

IRREGULAR MIGRANTS AND ASYLUM-SEEKERS:

ALTERNATIVES TO IMMIGRATION
DETENTION

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Working to protect the rights of uprooted people, AI has developed policy positions on a number of areas relating to the human rights of migrants, asylum-seekers and refugees. AI's position on immigration detention, including the detention of refugees, asylum-seekers and migrants, can be found in *Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees*, November 2007, AI Index: POL 33/005/2007. AI's position on alternatives to detention, like other policy positions, is grounded in international law standards, referenced throughout this document.

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 rights 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.



IRREGULAR MIGRANTS AND ASYLUM-SEEKERS:

ALTERNATIVES TO IMMIGRATION DETENTION

BACKGROUND

IMMIGRATION DETENTION: AMNESTY INTERNATIONAL'S POSITION

Amnesty International is generally opposed to the use of detention for the purposes of immigration control. Everyone, including all migrants and asylum-seekers, regardless of legal status, has the rights to liberty and to freedom of movement, including protection from arbitrary arrest and detention.

Any restrictions on the rights to liberty or to freedom of movement for immigration control purposes should be considered only to prevent irregular migrants or asylum-seekers from absconding, to verify their identity, or ensure their compliance with a removal order. States may impose alternative non-custodial measures to monitor the whereabouts of migrants or asylum-seekers as a condition for their regularizing their status, for example requiring an asylum-seeker to reside at a particular address for the duration of their claim. However, such measures should be temporary and come to an end as soon as the individual's status is fully regularized. Once asylum-seekers are recognized as refugees, it is no longer justifiable for states to continue to impose any form of alternative non-custodial measures.

There should be a presumption against detention established by law. Alternative non-custodial measures should always be considered first and given preference before resorting to detention. Detention of irregular migrants and asylum-seekers will only be lawful when the authorities can demonstrate in each individual case that alternatives will not be effective, that it is necessary and proportionate to achieve one of three recognized legitimate objectives: to prevent absconding, to verify identity or to ensure compliance with a removal order. In all cases where detention is used it must be on grounds prescribed by law.

Despite increasingly forceful statements from a range of international human rights bodies and experts against the routine use of detention as a form of immigration control, detention continues to be a frequent response to violations of immigration laws and regulations, such as unauthorized entry or presence of non-nationals in a host country. The routine or automatic use of detention against irregular migrants, including mandatory detention of irregular migrants, violates both the spirit and frequently the letter of states' international human rights obligations. The existence of effective alternatives to detention suggests that resorting to routine or automatic detention as a measure to control and regulate immigration is unnecessary and disproportionate.

Amnesty International opposes the routine or automatic use of detention for the purposes of immigration control.¹ International standards applicable to irregular migrants and asylum-seekers contain a strong presumption against detention and place clear restraints on its use. Everyone, including all migrants and asylum-seekers, has the rights to liberty and to freedom of movement, including protection from arbitrary arrest and detention. Accordingly, Amnesty International opposes most forms of immigration detention due to its negative impact on the human rights of individuals detained and the fact that states often use detention as a form of punishment or deterrent, instead of addressing the root causes of irregular migration.

In some states national immigration regulations often include measures that subject irregular migrants to criminal penalties, including detention, in an attempt to discourage irregular migration. The UN Working Group on Arbitrary Detention (WGAD) has stated that criminalizing those who enter or remain in the country without authorization exceeds the legitimate interest of states to control and regulate irregular migration and can lead to unnecessary detention.² Various UN bodies, including the Office of the High Commissioner for Human Rights (OHCHR) as well as the Special Rapporteur on the human rights of migrants have opposed the treatment of irregular migration as a criminal offence, stating that irregular migration should be treated as an administrative offence, and detention of migrants on the grounds of their irregular status should always be a measure of last resort.³



The presumption against detention should be established by law. Alternative non-custodial measures, such as those discussed below, should always be considered first and given preference before resorting to detention. States must therefore ensure that a range of alternative measures are available, and are considered before resorting to detention. Detention must be seen as a measure of last resort.

Any decision to detain should always comply with international and regional standards pertaining to the lawfulness of detention, and should be based on a detailed individualized assessment, including the individual's personal history and the risk of absconding. International law makes clear that state authorities must demonstrate in each individual case that detention is necessary and proportionate to the objective to be achieved, which must be one of three recognized legitimate objectives: preventing absconding, verifying identity or ensuring compliance with a deportation order. As well, state authorities must also demonstrate that less restrictive alternatives will not be effective.

This paper elaborates states' obligations to provide effective alternatives to immigration detention for irregular migrants and asylum-seekers.⁴ It does not deal with alternatives to detention under criminal charge, or for national security or related reasons.⁵

Section I sets out the obligation of states to provide alternatives to immigration detention. Section II establishes how those alternatives are to be applied, while Section III discusses the use of particular alternatives such as documentation requirements, release on bail, reporting requirements, the use of residence centres or directed residence, as well as a note on electronic monitoring. Finally, a brief conclusion summarizes key findings and recommendations for campaigning and advocacy.

I. OBLIGATION TO PROVIDE ALTERNATIVES TO IMMIGRATION DETENTION

International human rights standards restrict the use of detention for immigration purposes by requiring that it is necessary and proportional, and that no less restrictive measure would suffice. In other words, to prove that detention is necessary and proportional, in line with international legal standards, state authorities must use and make available alternative measures both in law and in practice. The availability of alternative measures means that a policy of routinely detaining irregular migrants, without considering the use of less restrictive alternatives, is disproportionate and unjustifiable in international human rights law.

To establish that detention is necessary and proportionate in the particular circumstances of each case, consideration must be given to "less invasive means of achieving the same ends."⁶ Thus, states must consider the use of alternative, less restrictive measures, such as reporting requirements, sureties or other conditions, taking into account the particular circumstances of the individual. These less restrictive means must always be considered first. Detention is only permissible where it has been found that less restrictive means would be ineffective; it should be used only as a last resort, where it is demonstrably necessary and proportionate in the individual circumstances to achieve one of three legitimate objectives: to prevent absconding, to verify identity or to ensure compliance with a removal order.

In their consideration of states' compliance with their human rights obligations, UN treaty bodies have stated that immigration detention should only be used as a measure of last resort; that the least

In her 2002 report, the Special Rapporteur on the human rights of migrants called on states to ensure that alternatives to detention are available for all migrants without discrimination:

74. Governments should consider the possibility of progressively abolishing all forms of administrative detention.

75. When this is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by...

(f) Ensuring that non-custodial measures and alternatives to detention are made available to migrants, including through providing for such measures in law and ensuring that the prescribed conditions are not discriminatory against non-nationals.

Report of the Special Rapporteur on the human rights of migrants, 30 December 2002, E/CN.4/2003/85, paragraphs 74-75.



restrictive means should be considered first, and recommended states to consider alternative measures to detention, including for irregular migrants and asylum-seekers.⁷

The WGAD and the UN Human Rights Committee have repeatedly underlined states' obligation to ensure that alternatives to detention are thoroughly considered, when assessing the necessity and proportionality of detaining an individual, particularly in the context of immigration detention. The Human Rights Committee has emphasized that states must demonstrate the necessity and proportionality of a detention order by first considering less restrictive alternatives.⁸ The WGAD recommended to states that the detention of non-citizens who enter the country without the necessary visa or who remain in the country without valid immigration papers, should in general be avoided.⁹

Accordingly, as the WGAD has repeatedly stressed "alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting to detention",¹⁰ recognizing "the obligation of states to consider alternatives to administrative custody".¹¹

Specific standards concerning asylum-seekers developed by the United Nations High Commissioner for Refugees (UNHCR) state that "[w]here there are monitoring mechanisms which can be employed as a viable alternative to detention ...these should be applied *first* unless there is evidence to suggest that such an alternative will not be effective in the individual case."¹² Recognizing that states should apply alternatives to detention, the UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (Detention Guidelines) set out a series of alternatives to detention which may be used for asylum-seekers.¹³ These were confirmed by the UN Sub-Commission on the Promotion and Protection of Human Rights, which expressly encouraged "States to adopt alternatives to detention such as those enumerated in the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers".¹⁴

Moreover, special attention must be given to the particular needs of vulnerable persons, such as children, pregnant women, the elderly, survivors of torture and those with serious medical or psychological conditions. As highlighted by the Special Rapporteur on the human rights of migrants, "...special arrangements should be sought to protect vulnerable groups. In these cases the harm inflicted [by administrative detention] seems to the Special Rapporteur to be wholly disproportionate to the policy aim of immigration control."¹⁵ The Special Rapporteur went on to underline that the particular conditions and needs of the elderly, persons with disabilities, pregnant women or those who are ill, including those with mental illness, were not adequately taken into consideration in immigration enforcement measures. And in particular, there should be a prohibition on the detention of unaccompanied children provided by law.¹⁶

Another particularly vulnerable group are victims of trafficking. The OHCHR's Recommended Principles and Guidelines on Human Rights and Human Trafficking explicitly call on states to ensure "that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody",¹⁷ that "legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons".¹⁸

According to Council of Europe Guidelines:

"A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed [...] if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to noncustodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems."

Council of Europe, Committee of Ministers, Twenty Guidelines on Forced Return, Adopted 4 May 2005, Guideline 6.

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 conditions.

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

II. PRINCIPLES ON THE USE OF ALTERNATIVE MEASURES

All alternatives to immigration detention will, to some degree, restrict or interfere with an individual's human rights. As such, the use of alternative measures must comply with the principles of legality, necessity and proportionality, as well as the principle of non-discrimination.¹⁹ These general principles of international human rights law must inform decisions and provide a framework for the application of alternatives to immigration detention.

Legality means that the restriction is provided for and carried out in accordance with the law, with substantive and procedural safeguards in place. This means that restriction of an individual's liberty or freedom of movement must only be based on grounds and conditions provided by law. Individuals must be able to predict with reasonable certainty when and under what conditions such restrictions may be imposed.²⁰ The law should include the definition of each available measure and the criteria governing their use, as well as specifying which authorities are responsible for their implementation and any delegation of authority to third parties.

Any restriction must be aimed at and necessary to fulfil a legitimate objective, as well as being proportionate to that objective.²¹ States must demonstrate that the restrictive measure is strictly necessary to achieve or protect a legitimate object (the principle of **necessity**).²² States must also establish that the measure is appropriate to achieving a legitimate objective, proportionate to the objective, and the least intrusive means of achieving it (the principle of **proportionality**).²³ In other words, necessity and proportionality require that the restriction is strictly balanced against the legitimate objective the measure aims to achieve, which in the case of immigration detention is either to prevent absconding, to verify identity or to ensure compliance with a removal order. Any restriction can be used only if no less intrusive and restrictive means can be used to reach the same objective.

States should use whichever measure will fulfil their objective with the least interference with the human rights of the individual concerned. While it is in practice impossible to define a hierarchy of measures, since the impact of any particular measure will differ from one individual to another, states should start by considering the measure least restrictive for the particular individual from a range of available alternatives. The application of alternative must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality.

The principle of non-discrimination requires that states make these measures available without discrimination, not only as a matter of law but in practice.²⁴ The conditions or criteria for each alternative must not discriminate against particular groups of non-nationals, including on the basis of their nationality, religion, economic situation, immigration or other status. The non-discrimination principle means also that states must take into account the particular situation of irregular migrants and asylum-seekers such as their general inability to provide large sums of money for bail, or limited ability to provide guarantors due to their lack of fixed address, formal employment, or stable family ties, as well as the particular vulnerability of certain groups. Alternative measures must not be imposed or rejected arbitrarily or on a discriminatory basis, nor should members of any particular group be subjected to measures which are more restrictive than would otherwise be applied to them.

Judicial review provides crucial oversight of the use of alternative measures, to guard against their disproportionate, unnecessary or discriminatory use, as well as providing an effective remedy against such violations. While state authorities have a degree of discretion in applying alternative measures, there must be a means of protecting the individual against arbitrary decisions and the abuse of such discretion.



There must be provision for both the decision and application of alternative detention measures to be reviewed by a judicial or other competent authority with the power to alter the measure and to order any other necessary remedial measures. Individuals affected by the alternative measures should have the right to have the legality, necessity and appropriateness of the alternative measures reviewed. In order for this safeguard to be truly effective, the individual must be informed of this right and should be afforded free legal assistance if they are unable to afford it.

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.

III. EXAMPLES OF ALTERNATIVE MEASURES

The legislation of several countries provides for alternatives to immigration detention, such as release on bail, payment of a sum of money as guarantee, police or community supervision, the obligation to reside at a given address with periodic reporting to the authorities or the deposit of travel documents with the authorities.²⁵ Their use, however, remains highly discretionary, often without any clear and consistent guidelines.

Even when the law provides expressly for alternatives to detention, they are often difficult to access.²⁶ Bail, when granted, is often set at a sum not affordable by irregular migrants or asylum-seekers because of their often limited financial means. The requirement of third parties to act as guarantors, or sureties, is a further obstacle given that migrants and asylum-seekers do not usually have relatives or friends in the country who can act as surety. Similarly, community supervision or residence in a fixed address may be difficult to put into practice, since irregular migrants may not have stable work or fixed places of residency.

However, the availability of these measures in many jurisdictions, despite their ad hoc and frequently inconsistent use, underlines that there is a range of potential alternatives which could be used by countries. When such alternative measures are used, they must be used in a way that complies with a state's human rights obligations.



A recent UNHCR study, *Alternatives to Detention of Asylum-seekers and Refugees*, recognized as best practice legislation which establishes a sliding scale of measures from least to most restrictive, allowing for an analysis of proportionality and necessity for every measure.²⁷ Describing the system in several Nordic States, Switzerland, New Zealand and Lithuania, the study concludes that where detention is one extreme end of a range of measures with unconditional release at another, states are more likely to ensure in practice the application of alternatives. In the case of New Zealand, both the decision to detain, as well as any decision applying alternative measures or granting unconditional release, is periodically reviewed to ensure that it takes into account the changing circumstances that may affect an asylum-seeker.²⁸

Alternative measures must be available and used without discrimination. Use of alternative measures must not restrict the individual's human rights further than is necessary and proportionate. If any of the measures are applied unnecessarily or disproportionately, or without due regard to individual factors, any one of these measures in a particular case could amount to an arbitrary violation of the rights of the individual.

A continuum of immigration control measures exists in the legislation of many states. They create a range of more or less restrictive alternatives to detention.

The most typical measures includes:

- *Registration/Documentation Requirements*
- *Release on Bail, Bond or Surety;*
- *Release to NGO Supervision;*
- *Reporting Requirements;*
- *Directed Residence;*
- *Residence in Open Centres;*
- *Residence in Semi-Closed Centres.*

REGISTRATION AND DOCUMENTATION REQUIREMENTS

Measures such as the registration and issuing of official registration documents when irregular migrants or asylum-seekers first enter a country offer a practical alternative to the detention of those arriving without documentation. Commonly used in many European countries for arriving asylum-seekers, registration is also increasingly used in several African states, and has reduced the use of detention for asylum-seekers arriving without documents.²⁹

The production of identity documents is sometimes required during an asylum claim in order to verify a claimant's identity. Handing over documents to authorities in the ordinary course of asylum proceedings is not, strictly speaking, an alternative to detention. When documents are turned over to authorities, they must be retained for the shortest period necessary in order to effect the registration of individual asylum-seekers and verify their identity.³⁰

Where states require the production of documents, they must replace them with recognized registration and identity documents, to ensure that asylum-seekers are not undocumented and thereby prevented from enjoying and accessing human rights such as adequate housing, healthcare, and education or otherwise placed in a vulnerable situation on account of their legal status and/or forced undocumented status.

In its report on the Bahamas, the Committee for the Elimination of All Forms of Discrimination (CERD), which monitors states' compliance with their obligations under the Convention for the Elimination of All Forms of Racial Discrimination, stated:

34. The Committee notes with concern that people entering the country without proper papers are automatically detained without such detention being subjected to judicial review. It takes note of the delegation's statement that such detention does not generally last longer than a few days but is disturbed at reports emphasizing that such detention sometimes extends to a year and more, depending on migrants' nationalities.

The Committee emphasizes that detention should be a last resort and invites the State party to adopt alternatives to detention for undocumented migrants and asylum-seekers. ...

CERD, Bahamas, UN Doc. A/59/18 (2004) 10, paragraph 34.

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

Irregular migrants and asylum-seekers can be required to report periodically to state officials, such as police or immigration officers, or a community case worker. The frequency of such reporting can vary from daily to weekly or less frequently, and can be linked to the renewal of registration documents. Often, reporting is required to be done in person, but it can be done by telephone, especially where reporting requirements are more frequent.

Reporting requirements are frequently used by many countries during immigration procedures, in particular during asylum procedures.³¹ However, they could be used more widely as a less restrictive, alternative measure to immigration detention.³²

State authorities must ensure that reporting requirements are appropriately tailored to each individual case, taking into account factors such as the individual's family situation, residential situation and financial means.

Reporting conditions can be burdensome. For example, A requirement to report to police every day can significantly restrict an individual's liberty or privacy; where the reporting centre is located in a remote or distance location, the cost of transportation and the time it takes to get there and back may be unaffordable, or may unduly interfere with their work or other obligations.

Accordingly, the use of reporting requirements and their frequency must be justified as necessary and proportionate to the stated objectives in each case and must not impose an unduly heavy burden on the individual. They must be flexible enough to accommodate changes in the circumstances of the individual, for example by changing the reporting centre to one closer to the individual if they change their place or residence.

According to the UN Human Rights Committee in order to establish that detention is necessary in all the circumstances, states must consider "less invasive means of achieving the same ends." In C v Australia the Human Rights committee considered the necessity of detaining an asylum-seeker, and found that Australia had "not demonstrated that in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions..."

Human Rights Committee, C. v. Australia, 13 November 2002, Case No. 900/1999, paragraph 8.2

States should be encouraged to develop reporting requirements that are sensitive and tailored to the particular situation of irregular migrants and asylum-seekers, as well as including supervision by a community organisation or other community support arrangements, where appropriate.

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



Bail, bond and surety usually involve a sum of money being pledged in order to ensure an individual's appearance at official appointments or hearings, while their case is being processed. *Bail* requires the deposit of a sum of money to guarantee an individual's future compliance with immigration procedures, including appearing at future hearings or compliance with a deportation order. The sum of money is returned if the individual appears, or it is otherwise forfeited. *Bond* is a written agreement with the authorities where the individual promises to fulfil their duties, such as appearing at interviews, hearings, or complying with a deportation order, and sometimes includes the deposit of a sum of money by the individual or a third person. A *surety* is a third person who vouches for the appearance of the individual concerned and agrees to pay a set amount of money if the individual absconds.³³ Requests for surety are frequently included as part of bail or bond conditions.

Although these alternatives are provided for in the legislation of many countries, they are often not applied in a systematic and non-discriminatory manner. The ability of an individual to apply for bail is often linked to their ability to find someone to pay a sum as guarantee for their future appearance at immigration proceedings, or depends on finding a family member or friend who will ensure their future appearance or supervise their release. Other obstacles frequently include a lack of information, lack of access to legal aid or legal representation and lack of adequate interpretation.³⁴

Thus, the availability in practice of release on bail, surety or bond to irregular migrants and asylum-seekers is often limited by their limited knowledge of and access to legal procedures, as well as their often limited financial means. When granted, bail is sometimes set at a sum that is out of reach for many irregular migrants and asylum-seekers. The application of these measures frequently fails to take into account their individual circumstances, including the lack of relatives or friends who can act as surety and the lack of a secure source of income or housing.³⁵

Other arrangements for supervision by an individual resident or citizen, or by an organisation, including release to community shelters, are increasingly being used as alternatives to immigration detention.³⁶ Reports evaluating these types of measures suggest that only a minimum level of supervision is required to ensure appearance at immigration procedures or prevent absconding, and that alternatives such as bail, bond, or supervision by an individual or organisation are very effective.³⁷

Under international human rights law, states are obliged to ensure equal and non-discriminatory treatment of all non-nationals. Denying bail solely on the basis of an individuals' nationality or other status, rather than based on an individual assessment of the risk of absconding, would violate this general prohibition against discrimination.

Some of the problems in how alternatives to detention are applied to the particular circumstances of migrants, asylum-seekers and refugees were recently highlighted by the Special Rapporteur on the human rights of migrants:

39. ... The legislation of several countries provides for alternatives to administrative detention, such as release on bail, release on parole, home detention, semi-liberty, payment of a certain sum as guarantee, police supervision, ban on leaving the country, obligation to reside at a given address with periodic reporting to the authorities, withdrawal of passport.

40. Reportedly, there is an element of discretion in many countries as to when such measures can be granted, as often the law itself does not prescribe them in the presence of specific criteria. Often, in the absence of statistics it is not possible to assess how often alternative measures are granted. However, it was reported that even when the [law] provides expressly for non-custodial measures, they are hardly accessible. Bail, when granted, is usually set at a sum not affordable by migrants. The request for sureties is a further obstacle given the absence of relatives or friends who can stand surety for migrants.

Report of the Special Rapporteur on the human rights of migrants, 30 December 2002, UN Doc. E/CN.4/2003/85, paragraphs 39-40.

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

Open centres, semi-open centres, directed residence, and restrictions to a specified district are already used by many states, particularly in Europe, for asylum-seekers during the processing of their claim.³⁸ The nature of the centres and the restrictions placed on freedom of movement vary greatly. In some countries, movement is restricted in practice as asylum-seekers have to report to or stay in their accommodation centres at certain times. In other countries asylum-seekers are not allowed to choose their place of residence, but may do so under certain conditions or at a certain stage of the asylum procedure. In some countries, asylum-seekers are free to leave their place of residence without any authorisation or by submitting a formal request which is routinely accepted. Others have a more stringent system of limited days of absence, reporting obligations or virtually no possibility of leaving apart from in exceptional circumstances.³⁹

Available evidence suggests that these measures could be used effectively as a less restrictive alternative to detention for individuals who would otherwise be detained.⁴⁰ However, since these measures clearly restrict liberty and freedom of movement, they must be used only where necessary and proportionate, taking into account individual circumstances, and applied in a non-discriminatory manner.

States should make use of such arrangements as alternatives in the case of individuals who would otherwise be detained. In particular, with regard to asylum-seekers, in line with UNHCR policy which calls on states not to detain individuals solely because they arrive without documents, states should keep in mind that verifying the identity of asylum-seekers can be done successfully through the use of open reception centres.⁴¹ But, where such centres are located in places which are geographically and socially isolated, irregular migrants and asylum-seekers may be unable to access health services, education, or legal assistance. States must ensure that the use of such centres, directed residence or other restrictions does not obstruct individuals from enjoying their rights, including to health and to education.

The UN Human Rights Committee has previously considered restrictions on the residence of non-nationals, warning against overly broad measures which clearly undermine the freedom of movement of foreigners without justification,⁴² in particular for those being admitted into a lawful immigration procedure. As confirmed in its General Comment 27, any restriction on freedom of movement must itself be provided by law, necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and must be consistent with other rights recognized in the Covenant. Moreover, any restriction cannot “nullify the principle of liberty of movement.”⁴³

In its consideration of the Czech Republic report, the Committee Against Torture (CAT) in 2004 expressed concern regarding amendments to the law on the right to asylum which increased the grounds for rejecting asylum requests and allowed for the detention of persons in the process of being removed to be held in “aliens’ detention centres” for up to 180 days, commenting explicitly on “the restrictive nature of the conditions in these centres which are comparable to those in prisons”. Ultimately, the CAT called on the state to “review the strict regime of detention for illegal immigrants with a view to its repeal”.

Committee Against Torture, Concluding Observations: Czech Republic, UN Doc. A/59/44 (2004), paragraphs 86j, 87(m).

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

Electronic monitoring covers a range of different forms of surveillance, which vary in intensity and the degree to which they limit an individual's freedom of movement, liberty or privacy. For example, Global Positioning System (GPS) 'electronic tracking' allows continuous tracking of an individual. 'Electronic tagging' works only within a certain range, and requires the individual to wear a bracelet which emits a signal to a receiver at a fixed point, usually the individual's home address. The individual could be required to be at home at a particular time or times of the week. 'Voice verification' or 'voice tracking' enables reporting and uses biometric voice recognition technology over a telephone, from a fixed landline and from a fixed address, at a notified time.⁴⁴ As new forms of electronic monitoring develop, it is important to ensure that their application as an alternative to detention is carefully examined.

Electronic monitoring should not be used as a default measure against irregular migrants who would not otherwise be detained and must not increase the number of individuals subject to surveillance. Given the variety of measures available, any particular form of electronic monitoring must be evaluated individually and in context, based on the technology used and any other restrictions proposed. If electronic monitoring is automatically linked to other stringent restrictions, such as a requirement to remain at home for most of the day, such restrictions might amount to house arrest, which Amnesty International would regard as equivalent to, rather than an alternative to, detention.⁴⁵

The use of electronic monitoring must meet all of the principles elaborate above, namely it must be set out in law, necessary and proportionate, applied in a non-discriminatory manner and subject to judicial review. It should only be used after careful consideration of the particular circumstances of the individual and the actual risk of absconding. The success of less invasive measures must be considered before resorting to electronic monitoring to ensure that it is used only where necessary and proportionate for the achievement of a legitimate objective, and only if and for so long as there is no less restrictive measure likely to achieve the same objective.

Review by a judicial or other competent and independent authority must be available to ensure that the use of electronic monitoring is necessary and proportionate to a legitimate stated purpose; that it is not being applied in a discriminatory or arbitrary manner or that its use is not unduly prolonged.

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.



IV. CONCLUSION

Under international human rights law, states are obliged to first consider and, where possible, apply alternatives to immigration detention. In accordance with international human rights standards, immigration detention should be the exception and used only as a last resort when alternative, less restrictive measures would be ineffective or have failed.

Accordingly, states should enact in law and use a broad range of alternative measures, drawing on some of the practices mentioned above as examples of practical alternatives to immigration detention. A range of measures should be considered for each individual case to ensure that all less restrictive measures have been considered before resorting to detention. Detention cannot be considered necessary or proportionate if other less restrictive measures to achieve the same legitimate objective have not been considered.

The application of alternative measures must itself be governed by international human rights standards, including the basic principles of legality, necessity and proportionality, as well as non-discrimination. If any one of the measures is applied unnecessarily or disproportionately, in a discriminatory manner or without due regard to individual factors such as the particular vulnerability of an individual, it could amount to an unlawful restriction. To guard against their arbitrary use, individuals subjected to alternative measures must have the right to have the lawfulness, necessity and appropriateness of the alternative measures reviewed by an independent judicial or other competent authority.

Alternatives to detention should be available to all irregular migrants and asylum-seekers, whether documented or undocumented, based on an individual assessment of their particular circumstances. Alternative measures may include registration requirements, reporting or monitoring conditions, the deposit of a financial guarantee, or an obligation to stay at a designated address, or an open or restricted centre. They must take into account the particular situation of irregular migrants and asylum-seekers, including their frequently unstable financial or housing situation.

States should endeavour to develop these alternatives in consultation with local non-governmental organizations with expertise in meeting the legal, cultural, and psychological needs of migrants and asylum-seekers. Joint initiatives between government authorities and non-governmental organizations for release and supervision of irregular migrants and asylum-seekers should be supported.



¹ For a detailed discussion of AI's policy on migration related detention and international standards relating to detention of migrants, asylum-seekers and refugees, see, Amnesty International, "Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees." November 2007, AI Index: POL 33/005/2007.

² See, Report of the Working Group on Arbitrary Detention, 10 January 2008, UN Doc. A/HRC/7/4, paragraph 53 ("In the view of the Working Group, criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.")

³ As stated by the Special Rapporteur for the human rights of migrants in his 2007 report, UN Doc. A/HRC/7/12, paragraph 50: "... it is important that irregular migration be seen as an administrative offence and irregular migrants processes on an individual basis. Where possible, detention should be used only as a last resort and in general irregular migrants should not be treated as criminals. The often erratic and unlawful detention of migrants is contributing to the broader phenomenon of the criminalization of irregular migration." See also, Report of the Special Rapporteur on the human rights of migrants, 30 December 2002, UN Doc. E/CN.4/2003/85, paragraphs 17, 60, 73.

⁴ Amnesty International, "Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees." November 2007, AI Index: POL 33/005/2007.

⁵ As stated in Amnesty International, "Migration-Related Detention" at 1, footnote 1: "Migration-related detention is understood to mean detention for migration-related reasons, and not extending to detention of migrants for general criminal or penal reasons or for terrorism or national security related reasons separate from migration for forced or voluntary migrants. In addition to standards specifically relevant to migration-related detention, the guide includes some reference to standards relevant to other forms of detention or imprisonment, such as the Standard Minimum Rules for the Treatment of Prisoners."

⁶ Human Rights Committee, *C v. Australia*, Case No. 900/1999, 13 November 2002, CCPR/C/76/D/900/1999, paragraph 8.2. (The case considered the necessity and proportionality of using detention against an asylum-seeker.)

⁷ In its consideration of the Bahamas, the Committee for the Elimination of All Forms of Discrimination (CERD) a treaty body charged with the review of states' implementation of their obligations under the Convention for the Elimination of All Forms of Racial Discrimination, stated:

34. The Committee notes with concern that people entering the country without proper papers are automatically detained without such detention being subjected to judicial review. It takes note of the delegation's statement that such detention does not generally last longer than a few days but is disturbed at reports emphasizing that such detention sometimes extends to a year and more, depending on migrants' nationalities.

...The Committee emphasizes that detention should be a last resort and invites the State party to adopt alternatives to detention for undocumented migrants and asylum-seekers. It recommends the institution of a right of appeal against orders to detain people entering the country without proper papers; such individuals should be duly informed of their rights and maximum duration of detention should be strictly defined

CERD, Concluding Observations: Bahamas, 28 April 2004, UN Doc. CERD/C/64/CO/1, paragraphs 34, 35 and 37.

In considering Australia's 2000 report on its implementation of the ICCPR, the Human Rights Committee was concerned about the compliance of Australia's mandatory detention policy for irregular migrants, including asylum-seekers, with article 9(1) of the Covenant. It explicitly encouraged Australia to develop and institute alternative ways of enforcing its immigration process:

The mandatory detention under the Migration Act of "unlawful non-citizens", including asylum-seekers, raises questions of compliance with article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention.

The State party is urged to reconsider its policy of mandatory detention of "unlawful non-citizens" with a view to instituting alternative mechanisms of maintaining an orderly immigration process.

Human Rights Committee, Concluding Observations: Australia, 24 July 2000, UN Doc. A/55/40 vol. I (2000), paragraphs 526 and 527.

⁸ The case concerned a complaint of arbitrary detention made by an Afghan asylum-seeker and her young children, where a mother and her two children were detained over two years and ten months on the basis of their unlawful presence in Australia. The Committee concluded that since less intrusive measures were not considered, the detention of the complainant and her children without appropriate justification was found to be arbitrary and contrary to Article 9(1). Human Rights Committee, *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, 6 November 2003, paragraph 9.3. See also *Baban v. Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, paragraph 7.2; *C v. Australia*, 13 November 2002, CCPR/C/76/D/900/1999, paragraph 8.2.

⁹ See, e.g. Report of the Working Group on Arbitrary Detention, Addendum: Mission to Equatorial Guinea: A/HRC/7/4/Add.3, 18 February 2008, paragraph 100: "(I) As far as possible, the detention of foreigners who enter the country without the necessary visa or who remain in the country once their visa has expired should be avoided. If the detention is necessary to ensure their expulsion from the country, a reasonable maximum duration of detention should be established."

See also, WGAD, Report of the Working Group on Arbitrary Detention - Mission to Angola, A/HRC/7/4/Add.4, 29 February 2008, at paragraph 97: "It has to be recalled that detention of illegal immigrants must be the exception, not the rule, and indefinite detention is clearly in violation of applicable international human rights instruments governing deprivation of liberty."

Report of the Working Group on Arbitrary Detention, Addendum: Report on the Visit of the Working Group to the United Kingdom on the issue of immigrants and asylum-seekers, E/CN.4/1999/63/Add.3, paragraph 26:



The Government should ensure that detention of asylum-seekers is resorted to only for reasons recognized as legitimate under international standards and only when other measures will not suffice; detention should be for the shortest possible period.

Report of the Working Group on Arbitrary Detention: Addendum: Visit to Australia, E/CN.4/2003/8/Add.2, 24 October 2002, paragraph 64, Recommendation 2(ii):

Persons able to provide credible guarantees (relatives with Australian nationality, family residing legally and permanently in Australia, benevolent organizations providing sponsorship or acting as guarantors, etc.) should be released and received in the community while waiting for a decision. In the case of a negative decision, the person should be detained pending removal **only if** he/she refuses to leave voluntarily.

¹⁰ Report of the Working Group on Arbitrary Detention, 18 December 1998, E/CN.4/1999/63/Add.3, paragraph 33. The WGAD also stated that where the detention of irregular migrants is mandatory, regardless of their personal circumstances, it violated the prohibition of arbitrary detention in article 9 of the UDHR, and article 9 of the ICCPR; and recommended that alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention. See, Report of the Working Group on Arbitrary Detention on its visit to the United Kingdom, E/CN.4/1999/63/Add.3, 18 December 1998, Recommendation 33.

Note also, in its resolution 2000/21, the Sub-Commission on the Promotion and Protection of Human Rights encouraged "States to adopt alternatives to detention such as those enumerated in the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers" (paragraph 6).

¹¹ Report of the Working Group on Arbitrary Detention, A/HRC/7/4, 10 January 2008, paragraph 53. See Report of the Working Group on Arbitrary Detention, Legal Opinion on the situation regarding immigrants and asylum-seekers, E/CN.4/1999/63, paragraph 69, Guarantee 13: "Possibility for the alien to benefit from alternatives to administrative custody." See also, E/CN.4/1999/63, paragraph 78: "The Working Group recommends that the problem of immigrants and asylum-seekers be dealt with by setting out rational criteria for their entry and rehabilitation, and that their detention be resorted to only as a last available measure."

¹² UNHCR, Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-seekers, Geneva, 10 February 1999, Guideline 3 [*Detention Guidelines*]:

Where there are monitoring mechanisms which can be employed as viable alternatives to detention ...these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved their lawful and legitimate purpose.

See also, ExCom Program "Agenda for Protection," UN Doc. E/CN.152/SC/CRP.9/Rev.1, 26 June 2002, Part III, Goal 1, Point 9: "States more concerted to explore alternatives to the detention of asylum-seekers and refugees."

¹³ UNHCR, *Detention Guidelines*, Guideline 4; See also UNHCR, ExCom "Detention of Asylum-Seekers and Refugees: The framework, the problem and Recommended Practice, UN doc. EC/49/SC/CRP.13, 4 June 1999.

Guideline 4 deals with Alternatives to Detention and provides the following:

Alternatives to the detention of an asylum-seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions. Alternatives to detention which may be considered are as follows:

- (i) Monitoring Requirements. Reporting Requirements: Whether an asylum-seeker stays out of detention may be conditional on compliance with periodic reporting requirements during the status determination procedures. Release could be on the asylum-seeker's own recognisance, and/or that of a family member, NGO or community group who would be expected to ensure the asylum-seeker reports to the authorities periodically, complies with status determination procedures, and appears at hearings and official appointments. Residency Requirements: Asylum-seekers would not be detained on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum-seekers would have to obtain prior approval to change their address or move out of the administrative region. However this would not be unreasonably withheld where the main purpose of the relocation was to facilitate family reunification or closeness to relatives.
- (ii) Provision of a Guarantor/ Surety. Asylum-seekers would be required to provide a guarantor who would be responsible for ensuring their attendance at official appointments and hearings, failure of which a penalty most likely the forfeiture of a sum of money, levied against the guarantor.
- (iii) Release on Bail. This alternative allows for asylum-seekers already in detention to apply for release on bail, subject to the provision of recognisance and surety. For this to be genuinely available to asylum-seekers they must be informed of its availability and the amount set must not be so high as to be prohibitive.
- (iv) Open Centres. Asylum-seekers may be released on condition that they reside at specific collective accommodation centres where they would be allowed permission to leave and return during stipulated times.

These alternatives are not exhaustive. They identify options which provide State authorities with a degree of control over the whereabouts of asylum-seekers while allowing asylum-seekers basic freedom of movement.

¹⁴ UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2000/21, Adopted on 18 August 2000, paragraph 6.

¹⁵ Report of the Special Rapporteur on the human rights of migrants, UN Doc. E/CN.4/2003/85, paragraph 43.

¹⁶ The Working Group on Arbitrary Detention has stated that unaccompanied minors



should never be detained. See, WGAD, *Report of the Visit of the Working Group to the United Kingdom on the Issue of Immigrants and Asylum-seekers*, 18 December 1998, UN Doc. E/CN.4/1999/63/Add.3, paragraph 37. UNHCR (1997), *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR Guidelines on Unaccompanied Children), Geneva, Guideline 2; UNHCR, Revised Detention Guidelines, Guideline 6: "Unaccompanied minors should not, as a general rule, be detained."

¹⁷ Also, the UN General Assembly (GA Res. 57/176, Trafficking in women and girls, 30 January 2003, paragraph 8), the Committee on Economic Social and Cultural Rights (Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ukraine, 24 September 2001, UN Doc. E/C.12/1/Add.65, paragraph 29) and the Committee on the Elimination of Discrimination against Women (CEDAW Concluding Observations: Kyrgyzstan, 30 January 2004, UN Doc. CEDAW/C/2004/I/CRP.3/Add.1/Rev.1, paragraph 160) have called on states to ensure that victims of trafficking are not penalized.

¹⁸ OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1, Guideline 2, paragraph 6, Guideline 4, paragraph 5, Guideline 6, paragraph 1.

¹⁹ The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Published in U.N. Doc. E/CN.4/1985/4, Annex [Siracusa Principles].

²⁰ Siracusa Principles, Principles 15-18. ICCPR, Article 15; ECHR, Article 9 (ii).

²¹ See generally, Siracusa Principles, Principles 10, 11:

10. Whenever a limitation is required in the terms of the Covenant to be "necessary", this term implies that the limitation:
- (a) Is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
 - (b) Responds to a pressing public or social need,
 - (c) Pursues a legitimate aim, and
 - (d) Is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

²² Restrictions on freedom of movements, for example, are only allowed to protect national security, public order, public health or morals and the rights and freedoms of others. ICCPR, Article 12(3).

²³ General Comment No. 27: Freedom of movement (Art.12) : 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9, paragraph 14. See also, Human Rights committee, General Comment 31, 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, paragraph 6.

²⁴ See, CERD, General Recommendation 30: Discrimination Against Non Citizens, Adopted 1 October 2004, CERD/C/GC/31/Rev.4

²⁵ See also, European Council on Refugees and Exiles, Research Paper on Alternatives to Detention, 1997, at http://www.ecre.org/policy/research_papers.shtm. (The various options discussed in that paper include supervised release of children to local child welfare agencies, supervised release to community organisations and individual citizens and other general restrictions on the place of residence, reporting requirements and open centres.)

²⁶ See, e.g. E/CN.4/2005/85/Add.3, Report of the Special Rapporteur on the human rights of migrants on her visit to Italy.

²⁷ UN High Commissioner for Refugees, *Alternatives to Detention of Asylum-seekers and Refugees*, April 2006. POLAS/2006/03 at paragraph 84 [*Alternatives to Detention*].

²⁸ *Alternatives to Detention*, Country Profile: New Zealand.

²⁹ As UNHCR points out, examples of positive developments cited in the study include, Uganda, where relatively open refugee settlements and the issuance of refugee identity cards has reduced the detention of undocumented asylum-seekers; Zambia, where the use of biometric identity cards and an efficient registration programme have reduced reliance on detention; and Kenya, where the government has moved towards more open camps with exit permits issued by UNHCR, and where urban sweeps of illegal migrants no longer put unregistered asylum-seekers at risk of detention and deportation. *Alternatives to Detention*, paragraph 123.

³⁰ UNHCR's Revised Guidelines on applicable criteria and standards relating to the detention of asylum-seekers (February 1999), states cannot detain an asylum-seeker merely for arriving on fraudulent documentation: Guideline 3: "As regards asylum-seekers using fraudulent document or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. 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." See also, UNHCR ExCom Conclusion No. 44 (XXXVII) - 1986 – Detention of Refugees and Asylum-seekers, paragraph (i).

³¹ Reporting requirements are extremely varied in frequency and how onerous they are to the individuals. France, Luxembourg and South Africa require asylum-seekers to present themselves in persons to renew identity documentation. Depending on how frequently an asylum-seeker must renew his or her papers, this could form a type of de facto reporting requirement. In Luxembourg and South Africa permits must be renewed on a monthly basis. In the UK, obligations to report to reporting centres and spot visits of asylum-seekers residence is tied to the availability of state assistance.

See, *Alternatives to Detention*, paragraph 106.

³² For example, while Austrian legislation provides for "more lenient measures", a requirement to report every second day and live in an assigned residence, and creates an obligation to apply such measures to minors, in 2003 only 622 foreigners benefited from these measures. In Greece, where alternative restrictive measures in the form of weekly or bi-weekly reporting requirements are explicitly provided for in law and involve both UNHCR and NGOs in referring specific cases, no information on the frequency of these orders or compliance with them is available. *Alternatives to Detention*, paragraph 107.

³³ See, *Alternatives to Detention*, paragraph 92.

³⁴ See, Report of the Special Rapporteur on the human rights of migrants, 25 February 2008, UN Doc. A/HRC/7/12, paragraph 46, describing the obstacles faced by migrants in exercising their legal rights with regard to judicial review of detention:



... In these cases, lack of awareness of the right to appeal, lack of awareness of the grounds for detention, difficult access to relevant files, lack of access to free legal counsel, lack of interpreters and translation services, and a general absence of information in a language detainees can understand on the right to instruct and retain counsel and the situation of the facilities where they are being held can prevent migrants from exercising their rights in practice. In the absence of lawyers and/or interpreters, migrants can often feel intimidated and obliged to sign papers without understanding their content.

³⁵ Report of the Special Rapporteur on the human rights of migrants, UN Doc. E/CN.4/2003/85, paragraphs 39-40.

³⁶ In Canada, the government funded Toronto Bail programme tries to make bail more accessible by offering to supervise those who have no family or other eligible guarantors or sureties able to offer bonds. Once the identity of the individual has been established, the programme supervises the detainee through regular reporting requirements and unannounced visits to the individual's home. The program supervises asylum-seekers, as well as those found not to be in need of protection who were considered at high risk of absconding. The Bail Program reported an extremely high rate of success, with 91.6% compliance rate in 2002-2003. Also, several homeless shelters in Toronto volunteer their addresses at bail hearings for those asylum-seekers who have nowhere to live, and report high levels of compliance (more than 95%) and without the intensive supervision characteristic of the Toronto Bail Programme. See, *Alternatives to Detention*, paragraph 94.

³⁷ In 2001, South Bank University in the United Kingdom conducted research analysing the compliance rates for asylum-seekers whose claims had failed, who were considered 'high flight risks' and who had been released on ordinary bail conditions. This group complied at 80 per cent with no other intervention. The report indicates that more restrictive measures may be necessary in only a minority of cases.

See, Bruegel, I. and Natamba, E., *Maintaining contact: What happens after detained asylum-seekers get bail?*, Social Science Research paper No 16, South Bank University London 2002.

See also, report of Vera Institute of Justice, on the Appearance Assistance Program in the US, which found that 84% of the asylum-seekers put under "regular supervision", with support services and referrals, letters and telephone calls, appeared for all their hearings, and moreover the appearance rates of those under "intensive supervision" were not any higher. See, *Alternatives to Detention*, paragraph 94.

³⁸ As pointed out in *Alternatives to Detention*, the varied use of reception and accommodation centres in Europe is not matched by sufficient official data to truly measure their effectiveness. See, *Alternatives to Detention*, paragraph 108.

³⁹ European Commission, Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, COM/2007/0745, Brussels, 26 November 2007, Section 3.4.1. "Free movement and residence", <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0745:EN:HTML>

⁴⁰ In Sweden, where most asylum-seekers are received in furnished self-catering flats for families or for groups of single asylum-seekers, official figures reported that between January and September 2003, only 2, 810 cases out of 22,314 processed were 'annulled', which includes both asylum-seekers who absconded, as well as voluntary returnees and cases closed for other miscellaneous reasons. Residence in the community without restriction is an effective alternative, ensuring compliance with asylum procedures in Sweden. See, *Alternatives to Detention*, paragraph 111.

Similarly high compliance rates were reported in Greece, where only 12% of asylum-seekers housed in open reception centres and hostels run by the Red Cross or other NGOs, where individuals must obtain permission for any absences and face suspension of their claim if they leave without permission, failed to appear for their interviews at either the first or second instance, and had their case suspended and later closed. As the UNHCR *Alternatives to Detention* points out, "[d]espite the fact that Greece is a major country of transit, this is a relatively low rate of non-appearance and suggests that provision of adequate reception assistance, even in a very open system, can effectively raise the rate of procedural compliance." See, *Alternatives to Detention*, paragraph 112.

⁴¹ According to UNHCR's *Revised Guidelines* states cannot detain an asylum-seeker merely for their lack of documentation: "What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent document or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. 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." See also, *Alternatives to Detention*, paragraph 122.

⁴² In considering the report of Norway on its compliance with its obligations under the Covenant, the Human Rights Committee stated, "Concern is expressed over the vagueness of the criterion of 'compelling social considerations', under which a foreign national's right to choose his or her place of residence may be restricted, and its conformity with article 12 of the Covenant." See, Human Rights Committee, Concluding Observations: Norway, 4 November 1993, UN Doc. CCPR/C/79/Add.27, paragraph 9.

⁴³ As the Human Rights Committee has recognized, freedom of movement is a broad right which include the freedom to leave the territory of a host State, and cannot be made dependent on the length of time or purpose that an individual wishes to leave. Where the person is an irregular migrant, and therefore lacks legal status in the country, their right to leave must be respected including their ability to choose the destination. Any restrictions placed on the right to freedom of movement must only serve the legitimate purposes, but be necessary to protect them. See, Human Rights Committee, General Comment No. 27: Freedom of movement (Art.12): 2 November 1999, UN Doc.CCPR/C/21/Rev.1/Add.9, paragraphs 2, 8, 11, 13, 14.

⁴⁴ See, US Customs and Immigration, "Alternatives to Detention" <http://www.ice.gov/partners/dro/details.htm>; Human Rights First, *Alternatives to Detention, "Ankle Bracelets for Asylum-seekers in Florida"*

http://www.humanrightsfirst.org/asylum/libertys_shadow/LS_6_Alternatives.pdf ; Joint Council for the Welfare of Immigrants (UK), *Electronic monitoring of asylum-seekers*, <http://www.icwi.org.uk/policy/ukpolicy/mediafactsheet%20on%20Electronic%20monitoring%20of%20asylum%20seekers.pdf>



Government of Scotland, "An evaluation of the Use of Electronic Monitoring as a Condition of Bail in Scotland, 2007,
<http://www.scotland.gov.uk/Publications/2007/06/20102655/3>

⁴⁵ For examples where electronic monitoring has been linked to stringent conditions amounting to house arrest of individuals awaiting deportation on security grounds, see *United Kingdom, "I want justice!"*, December 2005, (AI Index EUR 45/056/2005), <http://www.amnesty.org/en/library/info/EUR45/056/2005/en>

