

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





# UNHCR

**United Nations High Commissioner for Refugees**  
Haut Commissariat des Nations Unies pour les réfugiés

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:  
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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,<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> In fact, there is no evidence that detention has any deterrent effect on irregular migration.<sup>4</sup> 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,<sup>5</sup> persons found not to be in need of international protection<sup>6</sup> 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.<sup>7</sup> Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of “*degree or intensity and not one of nature or substance*”.<sup>8</sup> 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,<sup>9</sup> on islands,<sup>10</sup> on boats,<sup>11</sup> as well as in closed refugee camps, in one’s own home (house arrest) and even extraterritorially.<sup>12</sup> 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 1<sup>13</sup>



## 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”)<sup>14</sup> or any regional refugee instrument,<sup>15</sup> as well as other persons seeking complementary, subsidiary or temporary forms of protection.<sup>16</sup> 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.”*<sup>17</sup> An **asylum-seeking stateless person** refers to a stateless person who seeks to obtain refugee status under the 1951 Convention,<sup>18</sup> or another form of international protection.

# UNHCR Detention Guidelines

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| <b>GUIDELINE 1.</b>  | The right to seek asylum must be respected   |  |   |
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| <b>GUIDELINE 3.</b>  | Detention must be in accordance with and authorised by law   |  |   |
| <b>GUIDELINE 4.</b>  | 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: |  |   |
|                      | <b>GUIDELINE 4.1</b><br>Detention is an exceptional measure and can only be justified for a legitimate purpose   | <b>GUIDELINE 4.2</b><br>Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose | <b>GUIDELINE 4.3</b><br>Alternatives to detention need to be considered |
| <b>GUIDELINE 5.</b>  | Detention must not be discriminatory   |  |   |
| <b>GUIDELINE 6.</b>  | Indefinite detention is arbitrary and maximum limits on detention should be established in law   |  |   |
| <b>GUIDELINE 7.</b>  | Decisions to detain or to extend detention must be subject to minimum procedural safeguards  |  |   |
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| <b>GUIDELINE 9.</b>  | The special circumstances and needs of particular asylum-seekers must be taken into account  |  |   |
| <b>GUIDELINE 10.</b> | 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.<sup>19</sup> 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.<sup>20</sup> 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 person<sup>21</sup> and freedom of movement<sup>22</sup> 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.<sup>23</sup> These rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.<sup>24</sup>
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.<sup>25</sup> Article 26 of the 1951 Convention further provides for the freedom of movement and choice of residence for refugees lawfully in the territory.<sup>26</sup> Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision.<sup>27</sup>
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.<sup>28</sup> 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.”*<sup>29</sup> In particular, a specific factor that needs to be considered is the underlying purpose of preventing persons being deprived of their liberty arbitrarily.<sup>30</sup>
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.<sup>31</sup> The law permitting detention must not, for example, have retroactive effect.<sup>32</sup> Explicitly identifying the grounds for detention in national legislation would meet the requirement of legal certainty.<sup>33</sup>
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.<sup>34</sup>

## 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.<sup>35</sup> 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.<sup>36</sup> 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).<sup>37</sup> 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.<sup>38</sup>

#### 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.<sup>39</sup> The purposes of detention ought to be clearly defined in legislation and/or regulations (see Guideline 3).<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>



### **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.<sup>44</sup> Any detention in connection with accelerated procedures should only be applied to cases that are determined to be “manifestly unfounded” or “clearly abusive”;<sup>45</sup> 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.<sup>46</sup> 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,<sup>47</sup> 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.<sup>48</sup>

**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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

### 4.1.4 Purposes not justifying detention

31. Detention that is not pursued for a legitimate purpose would be arbitrary.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

## **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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken.<sup>59</sup>
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.<sup>60</sup> 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.<sup>61</sup>
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.<sup>62</sup> Individuals subject to alternatives need to have timely access to effective complaints mechanisms as well as remedies, as applicable.<sup>63</sup> 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.<sup>64</sup>
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).<sup>65</sup>

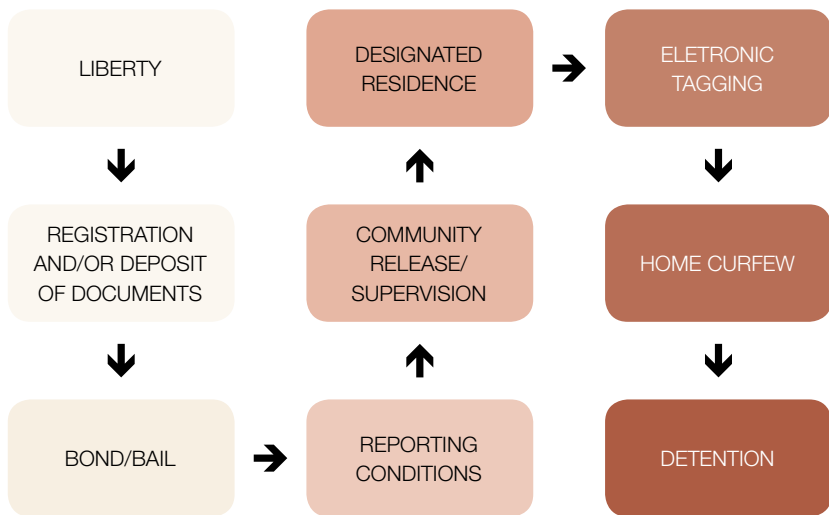


Figure 2<sup>66</sup>

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,<sup>67</sup> 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;<sup>68</sup> 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).<sup>69</sup>
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.<sup>70</sup> 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.<sup>71</sup> This applies even when derogations in states of emergency are in place.<sup>72</sup> States may also be liable to charges of racial discrimination if they impose detention on persons of a “particular nationality”.<sup>73</sup> 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.<sup>74</sup>

## 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.<sup>75</sup>
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).<sup>76</sup>
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.<sup>77</sup> 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,<sup>78</sup> and their rights in connection with the order, including review procedures, in a language and in terms which they understand.<sup>79</sup>
  - (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,<sup>80</sup> 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.<sup>81</sup>
  - (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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

## 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.<sup>87</sup>
  - (ii) Asylum-seekers should be treated with dignity and in accordance with international standards.<sup>88</sup>
  - (iii) Detention of asylum-seekers for immigration-related reasons should **not be punitive** in nature.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup>
- (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.<sup>93</sup> 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.<sup>94</sup> 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,<sup>95</sup> 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,<sup>96</sup> 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;<sup>97</sup> 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.<sup>98</sup>

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



## 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.<sup>100</sup> This can be the case even if individuals present no symptoms at the time of detention.<sup>101</sup> 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,<sup>102</sup> 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).<sup>103</sup>
  - 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”.<sup>104</sup> 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.”*<sup>105</sup>

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,<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> Inadequate age assessments can lead to the arbitrary detention of children.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup>

### GUIDELINE 9.3

## Women

58. As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained.<sup>113</sup> Alternative arrangements should also take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation.<sup>114</sup> 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.<sup>115</sup> The use of female guards and warders should be promoted.<sup>116</sup> All staff assigned to work with women detainees should receive training relating to the gender-specific needs and human rights of women.<sup>117</sup>
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.<sup>118</sup>
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.<sup>119</sup>

#### 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.<sup>120</sup>

#### 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.<sup>121</sup> A swift and systematic identification and registration of such persons is needed to avoid arbitrary detention;<sup>122</sup> 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 impairments<sup>123</sup> 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.<sup>124</sup>

## 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.<sup>125</sup>

## 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.<sup>126</sup> 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.<sup>127</sup> 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 UNHCR<sup>128</sup> and other relevant international and regional bodies with mandates related to detention or humane treatment<sup>129</sup> 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.<sup>130</sup>
67. In respect of monitoring the conditions of detention and treatment of women detainees, any monitoring body would need to include women members.<sup>131</sup>



## 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.<sup>132</sup>
- (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.<sup>133</sup>

**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,<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup>

## **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.<sup>138</sup> 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.<sup>139</sup>

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

- <sup>1</sup> 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>.
- <sup>2</sup> 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>.
- <sup>3</sup> UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in Action*, February 2011, available at: <http://www.unhcr.org/refworld/docid/4d9430ea2.html>.
- <sup>4</sup> 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>

- <sup>5</sup> 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>.
- <sup>6</sup> 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>.
- <sup>7</sup> See, below note 22.
- <sup>8</sup> *Guzzardi v. Italy*, (1980), ECtHR, App. No. 7367/76, para. 93, available at: <http://www.unhcr.org/refworld/docid/502d42952.html>
- <sup>9</sup> *Amuur v. France*, (1996), ECtHR, App. No. 19776/92, available at: <http://www.unhcr.org/refworld/docid/3ae6b76710.html>.
- <sup>10</sup> See, for example, *Guzzardi v. Italy*, above note 8.
- <sup>11</sup> 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>.
- <sup>12</sup> “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>.

- <sup>13</sup> Edwards, *Back to Basics: The Right to Liberty and Security of Person and “Alternatives to Detention”*, above note 4, Figure 1.
- <sup>14</sup> 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.
- <sup>15</sup> 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).
- <sup>16</sup> 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>.
- <sup>17</sup> 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>.
- <sup>18</sup> Article 1(A)(2), second paragraph, 1951 Convention.
- <sup>19</sup> 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).
- <sup>20</sup> Article 31, 1951 Convention.
- <sup>21</sup> 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.



- <sup>22</sup> 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.
- <sup>23</sup> 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>.
- <sup>24</sup> 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.
- <sup>25</sup> 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>.
- <sup>26</sup> 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.

- <sup>27</sup> 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>.
- <sup>28</sup> 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.*”
- <sup>29</sup> *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>.
- <sup>30</sup> *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.*”
- <sup>31</sup> *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>.
- <sup>32</sup> 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.
- <sup>33</sup> 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>.
- <sup>34</sup> *Louled Massoud v. Malta*, (2010), ECtHR, App. No. 24340/08, available at: <http://www.unhcr.org/refworld/docid/4c6ba1232.html>.

- <sup>35</sup> 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).
- <sup>36</sup> *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>.
- <sup>37</sup> *Ibid.* and *A v. Australia*, above note 35, paras. 9.2-9.4 (on proportionality).
- <sup>38</sup> 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>.
- <sup>39</sup> *A v. Australia*, above note 35, para. 9.
- <sup>40</sup> 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.”
- <sup>41</sup> *A v. Australia*, above note 35, para. 9.4.
- <sup>42</sup> UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, above note 23, para. (b).
- <sup>43</sup> International Detention Coalition (IDC), *There are Alternatives*, 2011, Introducing the Community Assessment and Placement Model, available at: <http://idcoalition.org/cap/handbook>.
- <sup>44</sup> *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>.
- <sup>45</sup> 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>.

- <sup>46</sup> UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, above note 23, para. (b).
- <sup>47</sup> 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.
- <sup>48</sup> 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>.
- <sup>49</sup> UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, above note 23, para. (b)
- <sup>50</sup> 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>.
- <sup>51</sup> 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>.
- <sup>52</sup> 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.
- <sup>53</sup> 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>.
- <sup>54</sup> 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>

- <sup>55</sup> Article 5 (3), ACHR; Article 7(2) ACHPR; Article 5(3) CFREU.
- <sup>56</sup> 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>.
- <sup>57</sup> *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.
- <sup>58</sup> *C v. Australia*, above note 38, para. 8.2.
- <sup>59</sup> 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](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>
- <sup>60</sup> Global Roundtable Summary Conclusions, above note 48, para 2.
- <sup>61</sup> Global Roundtable Summary Conclusions, above note 48, para 20.

- <sup>62</sup> 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).
- <sup>63</sup> Global Roundtable Summary Conclusions, above note 48, para 31.
- <sup>64</sup> Global Roundtable Summary Conclusions, above note 48, para. 19.
- <sup>65</sup> Global Roundtable Summary Conclusions, above note 48, para. 21.
- <sup>66</sup> Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention"*, above note 4, page 1.
- <sup>67</sup> Global Roundtable Summary Conclusions, above note 48, para. 21.
- <sup>68</sup> Global Roundtable Summary Conclusions, above note 48, para. 21.
- <sup>69</sup> 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/>.
- <sup>70</sup> Global Roundtable Summary Conclusions, above note 48, para. 24.
- <sup>71</sup> 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.
- <sup>72</sup> 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.

- <sup>73</sup> 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>.
- <sup>74</sup> 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>.
- <sup>75</sup> 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>.
- <sup>76</sup> *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.
- <sup>77</sup> 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>.
- <sup>78</sup> Article 9 (2), ICCPR; Article 7 (4), ACHR; Article 5 (2) ECHR and Article 6, ACHPR.
- <sup>79</sup> 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>.
- <sup>80</sup> Article 16(2), 1951 Convention.
- <sup>81</sup> *A. v. Australia*, above note 35 and *C. v. Australia*, above note 38.
- <sup>82</sup> 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.

- <sup>83</sup> 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>.
- <sup>84</sup> 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>.
- <sup>85</sup> 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.
- <sup>86</sup> 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>.
- <sup>87</sup> *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.
- <sup>88</sup> 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>.
- <sup>89</sup> 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.
- <sup>90</sup> WGAD, *Report to the Seventh Session of the Human Rights Council*, above note 54.



- <sup>91</sup> *Muskhadzhiyeva 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.
- <sup>92</sup> 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>.
- <sup>93</sup> Rule 48, Bangkok Rules, *ibid*.
- <sup>94</sup> Article 22, 1951 Convention; Art. 26, UDHR; Art. 13 and 14, ICESCR; Art. 28, CRC; Art.10, CEDAW.
- <sup>95</sup> 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>.
- <sup>96</sup> 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>.
- <sup>97</sup> Council of Europe Committee on Prevention of Torture Standards, December 2010, available at: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.
- <sup>98</sup> 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.
- <sup>99</sup> 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](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/19/L.24).
- <sup>100</sup> Global Roundtable Summary Conclusions, above note 48, para. 10.
- <sup>101</sup> See, Jesuit Refugee Service - Europe (JRS-E), *Becoming Vulnerable in Detention*, June 2010, available at: <http://www.unhcr.org/refworld/docid/4ec269f62.html>.

- <sup>102</sup> 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.
- <sup>103</sup> 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>.
- <sup>104</sup> *Muskhadzhiyeva and others v. Belgium*, above note 91.
- <sup>105</sup> 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/>.
- <sup>106</sup> *Popov v. France*, (2012), ECtHR, App. No. 39472/07 and 39474/07, available at: <http://www.unhcr.org/refworld/docid/4f1990b22.html>.
- <sup>107</sup> *Ibid.*
- <sup>108</sup> 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>.

- <sup>109</sup> 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.
- <sup>110</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, *ibid.*
- <sup>111</sup> 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.
- <sup>112</sup> See CRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, above note 103, para. 61.
- <sup>113</sup> See, also, the Bangkok Rules, above note 92.
- <sup>114</sup> 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.
- <sup>115</sup> Rule 5, Bangkok Rules, above note 92.
- <sup>116</sup> Rule 19, Bangkok Rules, above note 92.
- <sup>117</sup> Rule 33(1), Bangkok Rules, above note 92.
- <sup>118</sup> Rule 25(1), Bangkok Rules, above note 92.
- <sup>119</sup> Rule 25(2), Bangkok Rules, above note 92.
- <sup>120</sup> 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>.
- <sup>121</sup> Article 14, *International Convention on the Rights of Persons with Disabilities*, 2008 (ICRPD).
- <sup>122</sup> 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>.
- <sup>123</sup> Language taken from ExCom Conclusion, *ibid.*, preambular para. 3.
- <sup>124</sup> Article 18(1)(b), ICRPD.
- <sup>125</sup> 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>.

- <sup>126</sup> *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>.
- <sup>127</sup> 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.apt.ch>.
- <sup>128</sup> 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>.
- <sup>129</sup> 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.
- <sup>130</sup> Global Roundtable Summary Conclusions, above note 48, para. 25.
- <sup>131</sup> Rule 25(3), Bangkok Rules, above note 92.
- <sup>132</sup> Article 27, 1951 Convention. Global Roundtable Summary Conclusions, above note 48, para. 24.
- <sup>133</sup> Global Roundtable Summary Conclusions, above note 48, para. 22.
- <sup>134</sup> On the right to family and personal life, see above note 62.
- <sup>135</sup> Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention"*, above note 4, page 1.
- <sup>136</sup> Global Roundtable Summary Conclusions, above note 48, para. 29.

<sup>137</sup> Global Roundtable Summary Conclusions, above note 48, para. 30.

<sup>138</sup> Global Roundtable Summary Conclusions, above note 48, para. 31.

<sup>139</sup> 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>



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**UNHCR**  
The UN  
Refugee Agency

Division of International  
Protection

United Nations High  
Commissioner for Refugees  
Case Postale 2500  
1211 Geneva 2, Switzerland

[www.unhcr.org](http://www.unhcr.org)