

IRREGULAR MIGRANTS AND ASYLUM-SEEKERS: ALTERNATIVES TO IMMIGRATION DETENTION

POLICY SUMMARY

Any restrictions on the rights to liberty and to freedom of movement for the purpose of immigration control, such as detention or alternative non-custodial measures should only be used when necessary and proportionate to the objective of preventing absconding, to verify identity or ensure compliance with a deportation order. There should be a presumption against detention established by law. Alternative non-custodial measures should be the preferred solution and should always be considered before resorting to detention. Recognized refugees and migrants with a regular status should never have their rights to liberty or freedom of movement restricted for immigration purposes.

OBLIGATION TO PROVIDE ALTERNATIVES

States must ensure that alternatives to detention are available and accessible to irregular migrants and asylum-seekers, in law and in practice, without discrimination.

States must, in each individual case, consider and use less restrictive alternatives to detention, only resorting to detention if it is established that no alternative will be effective in achieving the legitimate objective.

In considering alternatives to detention states must take full account of individual circumstances and those with particular vulnerabilities including children, pregnant women, victims of trafficking, the elderly, or those with serious medical or psychological conditions.

In considering alternatives, states must bear in mind that unaccompanied children and victims of trafficking should not be detained.

APPLICATION OF ALTERNATIVE MEASURES

The application of alternative measures must respect the individual's dignity, and must comply with the principles of legality, necessity and proportionality, and non-discrimination. Alternative measures must also be subject to judicial review.

Alternatives must be provided for in law, which should define each available measure and the criteria governing their use, as well as specifying which authorities are responsible for their implementation.

The alternative measure applied in any particular case must be that which is the least restrictive of the human rights of the individual concerned, that is, where no less intrusive or restrictive means will achieve the same objective.

States must take into account the particular situation of migrants and asylum-seekers, as well as the particular vulnerabilities of certain groups, to ensure that the application of alternatives measures does not result in discrimination against particular groups of non-nationals, whether on the basis of their nationality, religion, economic situation, immigration or other status.

To safeguard against arbitrary application, an effective right to have the legality, necessity and appropriateness of the alternative measures reviewed by an independent judicial or other competent authority must be available.

REGISTRATION AND DOCUMENTATION REQUIREMENTS

The registration of migrants and asylum-seekers and providing them with official registration documents can be effective measures to prevent absconding and towards ensuring they are not subjected to arbitrary detention in host and transit countries.



States must ensure that measures such as the production of identity documents for the purpose of verifying identity in the course of ordinary asylum proceedings do not obstruct an individual from accessing their rights to adequate housing, healthcare, and education or otherwise place them in a vulnerable situation.

REPORTING REQUIREMENTS

States must ensure that monitoring or reporting requirements are not excessively difficult to comply with or restrictive of liberty or privacy and take into account the particular circumstances of the individual, such as their family situation, residential situation and financial means.

States should develop reporting requirements that are tailored to the particular situation of migrants and asylum-seekers and make use of opportunities for community supervision and support, where appropriate.

BAIL, BOND AND SURETY

States must ensure access to bail, bond and surety without discrimination against particular groups of non-nationals, for example on the basis of their nationality, ethnic or other origin, economic situation, or immigration or other status. In particular, states should not deny bail, bond or surety solely on the basis that a person has entered or remains on the territory irregularly.

Conditions attaching to the grant of bail or release on bond or surety must be reasonable, and must not create an excessive or unrealistic burden on the individual.

Bail, bond and surety must be available in practice to migrants and asylum-seekers, who should not be disadvantaged by their lack of family ties or limited financial means. To ensure this, states should establish flexible arrangements for monitoring and supervision with civil society groups or community shelters, or other innovative arrangements, taking into account the particular situation of migrants and asylum-seekers.

OPEN AND SEMI-OPEN CENTRES, DIRECTED RESIDENCE

Where states use measures such as open and semi-open centres, directed residence and restrictions to a specified district as an alternative to detention, they must ensure that the restriction of individuals' right to liberty and freedom of movement conforms with relevant principles of international law, including the principles of necessity and proportionality.

States must ensure that the use of such measures, whether with or without additional reporting requirements, does not prevent individuals from exercising their other human rights, including the right to health and education.

ELECTRONIC MONITORING

As an alternative to immigration detention, electronic monitoring should not be used as a default measure against irregular migrants who would not otherwise be detained. It must only be used to achieve a legitimate objective, and applied in accordance with relevant principles of international law.

Electronic monitoring should be used only after a careful assessment of the extent to which the specific measure will restrict the human rights of the individual, as well as its proportionality and necessity to fulfil a legitimate objective, and used only if, and for so long as, there is no less restrictive measure likely to achieve the same objective.

It must be subject to review by an independent judicial or other competent authority, to ensure that its application is necessary and proportionate for the legitimate stated purpose at that particular time, and is not discriminatory, arbitrary or unduly prolonged.

