.4-5.

⁹⁰ See UNHCR Detention Guidelines, note 4 above, Annex 1, p.44, on the capacity of ATDs combined with case management to achieve compliance with asylum procedures.

⁹¹ IDC, Gaining Ground, note 6 above. See further IDC, Immigration Detention and Alternatives to Detention in the Asia-Pacific Region, note 9 above; IDC, There are Alternatives: Africa, note 12 above; IDC and PICUM, Implementing Case Management ATD in Europe, note 12 above.

⁹² IDC, There are alternatives, note 3 above, p. 11.

⁹³ Ibid.

⁹⁴ European Migration Network, *Annual Report on Immigration and Asylum 2014*, 19 June 2015, [migrant-integration.ec.europa.eu/library-document/emn-annual-report-immigration-and-asylum-2014_en](https://migration.ec.europa.eu/library-document/emn-annual-report-immigration-and-asylum-2014_en)

⁹⁵ Human Rights Watch, *Considering Alternatives to Immigration Detention: Implementing Community-Based Case Management Through Newcomer Support Services and Organizations in Ontario*, August 2022, p. 14, www.socialconnectedness.org/wp-content/uploads/2022/11/Waghma-Final-Report-Considering-Alternatives-to-Immigration-Detention.docx.pdf

⁹⁶ IDC, There are alternatives, note 3 above, p. 11

⁹⁷ Ibid.

⁹⁸ Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, (United States of America, National Immigration Forum), 9 May 2018, immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-multiply/

⁹⁹ European Migration Network, *Annual Report 2014*, note 94 above.

¹⁰⁰ Detention Action, *What is immigration detention?*, detentionaction.org.uk/about-detention/what-is-immigration-detention/#:~:text=According%20to%20Oxford's%20Migration%20Observatory,14%20was%20%C2%A3164.4m.

¹⁰¹ International Detention Coalition, *Immigration Detention as an Exceptional Measure of Last Resort*, 2023, p. 28, idcoalition.org/wp-content/uploads/2024/01/Immigration-Detention-as-an-Exceptional-Measure-of-Last-Resort_WEB.pdf.

¹⁰² International Journal of Refugee Law, *Alternatives to Detention: Executive Committee of the High Commissioner's Programme*, Volume 28, Issue 1, March 2016, pp. 148–155, doi.org/10.1093/ijrl/eew005. See also UNCHR, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, PPLA/2011/01.Rev. 1, 2011, p.54-55, www.ohchr.org/sites/default/files/Documents/Issues/Migration/Events/BackToBasics.pdf.

¹⁰³ CMW General Comment No.5, note 20 above, para.48.

¹⁰⁴ IDC, Gaining Ground, note 6 above, p. 20-21.

¹⁰⁵ UNHCR Detention Guidelines, note 4 above, Guideline 4.

¹⁰⁶ HRC General Comment No. 35, note 4 above, para.18; OHCHR Principles and Guidelines on the Human Rights Protection of Migrants in Vulnerable Situations, note 85 above, Principle 8, paras.1 and 2. See also, WGAD, Revised deliberation no.5, note 49 above, para.16; HRC, *F.K.A.G. et al. v. Australia*, note 21 above, para.9.4. See also *C. v. Australia*, note 84, para. 8.2; *Zeyad Khalaf Hamadie Al-Gertani v. Bosnia and Herzegovina*, Communication No. 1955/2010, CCPR/C/109/D/1955/2010, UN Human Rights Committee (HRC), 6 November 2013, para. 10.4, www.refworld.org/jurisprudence/caselaw/hrc/2013/en/98623?prevPage=/node/98623; *Hassen El Dridi case*, Case no. C-61/11, European Union: Court of Justice of the European Union, 28 April 2011, para. 39, www.refworld.org/jurisprudence/caselaw/ecj/2011/en/75853; *Rahimi v. Greece*, (Application No. 8687/08), Council of Europe: European Court of Human Rights, 5 April 2011, para. 109, www.refworld.org/jurisprudence/caselaw/echr/2011/fr/78627; CMW General Comment No.5, note 20 above, paras.19-22 and 54-56.

¹⁰⁷ New York Declaration for Refugees and Migrants, note 56 above, para.33; Global Compact for Safe, Orderly and Regular Migration (GCM), note 19 above, Objective 13; See further the work of the *United Nations Migration Network (UNMIN) Working Group on Alternatives to Detention*, migrationnetwork.un.org/thematic-working-group-2-alternatives-detention.

¹⁰⁸ Global Compact on Refugees, note 19 above, para.60: "The development of non-custodial and community-based alternatives to detention, particularly for children, will also be supported". These aims are also reflected under Objective 13 of the Global Compact on Migration (GCM) which is implemented in a complementary manner with the GCR.

¹⁰⁹ See for example the peer learning events organized by the Working Group co-led by UNHCR, IDC and UNICEF on Alternatives to Detention of the UN Network on Migration, note 99 above.

¹¹⁰ UNHCR Detention Guidelines, note 4 above, paras.35 and 43.

¹¹¹ UNHCR Detention Guidelines, note 4 above, para.36.

¹¹² See e.g. Council of Europe, CDDH, Legal and Practical Aspects of effective alternatives to detention in the context of migration, 7 December 2017, p.7, edoc.coe.int/en/migration/7961-legal-and-practical-aspects-of-effective-alternatives-to-detention-in-the-context-of-migration.html; Report of the Special Rapporteur on the human rights of migrants, note 3 above, paras.53 and 73; WGAD, Revised Deliberation no. 5, note 49 above, para.17.

¹¹³ UNHCR Detention Guidelines, note 4 above, paras.37 and 41.

¹¹⁴ UNHCR Detention Guidelines, note 4 above, para.40.

¹¹⁵ See CMW General Comment No.5, note 20 above, para.52; *Thimothawes v. Belgium*, (Application no. 39061/11), Council of Europe: European Court of Human Rights, 4 April 2017, para.73, hudoc.echr.coe.int/eng/?i=001-172844; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, (Application No.13178/03), Council of Europe: European Court of Human Rights, 12 October 2006, paras. 102-105, www.refworld.org/jurisprudence/caselaw/echr/2006/en/36666; ECtHR, *Rahimi v. Greece*, note 106 above, paras.102-110; *Yoh-Ekale Mwanje v. Belgium*, (Application no.10486/10), Council of Europe: European Court of Human Rights, 20 December 2012, para. 124, hudoc.echr.coe.int/eng/?i=001-108155.

¹¹⁶ UNHCR and IDC, *Vulnerability Screening Tool - Identifying and addressing vulnerability: a tool for asylum and migration systems*, 2016, www.refworld.org/policy/opguidance/unhcr/2016/en/112752. See also Global Compact for Refugees, note 19 above, para.60; *Abdi Mahamud v. Malta*, (Application no 56796/13), Council of Europe: European Court of Human Rights, 3 May 2016, paras.88-89, hudoc.echr.coe.int/eng/?i=001-162424; *Abdullahi Elmi and Aweys Abubakar v. Malta*, (Applications Nos. 25794/13 and 28151/13), Council of Europe: European Court of Human Rights, 22 November 2016, hudoc.echr.coe.int/eng/?i=001-168780; UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, para. 34, www.refworld.org/legal/general/cedaw/2014/en/102146.

¹¹⁷ Global Compact for Refugees, note 19 above, para.60. See further, UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, para.115: "For stateless persons, the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention. Statelessness determination procedures are therefore an important mechanism to reduce the risk of prolonged and/or arbitrary detention," www.refworld.org/policy/legalguidance/unhcr/2014/en/122573; UNHCR, *Stateless Persons in Detention, a tool for their identification and enhanced protection*, June 2017, p.13, www.refworld.org/policy/opguidance/unhcr/2017/en/117659; *Convention Relating to the Status of Stateless Persons*, (28 September 1954), Article 25, www.refworld.org/legal/agreements/unga/1954/en/32744.

¹¹⁸ UNHCR, *Beyond Detention Toolkit: Guiding Questions for the assessment of Alternatives to Detention*, May 2018, p.2, www.refworld.org/policy/opguidance/unhcr/2018/en/120848.

¹¹⁹ UNHCR, Options Paper 2, note 3 above.

¹²⁰ UNHCR, *Beyond Detention Toolkit*, note 118 above.

¹²¹ UNHCR, *Alternatives to Detention Self-study Modules*, 2018, www.refworld.org/thematic-area/detention.

¹²² IDC, *Gaining Ground*, note 6 above, p.23.

¹²³ *Ibid.*

¹²⁴ IDC, *Gaining Ground*, note 6 above, p.27; UN Network on Migration, *Promising Practices on Alternatives to Immigration Detention: temporary regularization programmes*, migrationnetwork.un.org/system/files/resources_files/ATD_Temporary%20regularisation%20programmes.pdf; IDC, *Alternatives to Immigration Detention in Contexts with Transit Migration*, note 57 above, p. 41.

¹²⁵ IDC, *Alternatives to Detention in Contexts with Transit Migration*, note 57 above, pp.20, 33; UNMN, *Promising Practices on Alternatives to Immigration Detention: Ending Child Immigration Detention*, https://migrationnetwork.un.org/system/files/resources_files/ATD_Ending%20child%20immigration%20detention.pdf; UNHCR, *Beyond Detention: Progress Report 2018: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers & Refugees, 2014 - 2019*, February 2019, pp.72-76, www.refworld.org/policy/strategy/unhcr/2019/en/122574; UNHCR, *Global Strategy Beyond Detention Final Progress Report*, note 12 above, pp.103-105.

¹²⁶ Implemented by the Centre for Legal Aid – Voice in Bulgaria and Bulgarian Lawyers for Human Rights, in cooperation with the European Alternatives to Detention Network. The project has now ended but its implementors continue to work on ATD.

¹²⁷ The Bulgaria pilot project was carried out in parallel with similar projects in Cyprus and Poland, see Eiri Ohani, *Alternatives to Detention: Building a culture of cooperation*, EPIM, July 2020, www.epim.info/wp-content/uploads/2020/07/2020-ATD-Evaluation-Report_Final.pdf; IDC, *Alternatives to Detention in Transit Migration Contexts*, note 57 above, p.30.

¹²⁸ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, Australia: High Court, 28 November 2023, www.refworld.org/jurisprudence/caselaw/aushc/2023/en/147911.

¹²⁹ UNHCR Detention Guidelines, note 4 above, Guideline 1, 2, 3.

¹³⁰ UNHCR Detention Guidelines, note 4 above, Guidelines 3 and 4.

¹³¹ UNHCR Detention Guidelines, note 4 above, Guideline 8.

¹³² UNHCR Detention Guidelines, note 4 above, Guideline 10.

UNLOCKING RIGHTS: TOWARDS ENDING IMMIGRATION DETENTION FOR ASYLUM- SEEKERS AND REFUGEES

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